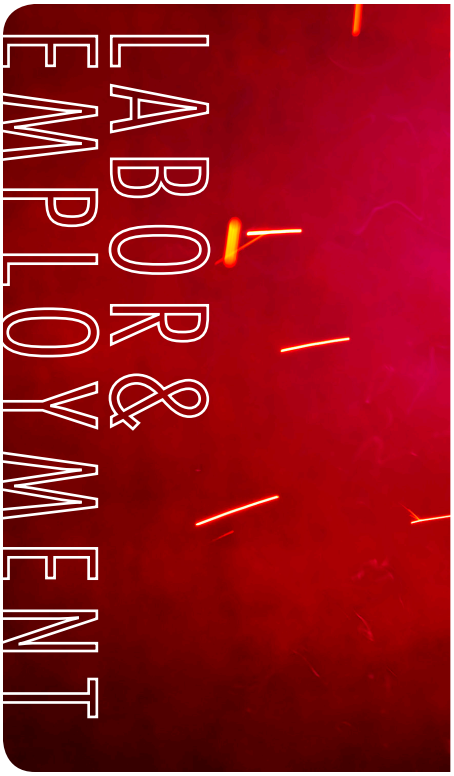

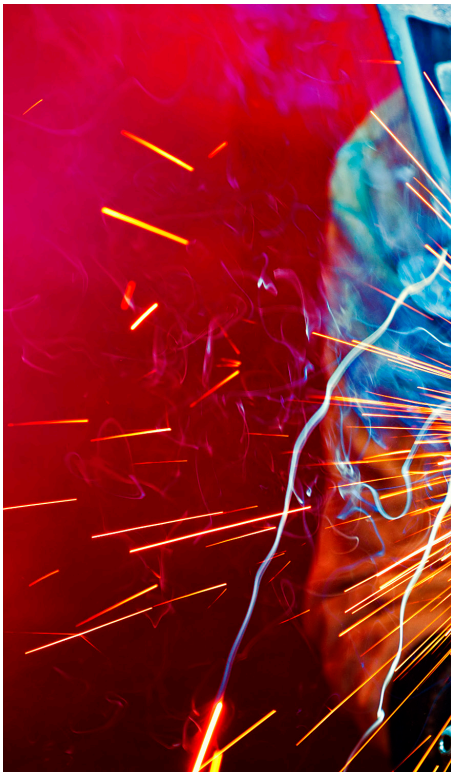

8th Annual Virginia Labor and Employment Law Seminar

Hemlock Haven Conference Center
Hungry Mother State Park
Marion, Virginia

Thursday, September 12, 2013
8:00 a.m. – 4:30 p.m.

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The Schedule

8:00 a.m. – 8:25 a.m. Registration at Ferrell Hall

8:25 a.m. – 8:30 a.m.
Welcome & Introduction
Steven H. Trent

8:30 a.m. – 9:20 a.m.
Employment Law Update: What the Folks in the Black Robes Have Been Up To
State and federal courts have decided many important labor and employment cases recently, including several noteworthy cases from the U.S. Supreme Court. We will get you up to speed on these important cases and how they affect your business.
Speaker: Steven H. Trent

9:20 a.m. – 10:10 a.m.
Workplace Bullying: An Ounce of Prevention...
Workplace bullying lowers productivity, and may impose liability on the employer. We will explore policies and procedures to help prevent bullying and its harmful effects, and discuss investigation and remediation strategies to help if a problem arises.
Speaker: Mark A. Fulks

10:10 a.m. – 10:25 a.m. **Break**

10:25 a.m. – 11:15 a.m.
Avoiding Equal Pay Lawsuits
Gender-based pay imbalances are frequently cited by the Obama administration as a top priority. The Equal Pay Act and Title VII of the Civil Rights Act of 1964 both provide remedies for employees who feel they have been paid less than their peers due to their gender. We will tell you what steps to take to minimize the risks and damaging effects associated with these lawsuits.
Speaker: Drew Hutchinson

11:15 a.m. – 12:00 p.m.
Building a "Dynasty" Through Effective Employee Relations & Management
A&E's hit show Duck Dynasty demonstrates many of the unique human resource challenges that can arise in any growing enterprise. Using the Robertson family's Duck Commander business as a backdrop, we will explore relations with a particular eye on the legal issues that can easily be camouflaged by necessary business and other competing interests.
Speaker: Matthew D. Davison

12:00 p.m. – 12:15 p.m.
Walk or Ride Shuttle to The Restaurant

12:15 p.m. – 1:15 p.m.
Lunch at The Restaurant (Provided)

1:15 p.m. – 1:30 p.m.
Networking/Return to Ferrell Hall

1:30 p.m. – 2:25 p.m.
EEOC Update: New Guidance and Trends
The EEOC is constantly publishing guidance to explain its position on laws before it takes formal legal action. We will discuss recent guidance from the EEOC regarding accommodations for cancer, diabetes, epilepsy and mental health, and what businesses can do to avoid lawsuits. Additionally, we will discuss how the EEOC has stepped up enforcement of the rules concerning criminal background checks from guidance to lawsuits.
Speaker: Steven H. Trent

2:25 p.m. – 3:20 p.m.
Keeping Temperatures Down When Terminations Arise
Terminated employees are more likely to sue you if they leave the company on bad terms. Nevertheless, single and/or group reductions in force are sometimes necessary. We will explore steps you can take to safely separate employees in a way that minimizes your risk of potential employment law claims.
Speaker: Matthew D. Davison

3:20 p.m. – 3:35 p.m. **Break**

3:35 p.m. – 4:30 p.m.
Employee Law Management Training – Mandatory?
Federal and state courts require management training on discrimination and harassment before an employer can avoid punitive damages. Several states' laws require harassment training. The EEOC applauds the efforts of employers who commit to regular employment law training for managers. Do these mandates set a national standard? Is your company missing the boat by not taking advantage of this easy way to reduce legal risks? This interactive session is designed to explore the issue of whether employment law management training may just be mandatory for the successful company today.
Speaker: Jennifer P. Keller

4:30 p.m. **Adjourn**

This program has been submitted for 6.0 hours of CLE credit in Tennessee.

The Speakers

Steven H. Trent, *strent@bakerdonelson.com*
Mr. Trent represents employers before the NLRB and other state and federal agencies and advises employers on many topics including union avoidance, FMLA administration, reductions in force, wage and hour issues, employee handbooks, drug testing and employment contracts. He also represents the interests of management during the collective bargaining process. His multi-state practice includes defending claims under the Americans With Disabilities Act, Title VII, age discrimination claims, FLSA, Equal Pay Act, FMLA, breach of contract, and retaliation claims of virtually every kind. Mr. Trent is licensed in Virginia and Tennessee.

Mark A. Fulks, *mfulks@bakerdonelson.com*
Mr. Fulks defends employers against claims of discrimination, retaliation, and wrongful termination. He is a seasoned appellate lawyer, having argued more than 40 cases before the Tennessee Supreme Court and more than 300 cases in the Tennessee Court of Appeals, Tennessee Court of Criminal Appeals, and the U.S. Court of Appeals for the Sixth Circuit. Mr. Fulks is also a dedicated public servant. He served as a prosecutor in the Criminal Justice Division of the Tennessee Attorney General's Office for more than a dozen years, and he continues to handle criminal prosecutions from time to time as a District Attorney General Pro Tem. Mr. Fulks is licensed in Tennessee.

Drew Hutchinson, *dhutchinson@bakerdonelson.com*
Mr. Hutchinson advises businesses and employers on a wide range of employment-related and general business topics, and represents clients before various state and federal courts and administrative agencies. Recent matters include summary judgments and dismissals of all claims for a national retailer in an age discrimination claim and for a national restaurant chain in a slip-and-fall claim. Mr. Hutchinson is licensed in Tennessee and Washington, D.C.

Matthew D. Davison, *mdavison@bakerdonelson.com*
Mr. Davison has first-hand experience with all aspects of employment law and labor relations, having served as in-house counsel for human resources at an NYSE traded company. His experience includes employment issues related to mergers, acquisitions and reductions in force, as well as EEO and affirmative action compliance. Mr. Davison proactively advises clients on issues and disputes arising under both federal and state employment laws such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act. He also represents employers before the EEOC and in federal and state courts when litigation ensues. Mr. Davison is licensed to practice in Tennessee, North Carolina and Virginia, and he is a frequent speaker at programs designed to aid employers.

Jennifer P. Keller, *jkeller@bakerdonelson.com*
Ms. Keller is an employment litigator, member of the Firm's Board of Directors and Chair of the Firm's nationally-recognized Labor & Employment Department. Ms. Keller advises clients on a wide variety of issues, including discipline and terminations, benefits issues, leave, disability accommodation, policy formulation and enforcement, and similar matters. A substantial part of her practice is providing training for employers in the areas of harassment and discrimination prevention, drug-free workplace, union avoidance and other employment law issues. Ms. Keller regularly practices in both state and federal court and regularly appears before various administrative agencies, including the Department of Labor, EEOC, Tennessee Human Rights Commission and NLRB. She has significant experience in mediating, arbitrating, and litigating claims based on the Civil Rights Acts, FMLA, ADA, FLSA, NLRA, ERISA, state workers' compensation laws and state-specific employment laws.

Seminar Partners

- Appalachian Chapter of the Virginians – SHRM (Bluefield and Tazewell)
- Bristol Chamber of Commerce
- Buchanan County Chamber of Commerce
- Dickenson County Chamber of Commerce
- Marion Employer Advisory Committee
- Mountain Empire Human Resources Association
- Norton Employer Advisory Committee
- Pulaski County Chamber of Commerce
- Scott County Chamber of Commerce
- Smith County Chamber of Commerce
- Southwest Virginia Chapter – SHRM (Norton/Wise)
- Tazewell County Chamber of Commerce
- The Greater Bluefield Chamber of Commerce
- Triad Employer Advisory Committee (Buchanan, Russell & Tazewell Counties)
- Twin County Chamber of Commerce
- Twin County Employer Advisory Committee (Grayson and Carroll Counties)
- Washington County Chamber of Commerce
- Wythe Manufacturing Council
- Wytheville-Wythe-Bland Chamber of Commerce

PRESENTATION

Employment Law Update: What the Folks in the Black Robes Have Been Up To

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BACKGROUND

- The Supreme Court has heard several cases in the last two years that have a significant impact on labor and employment law.
- We are going to go over these cases to get you up to date on how these cases may affect your business.

Cases at a Glance

1. A labor union case: Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277 (2012).
2. An "outside salesman" FLSA exemption case: Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012).
3. A FLSA collective action case: Genesis Healthcare v. Symczyk, 133 S. Ct. 1523 (2012).

Cases at a Glance

4. An arbitration provision case: Nitro-Lift Tech., LLC v. Howard, 133 S. Ct. 500 (2012).
5. A Title VII retaliation case: Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 2013 U.S. LEXIS 4704 (June 24, 2013).
6. A case regarding Title VII "supervisors": Vance v. Ball State Univ., 2013 U.S. LEXIS 4703 (June 24, 2013)

Knox v. Serv. Emps. Int'l Union

- This case makes the rules regarding union special assessments more employer-friendly in states lacking right to work laws.
- Holding: If a labor union seeks to impose a special assessment or dues increase, it must provide a Hudson notice (in addition to the required annual notice), and can only impose a fee on non-members if they affirmatively "opt-in."

Knox v. Serv. Emps. Int'l Union

- An annual Hudson notice, named that for the case that made such a notice mandatory, states the estimated expenses directly related to collective bargaining.
- Non-members are still required to pay the estimated annual expenses that go directly to collective bargaining, because non-members presumably benefit from collective bargaining.
- This case does not change the normal Hudson notice requirements or fee allocation; it does, however, essentially kill special assessments.

Knox v. Serv. Emps. Int'l Union

- Since special assessments, or due increases by other names, are "opt-in" rather than "opt-out" now, nonmembers can easily avoid payment. This puts a damper on the revenue the union could raise through a special assessment, thereby weakening the union.
- Additionally, the new standard is better for nonmembers because it does not impose a fee on them unless they chose to pay (by opting in).

Knox v. Serv. Emps. Int'l Union

- Less money for unions means less money for protests, rallies, and other unproductive union activities.

Knox v. Serv. Emps. Int'l Union

- The Supreme Court criticized the "opt-out" procedure, stating that "[by] permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of non-members."
- Based on this language, the Court may entertain a challenge to the opt-out procedure even for the normal annual fees.

Knox v. Serv. Emps. Int'l Union

- The potential First Amendment violation is as follows: forcing non-members to support the union's political goals and ideals is in effect a denial of the non-members' freedom of speech.

Knox v. Serv. Emps. Int'l Union

Key Takeaways

- Unions must file a new Hudson notice if they want to impose a fee in between the normal annual notice. Even if the union does file a new notice, non-members are not required to pay the additional fee unless they choose to do so by opting in.
- For now, unions may still charge non-members annual fees for the portion of dues that goes toward collective bargaining, provided they send out an annual Hudson notice first.

Christopher v. SmithKline

- This case shows that employees do not have to actually make sales to qualify for the outside salesman exemption to the FLSA.
- Holding: Pharmaceutical sales representatives fall under the "outside salesman" exemption under section 213(a)(1) of the FLSA, and are therefore not entitled to overtime pay.

Christopher v. SmithKline

- The Court noted that the purpose of the FLSA is to prevent substandard wages and excessive hours. The PSR's in this case made much more than minimum wage (over $70k on average) and worked 50-60 hours per week total.

- The exemption states: "outside salesman" is "any employee … [w]hose primary duty … is making sales within the meaning of [29 U.S.C. section 203(k)]" and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such duty."

Christopher v. SmithKline

- The problem for SmithKline was that PSR's do not actually make sales; they just advertise the products and attempt to get non-binding statements that the doctors will prescribe the drugs in the future.

Christopher v. SmithKline

- The Court held that the PSR's were exempt from FLSA overtime pay because they "worked away from the office, with minimal supervision, and they were rewarded for their efforts with incentive compensation."
- The Court also considered the fact that PSR's make substantially more than the minimum wage to be a factor.

Christopher v. SmithKline

Key Takeaways

- Employees do not necessarily have to make sales to qualify for the outside salesman FLSA exemption.
- If employees work away from the office frequently with little supervision, and are paid well (especially with incentive compensation), it is *likely* that they are FLSA exempt and not owed overtime pay.

Genesis Healthcare v. Symczyk

- This case allows a new defense strategy to moot FLSA collective actions before they become costly.
- Holding: a FLSA collective action becomes moot if the named plaintiff's claim becomes moot before there is a formally certified class, even if the class is already conditionally certified.

Genesis Healthcare v. Symczyk

- The FLSA allows an employee to file collective actions on behalf of herself and other similarly situated employees.
- In this case, Genesis tendered an offer of settlement to Symczyk immediately upon answering the complaint, with the condition that the offer would be deemed withdrawn after 10 days. She did not accept the offer, and Genesis filed a motion to dismiss the entire action as moot.
- Note that the Supreme Court did not decide whether an unaccepted offer moots a claim. The lower court found that it did, and the Supreme Court decided the case based on that assumption.

Genesis Healthcare v. Symczyk

- The Court held that the fact that Symczyk's claim was mooted by the unaccepted offer killed the entire action, so long as no other plaintiffs had actually joined the action.
- Symczyk argued that allowing defendants to pick off plaintiffs before the action was properly certified would be improper. The court rejected this argument.

Genesis Healthcare v. Symczyk

Key Takeaways

- A FLSA collective action becomes moot if the named plaintiff's claim becomes moot, even if the class is conditionally certified, as long as other claimants have not actually joined the suit.
- Using Rule 68 to "pick off" the named plaintiff in a FLSA collective action, killing the action, is permissible as a defense strategy. As noted by the NFIB, this ruling "will make it easier to stop frivolous lawsuits before they become multi-million-dollar affairs."

Nitro Lift Techs v. Howard

- This case reinforces the concept that valid arbitration clauses are binding and cannot be overridden by state law.
- Holding: The FAA trumps state law if the state law is contradictory; valid arbitration provisions prevent judicial review of the contract.

Nitro Lift Techs v. Howard

- In Nitro, the Oklahoma Supreme Court decided to review an underlying agreement despite the fact that the contract contained an arbitration clause, which prohibited review.
- The Oklahoma court found that the contract was null and void as against Oklahoma public policy.
- The U.S. Supreme Court vacated the judgment, and held that the state supreme court had no business reviewing the contract beyond the arbitration provision itself.

Nitro Lift Techs v. Howard

Key Takeaways

- If you want to force any dispute arising out of a contract to be decided via arbitration, an arbitration provision should be binding.
- Even if the state law governing the contract has a different standard for arbitration clauses, the FAA will trump the state law and force the dispute to be decided via arbitration.

Univ. of Tex. Southwestern Med. Ctr. v. Nassar

- This case shows that Title VII retaliation claims must be proven under the more strict "but-for" causation test, not the easier test provided by section 2000e-2(m).
- The new test is more employer-friendly, because it makes it harder for plaintiffs to win retaliation cases.

Univ. of Tex. Southwestern Med. Ctr. v. Nassar

- Status-based discrimination, such as race discrimination, is subject to a lower standard of proof than traditional tort claims. It is sufficient for a plaintiff in a status discrimination claim to show that "the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives."
- Retaliation discrimination, on the other hand, should be proven under traditional "but-for" causation, a much more stringent test.

Univ. of Tex. Southwestern Med. Ctr. v. Nassar

- But-for causation requires the plaintiff to show that "the harm would not have occurred but-for the defendant's conduct."
- The Supreme Court held that the lower standard only applies to status-based discrimination, not retaliation.

Univ. of Tex. Southwestern Med. Ctr. v. Nassar

Key Takeaways

- Title VII retaliation claims are more difficult to prove now due to the rejection of the lessened statutory standard in favor of the "but-for" tort standard.

Vance v. Ball State Univ.

- This case defines "supervisor" for Title VII purposes.
- Holding: a supervisor is someone "empowered by the employer to take tangible employment actions against the victim."

Vance v. Ball State Univ.

- In other words, a supervisor is someone who can hire or fire.

Vance v. Ball State Univ.

- Liability is automatic where the workplace harassment is conducted by a supervisor, so it is important to have a clear statement of who is and is not a supervisor.
- If a non-supervisor coworker harasses an employee, the employer is only liable if the employer was negligent in controlling working conditions.

Vance v. Ball State Univ.

- Additionally, the employer may avoid liability by showing that (1) it exercised reasonable care to prevent and correct any harassing behavior, and (2) the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities the employer provided.

Vance v. Ball State Univ.

Key Takeaways

- An employer will likely be held strictly liable for harassment by an individual who possesses power to hire, fire, demote, or otherwise impact the victim's status at the company.
- It would be a good idea to develop and implement policies and procedures to deal with harassment on the front end to avoid liability for harassment by a non-supervisor.

Virginia District Courts

Amir v. Sunny's Executive Sedan Service

- In U.S. District Court in Alexandria.
- FLSA class certification was denied to a group of drivers.
- The drivers were performing services pursuant to different contract agreements, terms, conditions, and pay.
- These types of claims are fact intensive and require individualized inquires into each Plaintiff.

Amir v. Sunny's Executive Sedan Service - Cont.

Key Takeaway

- Fighting class certification and sometimes even conditional certification may be worthwhile.

Jones v. SouthPeak Interactive Corp.

- $950,000 Whistleblower verdict.
- First whistleblower retaliation claim under the Sarbanes-Oxley Act of 2002 ("SOX") trial in Virginia.
- Former CFO discovered a loan from the Chairman of the Board to the Company.
- This loan was not disclosed in the Company's financial statements.
- Plaintiff reported the discrepancy and was terminated.

Jones v. SouthPeak Interactive Corp. – Cont.

Key Takeaway

- Know your obligations under SOX, otherwise, it could cost you.

QUESTIONS?

PRESENTATION

WORKPLACE BULLYING:
AN OUNCE OF PREVENTION

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"Bullying is the sexual harassment of 20 years ago; everybody knows about it, but nobody wants to admit it."

Lewis L. Maltby,
President,
National Workrights Institute

Introduction

- Define Workplace Bullying
- Identify Types of Bullying Behavior
- Properly Respond to Bullying
- Determine Reporting Channels/Mechanisms
- Identify Outcomes of Bullying
- Identify Differences between Bullying and Illegal Discrimination and Harassment

What is Workplace Bullying?

Workplace bullying has been defined as persistent, offensive, abusive, intimidating, or insulting behavior or unfair actions directed at the victim that causes the victim to feel threatened, abused, humiliated, or vulnerable.

Workplace bullies and victims may be employees, clients, or vendors of the affected organization.

Is Workplace Bullying Really a Problem?

Are organizations experiencing workplace bullying?

Based on a study conducted by the Society for Human Resource Management ("SHRM"),* about 51% of organizations reported that there had been incidents of bullying in their workplace.

* *All statistical information in this presentation comes from SHRM.*

Is Workplace Bullying Really a Problem?

Which bullying behaviors are most common?

Among organizations that experienced incidents of bullying:

- 73% reported verbal abuse;
- 62% reported malicious gossiping, spreading lies, and spreading rumors about workers; and
- 50% reported threats or intimidation.

Is Workplace Bullying Really a Problem?

What are the outcomes of workplace bullying?

The three most common outcomes of bullying incidents that organizations experienced were:

- Decreased Morale (68%),
- Increased Stress and/or Depression (48%), and
- Decreased Trust among Co-Workers (45%).

How big of a problem is workplace bullying?

According to a survey sponsored by the Workplace Bullying Institute in 2010:

- 35% of U.S. workers have experienced or witnessed bullying.
- 62% percent of bullies are men.
- 38% are women.
- 58% percent of the victims are women
- 42% of the victims are men.

How big of a problem is workplace bullying?

- Men bully men more frequently than they bully women (55.5 percent), and women usually bully other women (80 percent).
- Workers ages 30 to 49 are the most frequent targets.

What Forms of Workplace Bullying Exist?

- Verbal Abuse:

  Shouting, Swearing, Name Calling, or Malicious Sarcasm
- Gossiping and Spreading Lies or Rumors about Workers
- Threats or Intimidation
- Teasing:

  Appearance, Lifestyle, Habits, Attitudes, or Private Lives
- Ignoring or Excluding Workers

What Forms of Workplace Bullying Exist?

- Harsh or Constant Criticism
- Aggression
- Interfering with Work Performance
- Using Technology for Bullying

Who is Bullying Whom?

- Employee v. Employee

  Same or Similar Level
- Supervisor v. Employee
- Employee v. Supervisor

Bullying Like Harassment can happen at any Level

Who is Bullying Whom?

- Employee v. Client
- Client v. Employee
- Who else?
- Vendors, Board members, Volunteers

Effects of Bullying on Employees

- Physical and Emotional problems, including anxiety, depression, headaches, insomnia, etc.
- Decreased morale
- Decreased trust and productivity
- Increased turnover
- Increased absenteeism
- Increased concerns about violence in the workplace

Effects of Bullying on Employers

Increased Costs Due To:

- Turnover
- Higher Healthcare Costs
- Low Productivity
- Absenteeism
- Low Morale and Retaliation

How to Avoid Workplace Bullying?

- ✓ Implement a Workplace Bullying Policy.
- ✓ Have a grievance process for investigating and addressing allegations of bullying.
- ✓ Monitor bullying behavior and complaints.
- ✓ Conduct regular bullying prevention/awareness training and orientation programs.

Methods for Communicating Workplace Bullying Policy

- ✓ Employee Handbook
- ✓ Employee Orientation
- ✓ Company Code of Conduct
- ✓ Company Intranet or Website
- ✓ Staff Meetings
- ✓ Emails (*from HR or Management*)
- ✓ **Training**

(Either specifically dedicated to bullying or in conjunction with related training)

Typical Reporting Procedures

- ➢ The HR department
- ➢ The target employee's direct supervisor
- ➢ Other management-level staff (non-executive)
- ➢ Hotline or other reporting system
- ➢ Union representative

Investigating Bullying

- Follow the paper trail – be mindful of excessive grievances or sick leave requests, pay attention to exit interviews, EAP requests. Is there a pattern?
- Do not ignore these complaints because they will escalate!
- Review related policies. Have then been violated?
- When warranted, check emails or text messages (if you have access) to look for messages between bully and target.

Investigating Bullying

- When interviewing the alleged bully, pay very close attention to the way the response is delivered:
  - ✓ Listen to Words
  - ✓ WATCH BODY LANGUAGE.
- Follow your typical investigation procedures and DOCUMENT EVERYTHING!
  - Remember if you are handling the situation correctly, you want to be able to prove it.

Anti-Bullying Laws

- There are no federal or state anti-bullying law in the United States.*

  (**There is one legislative proposal floating around.*)
- The lack of statutory authority does not mean that employers are not at risk of liability for tolerating bullying.
- Bullying is against the law in other countries where bullying behaviors have been identified as contrary to the idea of dignity at work.
- Could this be on the horizon here?

Anti-Bullying Laws

- If the offending behavior is pervasive enough to be considered threatening or intimidating or it creates a hostile environment, the potential for the following claims increases:
  - Constructive Discharge, or
  - Intentional Infliction of Emotional Distress
- The possibility that a new protected class will be recognized also increases.

Other Sources of Liability

- Occupational Safety and Health Act's general duty clause to provide a safe workplace.
- Employers could be held liable for negligent hiring if they bring on a person who they knew or should have known was likely to cause harm.

What is the Legal Outcome of Bullying?

- Claims of workplace bullying, not involving a class covered by anti-discrimination laws, have resulted in verdicts for employees under state tort laws, which protect employees from assault, battery, and infliction of emotional distress.
  - A California jury awarded **$18 million dollars** to a devout-Christian employee, who did not discuss sex at work, because a female co-worker harassed him at work daily for almost two years by assuming suggestive poses and making crude remarks.
  - The Indiana Supreme Court recently upheld a **$325,000** verdict in an assault case against a cardiovascular surgeon who was a "known bully."

What is the difference between bullying and discrimination or harassment ?

- **Workplace Bullying** is inappropriate and unacceptable behavior, but it is not prohibited by any federal or state law.
- **Illegal Discrimination and Harassment** involves bullying (*discrimination and harassment*) based upon a protected group status, such as age, race, gender, disability, religion, and national origin.

Is it Bullying or Illegal Discrimination?

- **Discussion Topic 1:** Dan, the supervisor in the finance department, is known to have a temper. People describe his management style as harsh, demeaning, and overbearing. When Sally, Dan's subordinate, comes to you and complains about Dan's behavior, you ask if he treats everyone like this. Sally admits that Dan treats everyone this way and you explain that Dan is just an "equal opportunity jerk" and there is nothing illegal about that.
- What steps, if any, do you take with Dan? With Sally?

Is it Bullying or Illegal Discrimination?

- **Discussion Topic 2:** Joan Downing yells and curses at her co-worker, Paul Jones, who has a cubicle next to hers. She makes fun of his new haircut and the way he walks. She constantly criticizes his work performance and gossips to other employees about phone conversations between Paul and his girlfriend.

Review

- Workplace bullying is persistent, offensive, abusive, intimidating or insulting behavior or unfair actions directed at another individual, causing the recipient to feel threatened, abused, humiliated or vulnerable.
- Workplace bullying takes many forms, including, but not limited to: verbal abuse, malicious gossiping, interference with work, cruel comments, abuse of authority, unduly harsh or constant criticism, and through technology.
- Workplace bullying is inappropriate, but not always illegal. It can, however, escalate to illegal conduct.
- Employers must confront and stop workplace bullying because of the significant effect on and damage to employees and employers.
- Implement anti-bullying policies, train employees, provide sufficient reporting mechanisms, and take appropriate responses.

Questions?

PRESENTATION

Avoiding Equal Pay Lawsuits

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BACKGROUND

- The Obama Administration has made gender-based pay imbalances a top priority.
- Title VII of the Civil Rights Act of 1964 and the Equal Pay Act ("EPA") both prohibit sex discrimination.
- Title VII applies even if the work performed is not equal to the work performed by the other gender.
- We are going to go over a few things you can do to avoid liability stemming from an equal pay lawsuit.

Establishing a Prima Facie EPA Claim

- To establish a prima facie case of wage discrimination, the EPA plaintiff must show that "an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'"

  Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

EPA Definitions

- **Wages:** Total compensation, including any fringe benefits.
- **Employees of the Opposite Sex -- Proper Comparators:** Must show that an ***actual*** employee of the opposite sex earned more compensation for substantially equal work -- ***cannot be a hypothetical male or female***.
- **Establishment:** "[A] distinct physical place of business rather than an entire business or 'enterprise' which may include several separate places of business."
- **Equal Work:** Does not require that the jobs be identical, but only that there exist "substantial equality of skill, effort, responsibility and working conditions."

Why Should Job Titles and Descriptions Accurately Reflect Job Duties?

- Accurate titles and descriptions avoid confusion on the part of the employer.
- Accurate titles and descriptions avoid confusion on the part of the employee.
- Actual job duties determine whether the employee's job was "substantially equal" to an opposite-gender employee for EPA purposes, so it is confusing for companies to use the same job title for employees that perform different duties.

Why Should Job Titles and Descriptions Accurately Reflect Job Duties?

- Less confusing records make gender-based pay disparities (real or merely apparent) stand out.
  - It is important for companies to be able to analyze their own data and determine whether there is an apparent disparity.
  - Prevention is the best practice, but catching an imbalance before it becomes the basis of a lawsuit can save companies lots of money.
- Classifying employees with different job duties under the same job description can make it easier for plaintiffs to argue that they performed "substantially equal" work to an opposite-gender employee.

Provide Set Guidelines for Raises and Bonuses

- If all employees know what it takes to get a raise or promotion, it is less likely that one of them will sue you claiming they were subjected to discrimination.
- Set guidelines can also justify pay disparities and other employment actions.
  - If an employee claims he was subjected to gender-based discrimination and the company has a set guideline for raises which he failed to meet, the case is much easier to defend.

Court Treatment of Set Guidelines for Raises and Bonuses

- The Court of Appeals for the Fourth Circuit in Keziah v. W.M. Brown & Son, Inc. considered the lack of written guidelines for salary advancement a factor against the employer.
- The Court of Appeals for the Fifth Circuit in Brennan v. Victoria Bank & Trust Co. held that the objective merit-based system for raises implemented by the bank accounted for some pay disparity between male and female employees.

Provide Performance Evaluations Regularly

- Set guidelines work best when coupled with performance reviews.
  - If a company can show that it takes "X" to get a raise, and the employee suing the company failed to meet the goals in his or her reviews, that is strong evidence that the pay disparity is due to something other than gender, a defense to EPA suits.
  - Companies can increase or decrease wages based on evaluations without fear of suit under the EPA.

Train Managers Well

- Managers implement the company policies and conduct the employee evaluations.
- It is important that managers never make exceptions to the established rules for promotions.
- Managers need to record valid, non-discriminatory reasons for each employment decision, so the employer can show the validity of each decision if challenged.

Keep Thorough Records

- ALL records should be kept in their entirety, but especially management decisions and employee evaluations.
  - This includes records of former employees and records produced by former managers.
- Employers must be able to show the actual non-discriminatory reason behind pay disparities. Employers cannot simply allege that there is such a reason.

Keep Thorough Records

- One example case to illustrate how important it is to have thorough records and keep track of the records is Corning Glass Works v. Brennan, a 1974 U.S. Supreme Court case.
- In Corning, the glass company defendant paid night shift inspectors more than day shift inspectors. All night shift workers were male; all day shift workers were female.
- Even though the Supreme Court agreed with Corning that a night shift had less appeal than a day shift, the Court held that an EPA violation occurred because Corning could not actually show valid non-discriminatory reasons for the pay disparity.

Keep Thorough Records

- Corning could have probably avoided liability if it had thorough records to show the Court that the pay disparity was due to the fact that night shifts are more stressful, and that Corning could not obtain enough workers for night shifts at the day shift pay rate.
- Lack of records resulted in lots of liability for Corning Glass Works.

Audit Your Company

- It is advantageous to audit your company before a plaintiff's lawyer does.
- Audits should examine pay for every employee, and should attempt to account for each reason behind each pay difference.

Audits Should be Conducted by Attorneys so the Results are Privileged

- Audits can be privileged if conducted by your attorneys, so that the data obtained could be protected from discovery in the event of a lawsuit.
- Make sure that the inside or outside counsel the company uses plays a very active role throughout the audit, so information from the audit is attorney work-product and can't be used against the company in a lawsuit.

Legitimate Reasons for Pay Disparities

- There are many legitimate reasons for pay disparities, such as poor work performance and negative evaluations, but an audit may expose pay disparities that are not readily explainable.
- Some common legitimate reasons for pay disparities include: length of time at the company, economic value added, and market-based conditions for the company and area.
- Pay disparities explained by one of these reasons cannot be the basis of an equal pay lawsuit.

Use a Statistician for the Audit

- The audit should utilize the services of a well- qualified statistician as well as attorneys.
- Accuracy is very important when making salary decisions, and it is more harmful than beneficial to make decisions based on an erroneous study.
- One example of a case in which the statistician's failure created liability for the company is Smith v. Virginia Commonwealth University.

Use a Statistician for the Audit

- In Smith, the university conducted a study that found that female professors received less pay than male professors.
- VCU awarded $440,000 in increased salaries to female professors.
- Male professors sued, claiming the $440,000 in extra salaries violated Title VII.
- The U.S. Court of Appeals for the Fourth Circuit found that the regression model utilized by VCU was flawed, and held for the male professors.

Fix Disparities that Cannot be Explained, but be Careful not to Overcorrect

- If the audit reveals gender-based pay disparities that cannot be explained by some valid reason, fix the disparities.
- Overcorrection can be the basis of a lawsuit as well, so only correct as needed to restore balance.
- One example case that illustrates liability stemming from overcorrection is Maitland v. University of Minnesota.

Fix Disparities that Cannot be Explained, but be Careful not to Overcorrect

- In Maitland, the university settled a class action suit female professors had filed against it.
- A male faculty member filed a lawsuit, claiming the settlement terms violated the EPA.
- The court awarded damages to the male faculty member for the overcorrection .

Conclusion

- It is increasingly important for companies to do everything they can to prevent workplace discrimination, whether perceived or actual, before it occurs.
- Although following these tips and practices does not guarantee safety from lawsuits, it will decrease the chances of a lawsuit and make it easier to defend should one arise.

QUESTIONS?

8th Annual Virginia Labor and Employment Law Seminar

Hemlock Haven Conference Center • Hungry Mother State Park • Marion, Virginia

September 12, 2013 • 8:00 a.m. – 4:30 p.m.

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PRESENTATION

EEOC UPDATE: NEW GUIDANCE AND TRENDS

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Another Record Year for the EEOC

- FY 2011 – 99,947
- **FY 2012 – 99,412**
- **FY 2012 – 43,467 charges dual filed with the EEOC but investigated by state and local fair employment practice agencies**
- EEOC secured more than $365.4 million in monetary benefits for individuals – the highest level of relief obtained through administrative enforcement in the EEOC's history
- Retaliation is still the most common charge of discrimination

Federal Enforcement – EEOC Developments

- **Additional EEOC highlights:**
  - Sharp increase in number of on-site investigations, employee interviews, and requests for additional documentation and information
  - BUT, 2011 and 2012 saw an increase in "no cause" findings (60.9% in 2010 to 64.3% in 2011 to 68.3%)
    - What does this mean?
      - Is EEOC mediation now a more meaningful alternative?
      - How do these changes impact risk assessment and budgeting?

Internal EEOC Numbers

- 2008 – 2010 EEOC's budget increased
  - 2010 – $385.3 million
  - 2012 – $360 million
  - 2013 – Sequestration $330 million

- FY 2010 – Addressed the charge inventory – saw a 9% reduction in 2011. 1st time in a decade.

The EEOC's Strategic Plan

- **Three Main Objectives**
  1. Combat Employment Discrimination through Strategic Law Enforcement; (SEP)
  2. Prevent Employment Discrimination through Education and Outreach; and
  3. Deliver excellent and consistent service through a skilled and diverse workforce and effective systems.

Strategic Enforcement Plan

The SEP identifies six national priorities as the focus of this integrated enforcement effort. These are:

- Enforcing equal pay laws;
- Eliminating barriers in recruitment and hiring;
- Protecting immigrant, migrant and other vulnerable workers;
- Addressing emerging and developing employment discrimination issues;
- Preserving access to the legal system; and
- Preventing harassment through systemic enforcement and targeted outreach.

Targeting Pay Discrimination

- EEOC has launched a pilot program at 3 of its district offices – Chicago, New York and Phoenix
- Purpose of the pilot program is to determine the best approach for conducting direct investigations – investigations initiated without any prior charge of pay discrimination – to determine whether Equal Pay Act violations are occurring
- EEOC is working with other government agencies – OFCCP, Wage and Hour Division and Women's Bureau of the Department of Labor – to share best practices *and information*
- Note: unlike Title VII, the EPA is enforced through the FLSA – this means that the EEOC does not need to wait for a charge of discrimination to be filed, but instead has authority to conduct direct investigations of employers to assess whether EPA violations are occurring

- What does this mean for employers?
  - Gender pay discrimination is clearly a priority for government agencies – EEOC is just one of several federal agencies targeting this issue
  - Unclear as to how the EEOC will determine targets for direct investigations
  - Strongly consider a proactive approach – conduct a compensation analysis/pay equity study to determine whether gender-based pay disparity exists in your workforce

EEOC Guidance

- The Equal Employment Opportunity Commission ("EEOC") periodically released guidance to help businesses comply with the various laws the EEOC enforces.
- A large portion of the guidance is a kind of warning; the EEOC declares that certain actions do not comply with the law before it initiates formal legal action.

May 2013 EEOC Guidance

- In May 2013, the EEOC released new guidance on cancer, diabetes, and epilepsy in the workplace, an the role of mental health providers in employees' requests for reasonable accommodations.
- Additionally, the EEOC provided guidance last year on background checks and proved up its threat this year with lawsuits.
- How can your business can avoid liability?

Mental Health in the Workplace

- Employees with mental health conditions have a right to reasonable accommodations under the Americans with Disabilities Amendments Act ("ADAAA" or "ADA").
- Reasonable accommodations may include altered work schedules, time off for treatment, or reassignment to a different job.
- Some mental health disorders that entitle the employee to ADA protection are bipolar disorder, depression, and obsessive compulsive disorder.

The Role of Mental Health Providers in Determining Reasonable Accommodations

- Accurate mental records help the employer and employee.
- Failure to comply with the law regarding mentally impaired employees recently had very harsh consequences for Hill County Farms. An Iowa jury awarded $240 Million to a class of 32 workers with intellectual disabilities that were discriminated against between 2007 and 2009. This verdict is the largest in EEOC history.

Cancer in the Workplace

- Cancer is a disability under the ADA when it or its side effects substantially limit one of more of a person's major life activities.
- Employers may not ask applicants whether they have cancer, but can ask applicants questions directly related to job performance, such as "Can you lift 50 pounds?"
- An Employer may ask an applicant about health issues, including cancer, after offering the applicant employment. The fact that the individual has cancer may not be used to withdraw the offer.

Cancer in the Workplace

- The circumstances under which an employer may ask questions about an individual's cancer status with regard to his or her work performance are limited.
- If an employer has reason to believe cancer is affecting job performance, the employer may ask the employee if the cancer is causing performance problems, and whether the individual needs reasonable accommodations.
- If an employee is on leave because of cancer, the employer may require a doctor's note for proof of the individual's ability to return to work.

Cancer in the Workplace — Confidentiality

- An employer that knows that an employee has cancer must keep that information confidential.
- There are only a few exceptions, which allow the employer to disclose the individual's cancer status:
  - employers may disclose the status to supervisors or managers if necessary to provide reasonable accommodations.
  - to first aid and safety personnel if the employee needs emergency treatment.
  - to individuals investigating ADA compliance.
  - as needed for workers' compensation purposes.

Cancer in the Workplace — Accommodations

- Some common reasonable accommodations for individuals with cancer include:
  - working from home.
  - different working hours.
  - modification of office temperature.
  - more frequent breaks.
- Other changes may be appropriate; this is just a list of common accommodations.

Cancer in the Workplace — Accommodations

- All an employee has to do to get reasonable accommodations is ask for an adjustment. There are no magic words.
- An employer may request documentation if the disability is not readily visible.
- One of the recent guidelines promulgated by the EEOC notes that the failure to provide an exact date of return when taking a leave of absence will not prevent the employee from taking leave. It is common for symptoms to vary, and the individual may not know when he or she may return.

Cancer in the Workplace — Exeptions

- One exception to the rule is that employers need not grant accommodations that would burden the employer with “undue hardship.”
- This means significant expense or difficulty.
- It would have to be very expensive or difficult to avoid accommodation.

Diabetes in the Workplace

- Individuals that have diabetes are automatically covered under the ADA, because diabetes limits the major life activity of endocrine function.
- Diabetes has no known cure, but it can be successfully managed.

Diabetes in the Workplace

- As is the case with cancer, an employer may only ask about diabetes after making a formal offer of employment to the applicant.
- An employer may ask current employees whether they have diabetes if it has observed symptoms, such as extreme fatigue or irritability, or has "reliable" information that the employee may have a medical condition that is causing problems at work.
- As with cancer, employers may require a note to take off time for illness. Note, however, that the rules must be uniform for all employees. If other employees do not need doctor's notes to take leave for illness, the employer cannot require a note for diabetes-based leave.

Diabetes in the Workplace — Confidentiality

- An employer that knows of an employee's diabetic condition must keep that information confidential.
- There are only a few exceptions, which allow the employer to disclose the individual's diabetes status:
  - employers may disclose the status to supervisors or managers if necessary to provide reasonable accommodations.
  - to first aid and safety personnel if the employee needs emergency treatment, such as an emergency insulin shot.
  - to individuals investigating ADA compliance.
  - as needed for workers' compensation purposes.

Diabetes in the Workplace — Confidentiality

- As with cancer, the employer must maintain confidentiality even if the diabetic employee gets special accommodations other employees do not get.
- Even if the employee has an insulin reaction at work, such as fainting, the employer may not disclose the fact that the person is diabetic.
  - The employer may tell coworkers that the situation is under control, but cannot elaborate.

Diabetes in the Workplace — Accommodations

- There are several recommended accommodations for diabetic workers, including:
  - a private place to test blood sugar and inject insulin
  - frequent breaks to eat or drink
  - rest periods until blood sugar stabilizes
  - modified work schedules

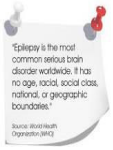
- As with other disabilities, there are no required words to get accommodations beyond simply asking for accommodations to help manage the condition.
- As with cancer, the failure to provide a date of return cannot justify denial of sick leave.

Diabetes in the Workplace — Accommodations

- One example the EEOC provided regarding indefinite sick leave was if a diabetic employee had to get his or her toe amputated, and could only state that he or she would return in “about three months.”
- As with other disabilities, employers must grant reasonable accommodations to diabetic employees unless it would burden the employer with undue hardship, meaning significant expense or difficulty.

Epilepsy in the Workplace

- Epileptic employees, like diabetic employees, are automatically covered by the ADA, because they are substantially limited in neurological function and major life activities (such as speaking and interacting with others) when seizures occur.
- Since ADA eligibility is based on the effects if left untreated, the fact that an individual has no seizures or few seizures due to medication does not void their ADA status.



Eliminating Barriers in Hiring

- Texas Roadhouse Refused to Hire Older Workers Nationwide
- The EEOC's lawsuit, Civil Action No. 1:11-cv-11732-DJC, filed in U.S. District Court for the District of Massachusetts, alleged that since at least 2007, Texas Roadhouse has been discriminating against a class of applicants for "front of the house" and other public, visible positions, such as servers, hosts, and bartenders, by failing to hire them because of their age, 40 years and older.
- Carefully scrutinize hiring practices, including background checks

Background Checks

- Does your company have a per se exclusion of candidates with felony convictions regarding of the nature of the crime or when the crime was committed?
- Does your application for employment inquire into past arrests?
- If so, your company may be on the EEOC's enforcement radar for disparate impact claims in your hiring procedures.

Background Checks and the Strategic Enforcement Plan

- Last year, the EEOC issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII"
- The EEOC will now its Strategic Enforcement Plan to push this "Guidance" into law
- Example: In June 2013, the EEOC commenced separate lawsuits against BMW in federal court in South Carolina and Dollar General in federal court in Illinois, alleging that the companies' use of criminal background checks have had disparate impacts on African-American applicants

Background Checks and Big Losses for the EEOC

- Recent EEOC cases make it confusing for employers to ascertain what it takes to convince courts that background checks are justified by business necessity
- On August 9, the EEOC dismissed the EEOC's case against event marketing company Freeman, which alleged that the company's use of credit and criminal histories to would-be employees had a discriminatory impact on African Americans.
- The Judge in that case wrote: "The story of the present action has been that of a theory in search of facts to support it."
- Remember the business necessity defense!

Protecting Vulnerable Workers

- From the Commission's website:

  Bass Pro Litigation

  The EEOC has sued Bass Pro Outdoor World for employment discrimination claiming that it did not hire people because of their race (African-American or black) or national origin (Hispanic or Latino).

  If you applied for a job at any Bass Pro location and think you may not have been hired due to your race or national origin; or if you have any information about the EEOC's lawsuit, please contact the EEOC at this special phone number toll free 855.857.8747 or by e-mail at Basspro.lawsuit@eeoc.gov.

- Intellectual Disabilities – $240 million jury verdict

Protections for Transgender Employees

- **What happened**: On April 20, 2012, the EEOC determined that discrimination against a transgender individual because that person is transgender is sex discrimination and violates Title VII.
- **The Case**: Mia Macy, a transgender woman (man to woman), was denied a job with the ATF. Macy applied for the job as a male and was told it was "virtually guaranteed," based on her military and police background and experience with the ATF's ballistics system. After disclosing his gender transition, Macy was told the job's funding was cut. She found out someone else was hired and she sued. The EEOC initially refused to consider her claim for sex-stereotyping/discrimination based on gender identity/sex change. She appealed to the EEOC, which held transgender discrimination equals sex discrimination.

What the EEOC Decided

- Title VII prohibits discrimination based on "sex." The courts have interpreted this to mean both sex - - the biological differences between men and women – and gender.
- Example: In Price Waterhouse, a female manager was denied partnership because she did not act how some of the partners thought a woman should act (e.g., she should walk more femininely, wear make-up, have her hair styled, etc.). The court held that such sex stereotyping, or failing to conform with gender norms, was sex discrimination.
- Sex stereotyping claims have been recognized in the Eleventh Circuit. In *Glenn v. Brumby*, the Eleventh Circuit held that a biological male, who presented at work as a female and was terminated, could state a claim of sex discrimination under § 1983 – not Title VII. The Court held that punishing an employee for her gender non-conforming behavior was sex-stereotyping and violated the Equal Protection Clause.

What the EEOC's Decision Means

1. The EEOC will consider discrimination against a transgender sex discrimination even if it is not based on a sex stereotyping theory.
2. EEOC enforcement will be consistent with this decision throughout the country. Courts in different jurisdictions may disagree, but the EEOC will use this to guide them in investigations.
3. The EEOC's decision does not address sexual orientation (gay vs. straight), but such claims may overlap.

Deposition of EEOC Investigator

- **Q: Is it your understanding that Title VII protects against [discrimination] based upon sexual orientation?**
- A: It's – it's coming to that.
- **Q: Explain that to me.**
- A: Meaning that's something that they're trying to get covered by Title VII—
- **Q: Who is trying—**
- A: -- is what I understand. That's all I understand.
- **Q: Okay. And who is trying to get that covered?**
- A: I would assume the lawmakers. That's –
- **Q: And is that something that you have learned through your training at the EEOC?**
- A: Yes.

2013 and Beyond – What to Expect

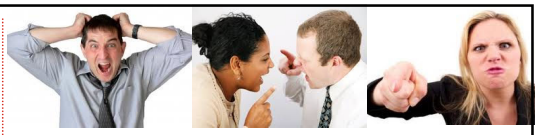
- Expect EEOC trends to continue as retaliation, disability and age discrimination claims rise, while harassment claims decline.

2013 and Beyond – What to Expect (continued)

- GINA
  - May 3, 2013 – EEOC settles its first GINA claim over asking temporary employees family medical history in post-offer application
    - More age claim lawsuits
      - Baby boomers not retiring
      - Reversal of the Gross Decision

Questions, Comments, Discussion…

PRESENTATION



Keeping Temperatures Down When Terminations Arise

Presented By:

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Consider this…

- Female server in a restaurant became pregnant and began missing work.
- Employer policy said “excessive” absences would result in discipline and that 3-days no-call, no-show would result in termination.
- Employer terminated employee for 3-day NC/NS.
- Termination notice listed first date employee failed to show/call and said she called 4 days later. Said she had NC/NS 3 other times.

But a second look showed . . .

- First day listed wasn’t a day she was scheduled to work (wrong days). If she called 4 days later, she would only have had 2 days NC/NS.
- Employee did miss 3 shifts, but claimed she was in the hospital and called manager to tell her that she would be out.
- Employer logged activity such as employees calling in, but did not retain the logs.

Then a third look showed . . .

- Manager terminated employee without a witness despite his own claimed policy of never terminating employees without a witness.
- Manager designated her eligible for rehire in spite of handbook policy stating employees terminated for no-call, no-show could not be rehired.
- The 3 other NC/NS were over the course of one year and manager admitted that one NC/NS a month wasn't "excessive."

And consider this…

- Managers testified in unemployment hearing with no preparation. Former employee had attorney; managers did not.
- Managers relied on termination notice and testified as to wrong days for absences.
- Employee sued for pregnancy discrimination. Claimed manager told her in termination meeting that her pregnancy was too much of an issue and she could return to work after she had her baby.

Did the managers do anything that increased their employer's legal risks?

Poor Judgment By The Front Line Managers

- Didn't take the time to fill out the termination notice accurately.
- Didn't look at the schedule to ensure days missed were days scheduled.
- Didn't retain records that would have helped in the company's defense, like logs.
- Didn't follow their own policies regarding terminations and rehire.

Did upper level management, in-house counsel or HR do anything that increased the employer's legal risks?

Penny-wise and Pound Foolish

- Didn't prepare their managers for unemployment hearing.
- Didn't hire a lawyer for unemployment hearing when they knew former employee would be represented.

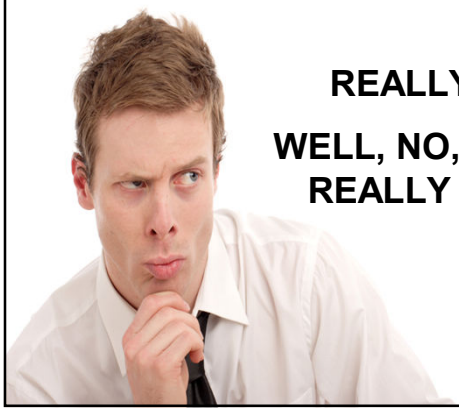
Today's Agenda

- Valid and Not-So-Valid Reasons for Discharge
- Pre-Termination Protocol and Meetings
- Severance Agreement(s)
- Termination Meeting(s)
- Post-Termination Communications
  - Internal
  - External
- Miscellaneous Considerations

At-Will Employment and Its Limits

Employment in Virginia (and most other states) is at-will.

This technically means an employee can be discharged with or without cause, and with or without notice – for any reason or no reason – unless the employer and employee have an employment contract providing otherwise.



REALLY?

WELL, NO, NOT REALLY . . .

Employees cannot legally be terminated for:

-Race	-Sex/gender	-Religion
-Age	-Ethnicity	-Genetic information
-Veteran status	-Need for military leave	-Filing work comp claim
-Disability	-Complaining about terms and conditions of employment on social media?	-Having a gun in car at work in spite of employer policy?????
-Organizing or joining a union	-Suing employer for discrimination or harassment/protected activity	-Pregnancy
-Requesting or taking FMLA leave	-Refusing to participate in, or refusing to remain silent about, illegal activities	-Participating in an investigation of another employee's claim of discrimination or harassment
-Smoking		

Categories of Legal Reasons for Termination

- Unsatisfactory performance
- Violating employment policies/breaking rules
- Unacceptable workplace behavior
- Reduction in force, reorganization, outsourcing work, closing facility

What is the Key to Reducing Legal Risks for Managers, HR Professionals and In-house Counsel?

STOP AND THINK!

Before terminations occur – assess:

- Your policies/practices affecting termination –
  - Attendance policies
  - Investigations
  - Discipline
  - Suspensions
  - Rehire
  - Layoff/RIF
  - Introductory periods

Before terminations occur – assess:

- Who in your Company is empowered to make a discharge decision?
- When must HR be notified? By whom?
- Who is responsible for generating documentation about the discharge?
- What planning occurs beforehand?
- Do you have a system – a checklist – you follow for terminations? If not, we'll help you customize one for your business.

Employee identified for termination – consider:

- Is there an employment contract? Are there limitations on termination under the contract?
- Has reason for discharge been investigated and employee's side of the story considered?
- Is the reason for the discharge legitimate?
- Is it non-discriminatory?

Employee identified for termination – consider:

- Is it non-retaliatory? Has the employee filed an EEOC charge; made an internal complaint about discrimination/harassment, pay issues, etc.; complained about illegal activities; taken FMLA leave; filed a workers' compensation claim; filed a charge with the NLRB; been involved in union organizing?
- Is it consistent with Company policy?
- Is it consistent with past practice?
- What do you find in the personnel file that gives you pause?

Pre-Termination Planning:

- Assemble team
- Who is/are the decision maker(s)?
- What is the reason for the termination?
  - All decision makers should agree on the reason.
  - Draft Separation Agreement and other documentation to reflect this reason.
  - Advise team to avoid unnecessary written communications (may be discoverable)

Pre-Termination Planning:

- Does employee owe Company any money? (Check company credit card balances and cancel card).
- Does employee have access to information that can hurt your organization?
- Is employee a threat? How do you want to carry out termination?

Pre-Termination Planning – for employee/threat:

- Consider firing employee over the telephone or at another location.
- If termination must occur on Company property, is Company security robust enough to handle it? If not, consider hiring private security (plain-clothes/uniformed).
- Consider who will be in the room when termination occurs. Security inside the room or outside? Where will everyone sit?

Pre-Termination Planning – for employee/threat:

- Consider how employee's personal belongings will be returned to him or her.
- Consider how employee will get home. If ride is needed, coordinate cab in advance.
- Consider keeping security in place for some period after the event.

Termination Meeting

- Have at least 2 people from the Company.
- Explain up front that the employee is being terminated and the reason. Always tell employee the real reason.
- Be compassionate but firm. If employee wants to argue, explain that you already took into consideration his/her explanation and that you've reached a final decision.
- Have employee submit final expense report (or give him/her a date by which to do so).

Termination Meeting

- Remind employee of any ongoing obligations (noncompete, nonsolicitation, nondisclosure).
- Have employee sign reimbursement agreement (for sign-on bonus, advance, etc.).
- Collect all Company property (laptop, phone, credit card, parking pass).
- Ensure you have correct home address.
- Allow employee to gather belongings. Consider whether supervision is necessary; if so, consider doing it after hours or without employee.

During or immediately after termination:

- Disable employee's access to e-mail, voicemail, security etc. Remote wipe Company devices if necessary.
- Assign another employee to monitor employee's e-mail and voicemail to address customer issues
- Each Company person should write down how termination went, any statements that were made by either party, and how employee reacted. Have HR person put those notes in file.

During or immediately after termination:

- Give or send Separation Notice and send COBRA letter.
- Give employee final pay and vacation, if policy requires, by next regular payday.
- Change locks/security code to building.
- Communicate departure to staff.
- Communicate departure to key customers, vendors, etc.
- Complete and submit benefit forms to stop coverage.

What about layoffs/RIFs?

- Voluntary or involuntary?
- If voluntary, early retirement or resignation incentive?
- If voluntary doesn't work, plan for a RIF
  - Consider WARN Act or similar state law obligations.
  - Define the business purpose (not "reduce costs" but "need to reduce sales force due to 20% reduction in demand for widgets").
  - Consider selection criteria
    - Seniority
    - Positions v. people
    - Performance-based decisions
  - Conduct disparate impact analysis
  - Consider offering severance in exchange for a release.

Severance Agreement(s) – Benefits

- Nondisparagement (but be prepared for employee to want mutuality)
- Cooperation with future litigation
- Noncompete or nonsolicitation (of employees or customers)
- Return of property
- Recommend paying out over time rather than lump sum so employee has an incentive to continue to abide by obligations
- Employee agrees he is ineligible for rehire
- Release of most claims
- Statement that employee has received all pay to which he is entitled

Severance Agreement(s) – What to know before you use:

- Must provide for "consideration," which is something you don't already owe the employee.
- To be effective release of age claims under the ADEA/OWBPA, must also:
  - Be written in a manner that can be clearly understood
  - Specifically refer to the ADEA by name
  - Advise employee to consult with an attorney
  - Provide 21/45 days to consider the agreement (waivable)
  - Provide 7 days to revoke (non-waivable)
  - Exclude rights and claims that arise after execution date
  - Cannot be a result of fraud or duress
  - For group terminations, provide required information about ages of individuals retained v. those terminated

Post-Termination Communication Issues & Considerations

- References?
- Unemployment benefits?
- Rehire status?
- Resignation in lieu of termination?

Post-Termination Issues – References

- If a former employer gives a negative reference that the former employee perceives to be false, the former employer can be sued for defamation.
- If the former employer provides a falsely positive reference about a dangerous former employee who goes on to commit a violent crime at the place of new employment, could the former employer be held liable for negligent or intentional misrepresentation?
- What's an employer to do? Consider moral, legal and PR impact.

Post-Termination Communication Issues & Considerations

- Unemployment benefits?
  - Can you win?
  - Is it worth fighting?
  - Is there a reason not to?

Resignation in lieu of termination – pros and cons

- Doesn't really protect you from EEOC charge, lawsuit, unemployment compensation benefits
- But relieves the employee of having to tell prospective employers they were fired
- May encourage the employee to sign a severance agreement and release of claims
- May force you to designate the employee as eligible for rehire if your policy states all resignations are eligible for rehire
- May make current workers feel as if the employee "got away with" something
- May set a bad precedent

Miscellaneous Considerations

- Review and update your policies and procedures that can impact termination.
- Assemble a termination team, with HR as the lead, so everyone understands termination procedure.
- If supervisors are empowered to terminate, consider special training similar to this for them.
- Prepare a checklist for terminations in conjunction with legal counsel (so it's privileged).

Bottom line

- STOP AND THINK!
- Be respectful and mindful of your employee's dignity
- Follow your policies
- Be prepared
- Seek legal counsel if warranted

QUESTIONS?

PRESENTATION

Employment Law Management Training -- Mandatory?

Jennifer P. Keller
423.928.0181
jkeller@bakerdonelson.com

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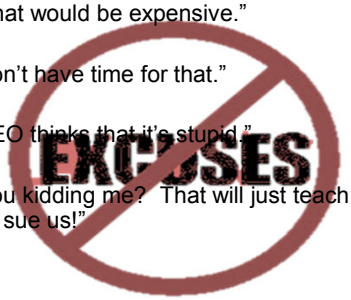
Management Training?

Excuses for Not Training

- Gee, that would be expensive."
- "We don't have time for that."
- "My CEO thinks that it's stupid."
- "Are you kidding me? That will just teach them how to sue us!"



Why Train?

- It's required by EEOC guidelines.
- It's required by State law.
- It's required to establish the affirmative defense to harassment.
- It's required to defeat a claim for punitive damages.
- It's required by other agencies & statutory schemes.

Also: An Opportunity To Drive Positive Behavior

- Share Experiences
- Build Consistency
- Ensure Knowledge Base
- Identify Weaknesses
- Build Camaraderie
- Get an Outsider's Look at your Organization

It's Required By The EEOC

"The employer should provide training to all employees to ensure they understand their rights and responsibilities concerning workplace harassment."

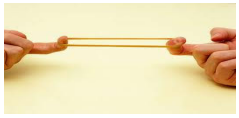
EEOC Employment Guidance: *Vicarious Liability for Unlawful Harassment by Supervisors* (6/18/99)

EEOC Expands Training Requirements

"Describe all the training given to managers and supervisors during the relevant period related to (a) equal employment opportunity; (b) the Americans With Disabilities Act, as amended; (c) requests for accommodations; and (d) retaliation for engaging in protected EEOC activity."

EEOC Expands Training Requirements

"Your answer should include a description of the training, e.g., whether it was in person or computer-based, the date and place of the training, the name of the individual(s) who conducted the training, those who attended the training, and the subjects covered during the training."



It's Required By State Law

- California, Maine, Connecticut, and New Jersey have mandatory sexual harassment training laws.
- Numerous states' courts have issued guidance making training virtually mandatory under those states' laws.

California: An Outlier or Ahead of its Time?

- Law requires **"mandatory sexual harassment prevention"** training for all businesses having more than 50 employees or employers who use the services of 50 or more people.
- If employers do not comply, training is conducted by California governmental department.
- Infractions of the law may also serve as the basis for punitive damages.

It's Required to Establish Affirmative Defense To A Harassment Claim

Affirmative Defense

1. That the employer exercised reasonable care to prevent and correct promptly any unlawful harassing behavior; and
2. That the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Bishop v. Woodbury Clinical Laboratory (M.D. Tenn. 2010)

- No evidence the employer provided training on the sexual harassment policy and reporting obligations.
- The employer could not demonstrate it exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
- No affirmative defense allowed.

It's Required to Defeat A Claim For Punitive Damages

Limiting Liability: the Kolstad Defense

Kolstad allows an employer to avoid punitive damages even if harassment is proven, and even if a compensatory damage award is made.

The Kolstad Defense

In order to take advantage of this defense, an employer needs to show that it engaged in "good faith efforts to implement an anti-discrimination policy."

What Proof Is Required?

The existence of an anti-harassment policy "is not sufficient in and of itself to insulate an employer from a punitive damages award." *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858-59 (7th Cir. 2001).

What Proof Is Required?

Generally, employers qualify for the *Kolstad* defense by adopting a comprehensive anti-harassment policy, and providing adequate harassment training for at least every management level employee.

U. S. Supreme Court

"The purposes underlying Title VII are similarly advanced when employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions."

Kolstad v. Am. Dental Ass'n. 527 U.S. 526 (1999)

Management Training Now Required By Courts

"Thus, the extent to which an employer has adopted antidiscrimination policies and educated its employees about the requirements of the ADA is important in deciding whether it is insulated from vicarious punitive liability."

EEOC v. Wal-Mart Stores, Inc., 187 F. 3d 1241 (10th Cir. 1999)

Management Training Now Required By Courts

"Wal-Mart certainly had a written policy against discrimination, but that alone is not enough. Our review of the record leaves us unconvinced that Wal-Mart made a good faith effort to educate its employees about the ADA's prohibitions."

EEOC v. Wal-Mart Stores, Inc., 187 F. 3d 1241 (10th Cir. 1999)

Management Training Now Required By Courts

"Leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an "extraordinary mistake" for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference."

Judge Diane P. Wood, *Mathis v. Phillips Chevrolet, Inc.* (7th Cir. 10/15/01)

Management Training Now Required By Courts

Employer "never adopted any anti-discrimination policy, nor did it provide any training whatsoever on the subject of discrimination."

"placement of EEOC poster…in dispatch trailer simply does not constitute a good faith effort to forestall potential discrimination."

Case remanded for a new trial on punitive damages.

Anderson v. G.D.C., Inc., 281 F. 3d 452 (4th Cir. Feb. 25, 2002)

Quality Counts!!!

- Seventh Circuit Court of Appeals in *EEOC v. IHOP of Racine (1/9/12)*, found pre-canned, un-customized training such as generic videotaped training does not qualify for the *Kolstad* good-faith effort defense.
- Employer assessed $5000 in compensatory damages, but $100,000 in punitive damages for its failure to adequately train its employees.

"This training consisted of showing all new hires a sexual harassment videotape, handing them a copy of the sexual harassment policy, and asking them to read and sign it."

"[A]lthough management was required to take sexual harassment training, the evidence at trial suggested that the training was inadequate."

What is sufficient to avoid punitive damages?

- Issuance and communication of EEO policy company-wide;
- Training of employees in a "carefully developed" classroom program that includes interactive group exercises;
- Voluntarily monitoring departmental demographics to help spot any issues of discrimination.

What is sufficient to avoid punitive damages?

- Requiring classroom training of employees on numerous occasions, including:
  - new orientation training;
  - follow-up training several weeks into employment;
  - new supervisor orientation;
  - diversity training that included harassment.

What is sufficient to avoid punitive damages?

- Maintaining harassment-free workplace training for all managers and employees; similar training was provided three times in five years;
- An eight-hour diversity training program for managers;
- Classroom training for all employees on two different occasions over five years.

Employers Pay The Price

- ***Bains v. ARCO Prods. Co.*** **$5 million in punitive damages for failing to train on harassment.**
- ***Swinton v. Potomac Corporation.*** **Lack of manager training justified a punitive damage award of $1 million.**
- ***Godinet v. Management and Training Corp.*** **Punitive damage award based in large part on failure to train.**

Questions and Answers

Q. Mr. Anderson, does your company have a Human Resources Director?
A. The Chief Operating Officer and I handle those functions.

Q. Mr. Anderson, does your company train its employees on employment issues such as discrimination and harassment?
A. Well, we have an employee handbook.

Q. I didn't ask you if you had an employee handbook Mr. Anderson, do you need me to repeat the question?
A. Yes, please do.

Q. Mr. Anderson, does your company train its employees on employment issues?
A. Well, we have monthly and sometimes weekly safety training classes.

Q. And in those meetings, you talk about issues such as employee safety, proper lifting techniques, correct?
A. Yes, that's what we talk about in those.

Questions and Answers

Q. But you do not normally talk about the companies policies and procedures dealing with discrimination or harassment in those, do you?
A. No.

Q. And, in fact, those are done by your Safety Coordinator and your Foremen, correct?
A. Yes, that's correct.

Q. Well, let me get back to my original question then Mr. Anderson. Does your company provide training on issues of discrimination and harassment?
A. Well, I guess not.

Q. You don't guess that you don't, you know that you don't, don't you Mr. Anderson? It is true that your company does not do any training of its employees on issues of discrimination and harassment.
A. No, we do not.

Don't let your answer be ….

"Um, no, we do not."

Training Your Investigators

In *EEOC v. Smokin' Joe's Tobacco Shop, Inc.,* the court noted the individual who investigated the Plaintiff's complaint had no special training regarding sexual harassment investigations. Therefore, the employer's attempt to escape liability was denied.

DON'T FORGET OTHER AGENCIES & STATUTES!

- Wage & Hour
- FMLA
- OSHA
- YOUR HANDBOOK!!!!!!

WHY TRAIN ON FMLA??
Let me give you 1.2 Million Reasons . . .

Elements of Effective Management Training

- Qualified trainer
- Interactive training process
- Case studies, roles plays, and quizzes that require managers to spot potential employment law issues and decide on a proper course of action
- Time for questions by managers

BUT WHAT ABOUT MY VIDEOS????

Subjects to Cover in Management Training

- Basics of unlawful discrimination/harassment
- Application of the basics in non-basic settings
- The scope of the ADAAA and the reasonable accommodation problem solving process
- FMLA/Other laws
- The Handbook!
- Union Avoidance
- Hiring, Firing, Evaluations
- Prohibition of retaliation for making complaints, participating in investigations, or exercising a legal right
- Importance of good documentation in personnel actions
- How to respond to complaints/concerns by employees

Subjects to Cover in Employee Training

- Unacceptable conduct (harassment, discrimination, retaliation)
- Wage & hour issues, handbook details, special state laws
- How to raise a concern
- Encouragement for raising concerns internally
- No retaliation for raising concerns, participating in investigations, or exercising legal rights
- Expectations for proper conduct

BEWARE: WHAT NOT TO DO

- **Do not focus only on sexual harassment.**
- **Do not forget to talk about what DOES NOT constitute illegal activity.**
- **Do not use the same material with employees and supervisors/managers.**
- **Do not include too much legal-ease or focus on the statutory content.**
- **Do not limit examples to only the obvious; test your trainees' knowledge and application ability.**
- **Do not forget to document training efforts.**
- **Do not use a trainer that is not familiar with the material.**
- **What have you learned NOT TO DO?**

What Questions Do You Have?

BAKER DONELSON

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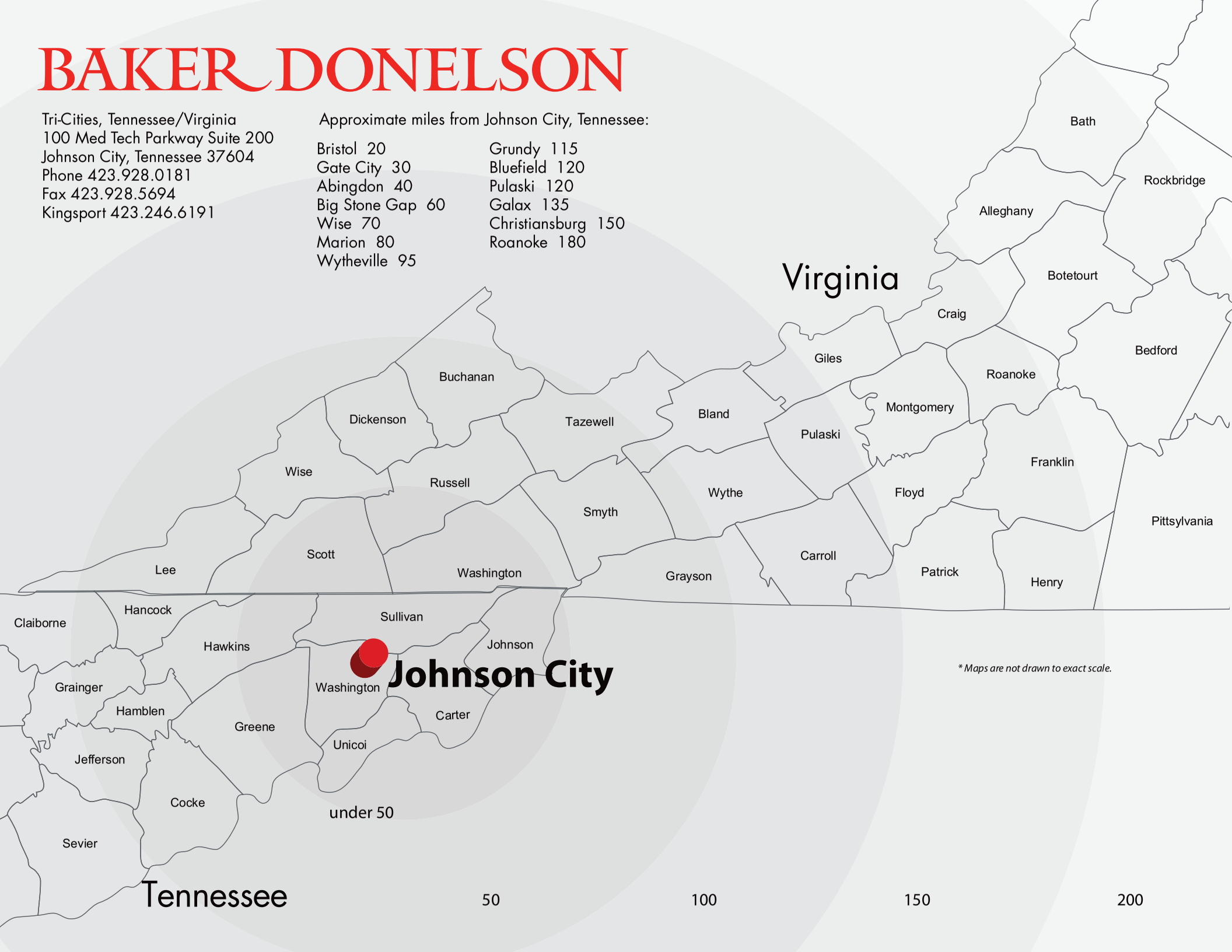
100 Med Tech Parkway Suite 200
Johnson City, Tennessee 37604
Phone 423.928.0181
Fax 423.928.5694
Kingsport 423.246.6191

Approximate miles from Johnson City, Tennessee:

Bristol 20	Grundy 115
Gate City 30	Bluefield 120
Abingdon 40	Pulaski 120
Big Stone Gap 60	Galax 135
Wise 70	Christiansburg 150
Marion 80	Roanoke 180
Wytheville 95	



** Maps are not drawn to exact scale.*

About Labor & Employment

We're the Resource in Human Resources. Our labor and employment attorneys offer litigation defense services for administrative and court proceedings at the federal and state level, advice on pre-litigation strategies to reduce legal risks, policy analysis and drafting, compliance audits, management training and labor negotiation.

We Know People. We know our clients as people, not just clients. We form business partnerships so we can help clients strategize on the best approach for each situation, and are always looking at the big picture to ensure long-term success.

We Know Business and Industry. We work with clients across all types of businesses and industries, and we take pride in understanding exactly how they work and how our clients are positioned in the marketplace. These include local, regional and global companies in the health care, energy, food processing, entertainment, insurance, chemical manufacturing, construction, transportation and distribution industries.

We Know Our Alphabet. Our attorneys stay on top of the latest changes in laws and regulations from A to Z. We provide counseling and strategic advice on all employment-related laws and regulations, and when necessary, we defend our clients in district and federal courts across the country. Attorneys regularly appear before the EEOC, DOL and Occupational Health and Safety boards.

We Get Around. Our more than 70 labor and employment-focused attorneys are spread across the Firm's seven states and Washington, D.C. Attorneys are licensed in a total of 14 states and have handled matters in 40 states and the District of Columbia. Over the last three years, the team has tried more than 630 federal court cases, has appeared in the Third, Fourth, Fifth, Sixth, Eleventh and District of Columbia Courts of Appeal, and has appeared in 22 District Courts as well as the District of Columbia.

We Know Labor, Health and Safety. We help management deal with labor unions during the election phases of union campaigns, and we help with labor agreement negotiation. For clients who have unions already representing their workforce, we pursue management's interests in all phases of the grievance and arbitration process. Our health and safety lawyers offer regulatory monitoring, compliance oversight, training programs and internal auditing protocols, and represent clients before federal and state Occupational Safety and Health regulators.

We Like to Help. Baker Donelson customizes all in-house management training programs so that clients' management teams will feel comfortable interacting with us and getting answers to their questions. We offer mock trials, case studies, role-playing, quizzes and video vignettes for human resources managers, mid-level managers and front line supervisors.

We Open Doors for Immigration. We offer a comprehensive and efficient approach to immigration, guiding clients through the entire range of immigration processes for foreign investors, executives, managers, professionals and other workers and their family members. Our experience and relationships help us cut through to practical solutions, using state-of-the-art systems to drive our best thinking through each step of every case.

We Play Well With Others. We want to be your go-to lawyers for every aspect of your company. No matter the legal issue, Baker Donelson's labor and employment attorneys can count on an integrated and experienced team of professionals to assist you in every other aspect of your legal business needs.

We're Good People. We are part of a Firm culture that promotes diversity, inclusion and a sincere appreciation for creative approaches to problem-solving. We are proud to have been listed among FORTUNE magazine's "100 Best Companies to Work For" for four consecutive years, something few other law firms have attained. Many of our offices consistently rank as a Best Place to Work in their cities and states, as well. Our labor and employment attorneys are listed in *Chambers USA*, *Best Lawyers in America*© and *Super Lawyers*, alongside other state-specific accolades. The group also holds national Tier Two rankings in *U.S. News – Best Lawyers* in Employment Law and Labor Law.

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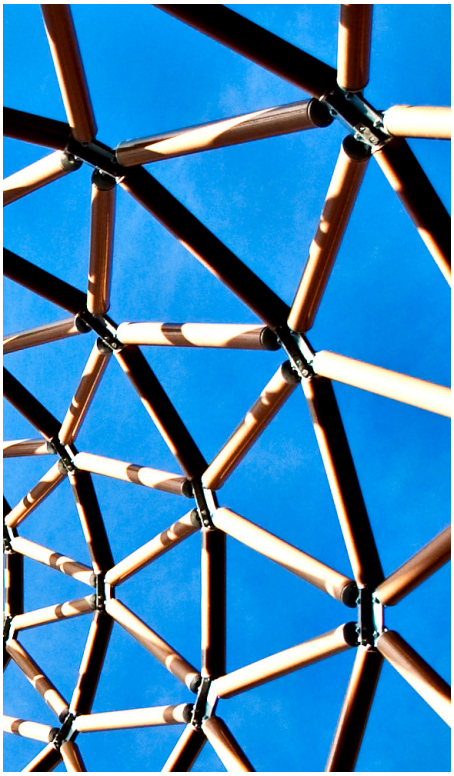

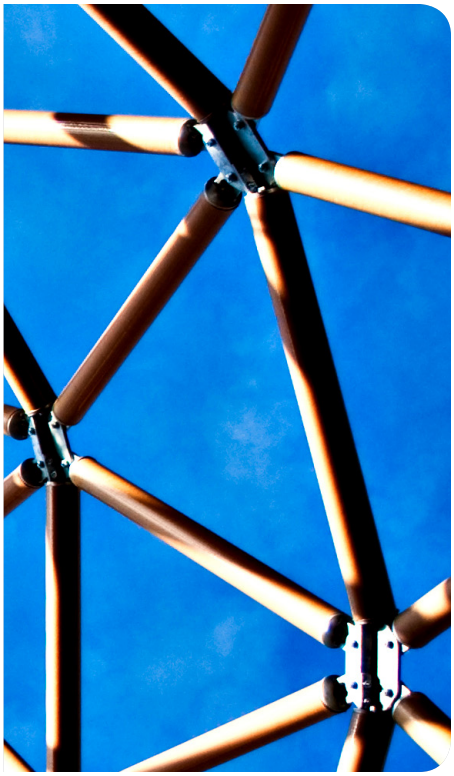

Firm Profile

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FIRM PROFILE

As the 66th largest law firm in the U.S., Baker Donelson gives clients access to a team of more than 650 attorneys and public policy advisors representing more than 30 practice areas, all seamlessly connected across 19 offices to serve virtually any legal need.

Who We Are

Since our beginnings in 1888, Baker Donelson has built a reputation for achieving results for our clients on a wide range of legal matters. While providing legal services is our focus, it is how we deliver them that sets us apart. Our goal is to provide clients with more than what they have come to expect from a law firm.

Baker Donelson commits to a deep understanding of a client's business, to enable us to anticipate clients' needs and assist in their decision making processes. Because we offer consistent, knowledgeable guidance based on their specific goals and objectives, clients view us as a valued business partner. This allows them to focus on the growth and success of their business, confident their legal issues will be handled by an attentive, responsive team.

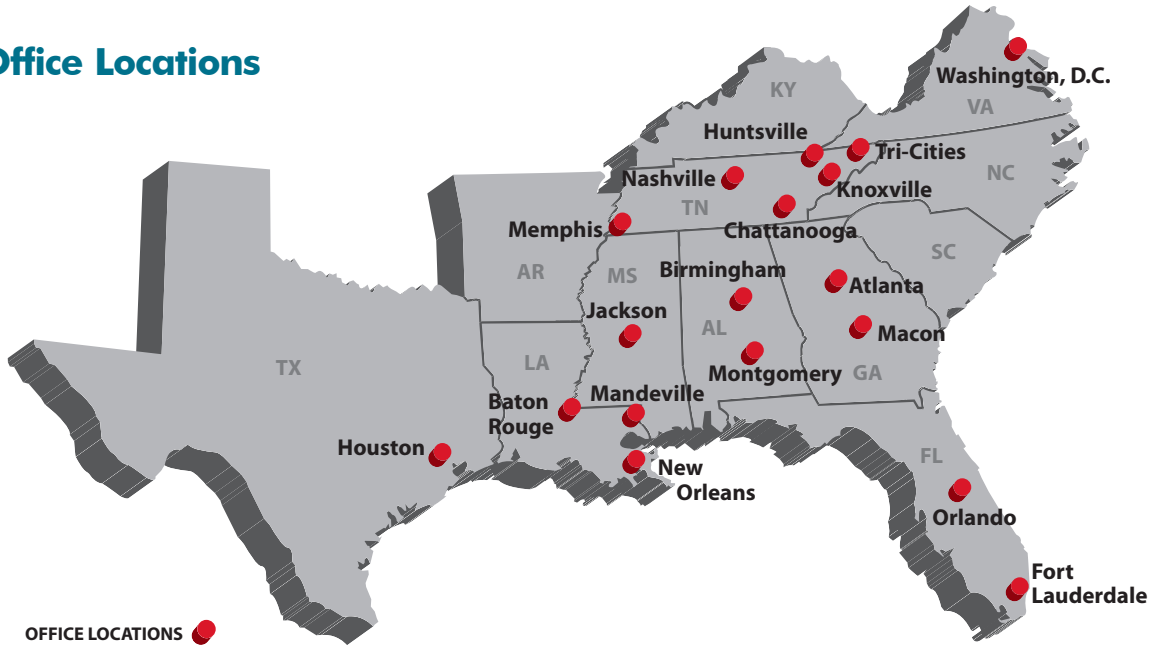
Our unique approach to providing legal services is enabled by our extensive support structure. As the 66th largest law firm in the U.S., Baker Donelson gives clients access to a team of more than 650 attorneys and public policy advisors representing more than 30 practice areas, all seamlessly connected across 19 offices to serve virtually any legal need. Clients receive informed guidance from experienced, multi-disciplined industry and client service teams. Our diversity and women's initiatives ensure diversity in our people, perspectives and experiences. Technology helps us operate more effectively and efficiently by providing instant access to client-specific information and other key resources.

What Sets Baker Donelson Apart

- Our Health Care practice is nationally recognized: *Modern Healthcare* named us the 11th largest health law practice in the U.S. (2013); *Chambers USA*: America's Leading Business Lawyers (2013) ranks us as one of the nation's leading health law practices; and American Health Lawyers Association (AHLA) named us as one of the top ten health practices in the nation.
- We have been ranked by FORTUNE magazine as one of the "100 Best Companies to Work For" since 2010.
- We created BakerManage™, an industry-leading proactive project management system that ensures complicated legal matters are managed efficiently and completed on time and within budget.
- We created BakerCorp Connect and BakerLit Connect, collaborative, web-based tools that allow our clients to manage corporate and litigation matters more efficiently through real-time information. These and other related online services deliver cutting-edge legal support to our clients, reducing costs and improving results through innovative knowledge management.
- We established the Howard Baker Forum in Washington, D.C. to provide a platform for examining specific, immediate, critical issues affecting the nation's progress at home and its relations abroad. Under Senator Baker's leadership, the Forum organizes a variety of programs and research projects to examine and illuminate public policy challenges facing the nation today.
- Our commitment to pro bono matters is routinely recognized on an individual city and lawyer basis. Recent nods have come from the Birmingham Bar Association Volunteer Lawyers Program, Louisiana State Bar, State Bar of Georgia, Mississippi Volunteer Lawyers Program, Mississippi State Bar, Legal Aid of East Tennessee and the Tennessee Bar Association.

- Our Baker Donelson Nonprofit Institute allows attorneys to provide board training, charter and bylaw review and advice, director liability analysis and more on a pro bono basis to nonprofit organizations.
- We have been consistently ranked by *Multicultural Law* magazine in the "Top 100 U.S. Law Firms For Diversity" since 2005, in the "Top 100 Law Firms For Women" since 2008, and in the "Top 25 Law Firms For African-Americans" since 2011.
- We established the Baker Donelson Diversity Scholarship Program for law students. Through it, recipients of the three annual scholarships are awarded a salaried second-year law student Summer Associate position, and $10,000 is paid during the students' third year of law school to help defray the cost of tuition and related expenses.
- Since 2006, we've been listed as a "Go-To Law Firm" in the Directory of In-House Law Departments of the Top 500 Companies, produced by *Corporate Counsel* and American Lawyer Media.
- *National Law Journal's* 2013 list names us as the country's 66th largest law firm.
- *Chambers USA*: America's Leading Business Lawyers 2013 list ranked 78 of our attorneys across 25 practice areas, with 25 of those practice areas noted as leading practices in individual states.
- *Best Lawyers In America*® 2013 named 226 of our attorneys to its list. Based upon total number of attorneys listed, we are top-listed in the nation in nine practice areas: Business Organizations (including LLCs and Partnerships), Closely Held Companies and Family Businesses Law, Commercial Finance Law, Commercial Transactions/ UCC Law, Litigation – Construction, Mass Tort Litigation/ Class Actions – Defendants, Medical Malpractice Law – Defendants, Non-Profit/Charities Law, Transportation Law.
- We were awarded 151 different Tier 1 metropolitan rankings in the 2013 *U.S. News – Best Lawyers* "Best Law Firms" list, which ranks us among the top 20 firms nationally with the most first-tier metropolitan rankings.

Our Office Locations



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GUIDES

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Introducing Baker Donelson's Quick and Easy Guides to Labor & Employment Law

Get the Answers You Need with Our Quick and Easy Guides to Labor & Employment Law

Whether you are double-checking what you already know or need to learn something new about a legal issue, *Baker Donelson's Quick and Easy Guides to Labor & Employment Law* are for you. The topics covered in these web-based guides are the ones our clients ask about most often and cover the basic topics that HR professionals encounter on a daily basis. While these guides are certainly not intended to provide a "law-school" thesis on these issues, they will provide a useful reference tool for any HR professional.

Visit the URL below to get started. Don't forget to bookmark it for easy access!

http://inside.bakerextranet.com/practice/LE-EZGuide/default.aspx

If you have questions about the Guides or any other labor and employment matter, do not hesitate to contact a Baker Donelson Labor & Employment lawyer for more information.

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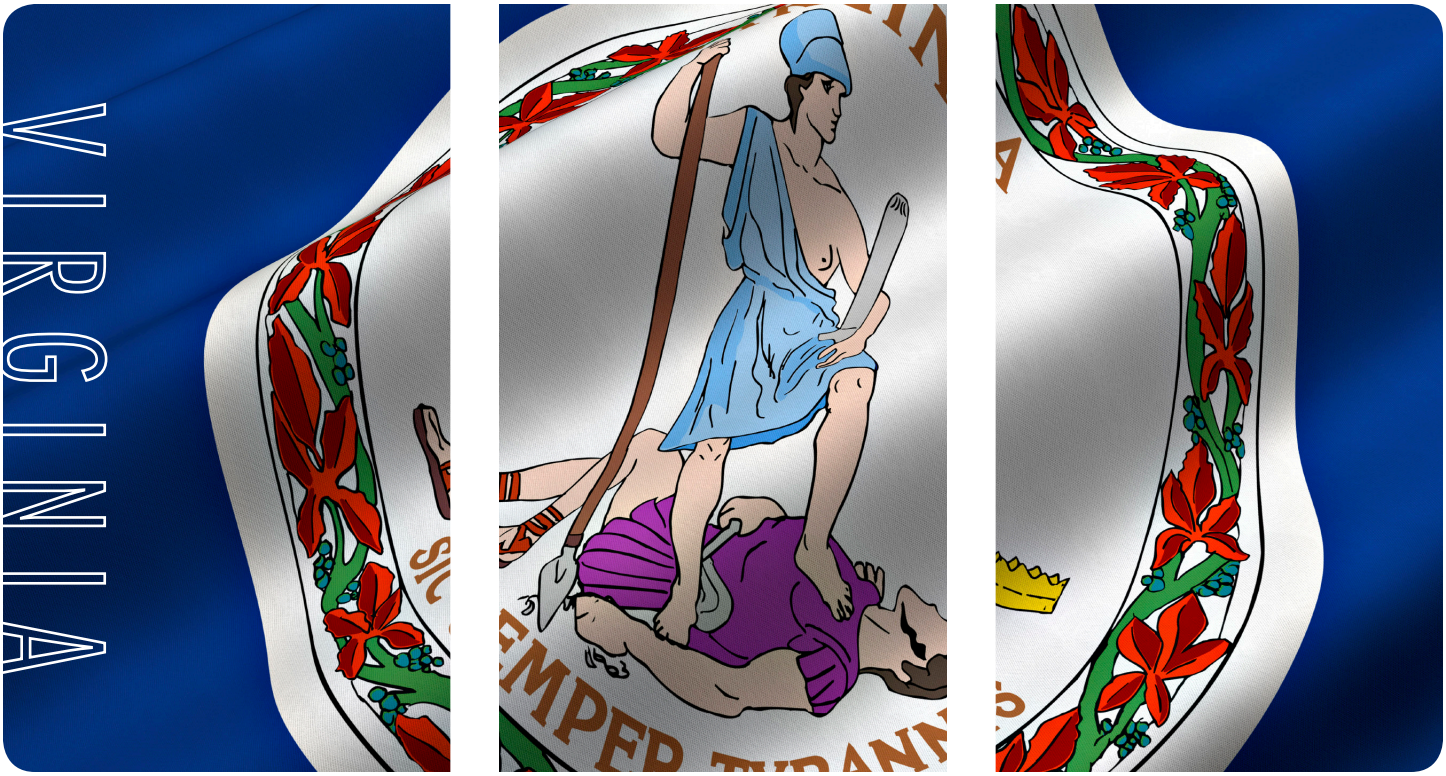

Quick and Easy Guide to Labor and Employment Law

Provided by Baker Donelson

Disclaimer: These materials do not constitute legal advice and should not be substituted for the advice of legal counsel.

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VIRGINIA

At-Will Employment

The employer/employee relationship is governed by the at-will employment doctrine. This means that either party may terminate the relationship at any time, with or without cause, and with or without notice. An employer, however, shall not discharge an employee in violation of public policy, which is subject to various interpretations. *Bowman v. St. Bank of Keysville*, 229 Va. 534 (1985). Further, absent a disclaimer to the contrary, the terms and conditions of an employer's Employment Manual or Handbook may narrow and restrict the employment at-will doctrine. *Miller v. SEVAMP, Inc.*, 234 Va. 462 (1987).

Right to Work Laws

An employer cannot deny nor otherwise condition an employee's right to work upon that employee's membership or non-membership in any labor union or labor organization. Further, an employer cannot deny nor otherwise interfere with an employee's right to organize, or to bargain collectively, by and through a labor organization. Va. Code §§ 40.1-60, 61, 62.

Immigration Verification

Virginia Code Section 40.1-11.2, requires all state agencies to use E-Verify for new hires as of December 1, 2012. Beginning on December 1, 2013, under Section 2.2-4308.2, all employers with more than an average of 50 employees for the past 12 months and entering into a contract in excess of $50,000 with a state agency must use E-Verify to authorize all newly hired employees who will work on that agency contract. Any employer who does not comply with this mandate will be barred from receiving a contract with the state for up to 12 months.

Prince William County requires all newly hired county employees to have their employment authorized through E-Verify. Any contractors with the county must also use E-Verify for their employees.

Drug Testing

The State of Virginia does not prohibit the drug testing of employees, and employers are not expressly prohibited from discharging at-will employees who test positive on random drug tests. However, employers should cautiously approach drug testing as it can present substantial hurdles.

Jury Duty Leave

It is a criminal violation, specifically a Class 3 misdemeanor, for an employer to terminate or take any adverse action against an employee because the employee is on jury duty or responding to a jury summons. Va. Code § 18.2-465.1.

Voting Leave

The State of Virginia does not require an employer to offer to its employees time off to vote.

Parental Leave

The State of Virginia does not require an employer to offer to its employees parental leave.

Other Leave

The State of Virginia does not require employers to offer to employees paid vacation or sick leave.

Smoking Laws

Under the Virginia Clean Indoor Air Act, Va. Code §§ 15.2-2820, *et seq.*, smoking is prohibited in all enclosed areas not specifically exempted by statute. Also, under the Act, and subject to certain requirements, an employer may have the right to limit or ban smoking in the workplace. Va. Code § 15.2-2828.

VIRGINIA

Break Time to Express Milk

A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present, including any property owned, leased, or controlled by the State of Virginia. Va. Code §§ 2.2-1147.1; 18.2-387. As for places of employment, Virginia House Joint Resolution 145 "encourages" employers to recognize the benefits of breastfeeding and to provide unpaid break time and appropriate space for employees to breastfeed or express milk.

Meal Breaks

In general, the State of Virginia has no law regulating meal breaks or rest periods. However, employees under the age of sixteen shall not work more than five hours without a continuous thirty-minute break period. Va. Code § 40.1-80.1.

Minimum Wage

The State of Virginia mandates a minimum wage equivalent to the minimum wage set by federal law. Va. Code § 40.1-28.10.

Final Payments

Upon termination of employment, an employee shall be paid all wages or salaries due him or her for work performed prior to termination; such payment shall be made on or before the date on which he or she would have been paid for such work had his or her employment not been terminated. Va. Code § 40.1-29A.1.

Unemployment Insurance

Unemployment insurance benefits provide income to individuals who have lost work through no fault of their own. The benefits are intended to partially offset the loss of wages while an unemployed worker searches for suitable work, or until an employer can recall the employee to work. Nothing is deducted from the employee's wages to pay for this coverage. Unemployment benefits are administered by the Virginia Employment Commission and additional information regarding the benefits may be accessed at http://www.vec.virginia.gov/unemployed.

Workers' Compensation

The Virginia Workers' Compensation Act, Va. Code 65.2, *et seq.*, applies to virtually every employer in Virginia with three or more employees. The Act is administered by the Virginia Workers' Compensation Commission and additional information regarding the Act may be accessed at http://www.vwc.state.va.us/portal/vwc-website.

Employees who suffer injuries and/or occupational diseases arising out of and in the course of their employment may be eligible to receive several types of benefits under the Act. Under the Act, a workplace injury must be immediately reported to the employer; failing to timely report an injury may result in a denial of benefits. Also, it is unlawful to discriminate against an employee because she or he has filed a workers' compensation claim, participated in an investigation related to a claim, or testified in a proceeding regarding a claim. Va. Code § 65.2-308.

Additional Laws & Regulations

Anti-Retaliation Provisions. An employer shall not retaliate against an individual because that individual has, for example: (1) had his or her earnings garnished for any one indebtedness, Va. Code § 34-29(g); (2) filed a complaint or participated in an investigation under the Virginia Occupational Safety and Health Act, Va. Code § 40.1-51.2:1; (3) a certain genetic characteristic or as a result of a genetic test, Va. Code § 40.1-28.7:1; (4) filed a claim with the Commissioner of Labor and Industry for unpaid or untimely paid wages pursuant to Va. Code § 40.1-29; or (5) served in the Virginia National Guard, Virginia Defense Force, or naval militia, Va. Code § 44-93.4.

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Human Rights Act. The Act, which may be found at Va. Code § 2.2-3900, *et seq.*, prohibits discrimination on the basis of race, color, religion, sex, pregnancy (including childbirth or related medical conditions), age (forty and over), national origin, disability, or marital status. All employers are covered by the Act; however, civil lawsuits may only be brought against those employers with between five to fifteen employees.

Virginians with Disabilities Act. The Act, in pertinent part, mimics the Americans with Disabilities Act of 1990, as amended, in that it prohibits discrimination because of an individual's disability. Va. Code § 51.5-41. Employers subject to the Rehabilitation Act of 1973 are exempt from the Act. Va. Code § 51.5-41(F). Additional information regarding the Act may be found on the Virginia Department for Aging and Rehabilitative Services' website, http://www.vadrs.org/.

Employment Applications. It is a Class 1 misdemeanor for an employer to require an applicant to disclose any information concerning an arrest or criminal charge against him or her that has been expunged. Va. Code § 19.2-392.4. Additionally, all applications "shall ask prospective employees if they are legally eligible for employment in the United States;" it is a Class 1 misdemeanor to hire an individual not authorized to work in the United States. Va. Code § 40.1-11.1.

Reference Immunity. An employer who, upon request, discloses information about a former or current employee to a prospective employer of the former or current employee is immune from civil liability for such disclosure or its consequences, unless it is shown that the information disclosed by the former or current employer was knowingly false or was offered with the intent to deliberately mislead. Va. Code § 8.01-46.1.

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Training Programs

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LABOR & EMPLOYMENT

Baker Donelson customizes all in-house management training programs so that your management team will feel comfortable interacting with us and getting answers to their questions.

The key to effective management training on employment law issues is interaction. Baker Donelson customizes all in-house management training programs so that your management team will feel comfortable interacting with us and getting answers to their questions. We use a variety of techniques to make the training sessions educational and entertaining, including the following:

Customization

Programs are made industry, business and/or company specific, including use of your company's policies, forms, mission and values during training sessions.

Non-Lecture

Training sessions are open and interactive, with ample time for managers to ask questions and get answers.

No Legalese

We make employment laws understandable for the layperson and modify content based on the attendees' experience level.

Mock Trials

Managers get a real-world view of what it is like to be a witness or a juror in an employment law case.

Video Vignettes

We create videos using your management team or purchase videos as options for enhancing the learning experience.

Case Studies

Managers are challenged to apply what they have learned through real-world scenarios pertinent to your business.

Quizzes

We offer a variety of quiz formats to enhance your managers' ability to retain what they have learned.

Role-Playing

Managers practice investigation techniques, termination scenarios, performance evaluation meetings and counseling scenes with us and their peers, giving them an opportunity to hone their skills and be able to react quickly when difficult employment situations arise.

Employment Law Training Topics Include:

Mid-Level Managers And Front Line Supervisors

- Basics of Employment Discrimination and a Guide to Common Causes of Discrimination/Harassment Complaints
- Creating and Maintaining a Harassment-Free Work Environment
- When and How Managers Should Respond to Employee Complaints
- Compliance Guides on The Family and Medical Leave Act (FMLA) and The Americans With Disabilities Act (ADA)
- Religious and Disability Accommodations: When, Where and How
- Management's Guide to Legal and Ethical Decision-Making
- Dos and Don'ts for Protecting Privacy Rights in the Workplace
- Reduce Legal Risks: Basics of Progressive Discipline, Documentation and Termination
- Making the Employee Handbook Your Management Playbook
- Recruiting, Interviewing, Selecting and Hiring Employees and Conducting Evaluations
- Conducting Internal Investigations
- Negligent Supervision: Easy Guide to Reducing Legal Risks
- Wage and Hour Law for the Front Line Supervisor
- Mission Possible: Union Avoidance
- Unlawful Retaliation: Prevention is Worth a Pound of Cure
- Leadership Workshops on Diverse Workforces, Reducing Legal Risks, and Motivation

Human Resources Professionals

- Internal Investigations A to Z
- The Americans With Disabilities Act: Straight Answers to Tough Questions
- Coordinating the FMLA, ADA, and Workers' Compensation
- Maintaining a Union-Free Work Environment
- How to Conduct an Employment Practices Audit
- Lawfully Managing Attendance
- Personnel Document Retention: Best Practices for Reducing Legal Exposure
- Developing an Employee Handbook
- Affirmative Action Compliance
- Surviving an OFCCP Audit
- A Step-By-Step Guide for Responding to an EEOC Charge
- Negligent Hiring: Crafting Policies and Procedures to Reduce the Risk
- Conducting a Wage & Hour Audit
- Train the Trainer Sessions
- Employment Verification: Policies, I-9, E-Verify and No-Match
- Managing Visas and Status for Foreign Workers

Executive Management

- Employment Law 101 for Executive Management
- Tone at the Top: Executive Management Commitment to a Harassment Free Workplace

To schedule your training program, please contact:

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