PRESENTATION

Preparing for 2015:

A Look Back at Significant Employment Law Developments Over the Past Year and What to Expect in the New Year

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EXPAND YOUR EXPECTATIONS℠

Agenda

- 2014: A Review of What Happened in the Legislature
- 2014: A Review of What Happened in Executive Action
- 2014: A Review of What Happened in the Judiciary
- Gazing into the Crystal Ball: What to Expect in 2015

2014: A Review of What Happened in the Legislature

- Federal
  - Congress - Republican Senate and Republican House
    - Senate: 46 Democrats; 54 Republicans
    - House: 186 Democrats; 244 Republicans
  - Avoided a shut-down
  - Keystone Pipeline voted down.

- State
  - Tax tribunal. HB 105. Creates the Alabama Tax Tribunal to hear taxpayer appeals.
  - Sales taxes. HB 151. Requires fewer businesses to pay estimated monthly sales taxes in advance instead of paying actual revenues collected.

2014: A Review of Executive Action

- Executive Orders
- The Equal Employment Opportunity Commission
- The Department of Labor
- The National Labor Relations Board

Executive Orders

- February 12, 2014 – Established minimum wage for contractors $10.10 per hour effective as of January 1, 2015
- April 8, 2014 – No discrimination or retaliation for inquiring about, discussing or disclosing compensation.
- July 21, 2014 – Expanded anti-discrimination executive orders to include protection for sexual orientation and gender identity.

Executive Orders

- November 20, 2014 – Immigration
  - Expanded the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extending the period of DACA and work authorization from two years to three years
  - Protects 5 million undocumented persons from deportation.

What's New at the EEOC?

- FY 2011 – 99,947
- FY 2012 – 99,412
- FY 2013 – 93,727 (Alabama charges – 3,105)
  - Resolved 97,252 charges; 14,000 fewer than FY 2012
  - Pending inventory: 70,781 (average pending time is 267 days)

- EEOC secured more than $372.1 million in monetary benefits for individuals – the highest level of relief obtained through administrative enforcement in the EEOC's history ($6.7 million increase).
- Good news for Employers: Fewer Charges
- Bad news for Employers: You are paying more money to resolve them.

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.

Systemic Enforcement Program

- According to the EEOC, “harassment claims based on race, ethnicity, religion, age and disability combined significantly outnumber even sexual harassment claims in the private and public sectors.”

- FY 2013 – “The agency continued to build a strong national systemic enforcement program. At the end of the fiscal year, there were 300 systemic investigations resulting in 63 settlements or conciliation agreements that recovered approximately $40 million.”

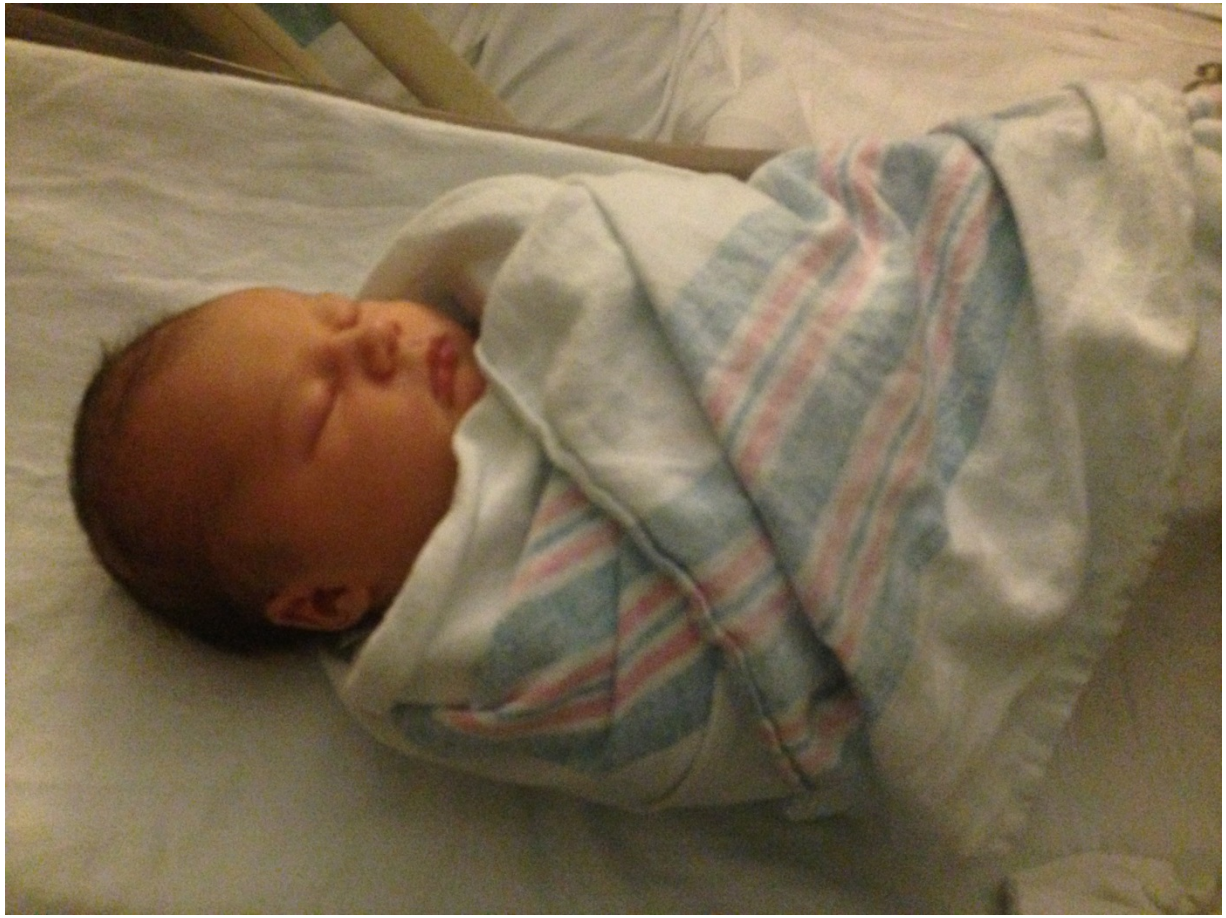
- FY 2014 – Completed investigations dropped to 260. Filed 17 systemic lawsuits down from 21.

Systemic Enforcement Program

- Found REASONABLE CAUSE in 45% of systemic investigations in 2014.
  - 35% in 2013.
  - In comparison, EEOC issues for cause determinations in less than 5% of charges filed.
- Merit suits
  - FY 2013 – 131 filed
  - FY 2014 – 133 filed

- Systemic suits comprised 16 percent of all merit filings, and by the end of the year, represented 23.4 percent of all active merit suits – the largest proportion since tracking started in fiscal year 2006.

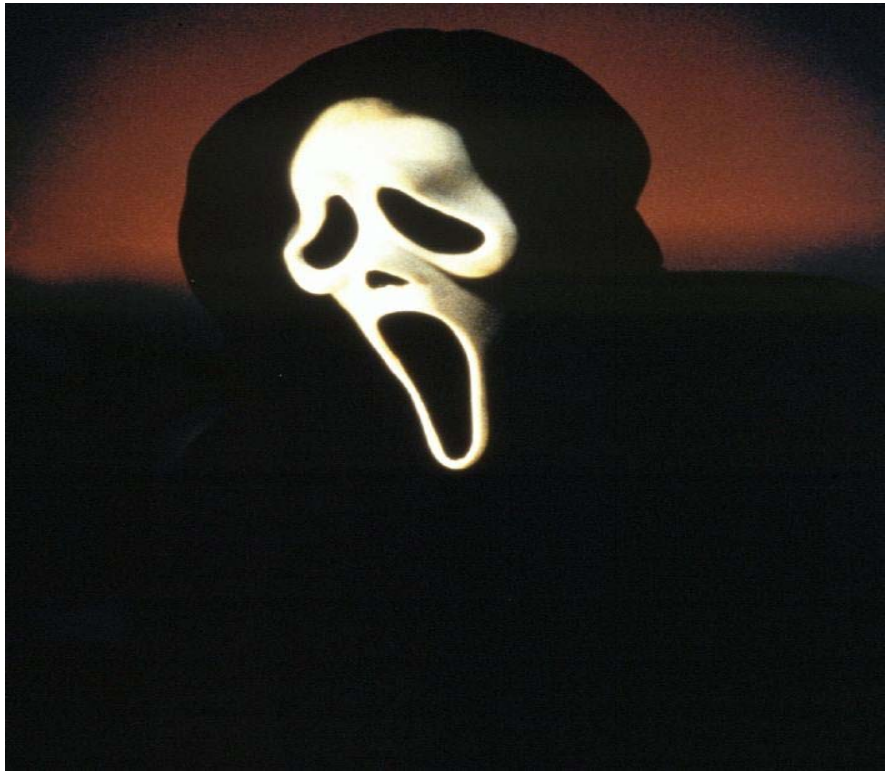
EEOC's Pregnancy Discrimination Regulations



EEOC Guidelines issued on July 14, 2014 (3-2)

- Reinforces well-established law
- Expands protections for pregnant employees
- Closely tracks the ADA
- Treat “similar in their ability or inability to work.”
- Must provide light-duty assignments
- No public comment

What's New with the Department of Labor



Record Number Filed in 2014

- 2007 – 5,302
- 2008 – 5,644
- 2009 – 6,081
- 2010 – 7,006
- 2011 – 7,064
- 2012 – 7,764
- 2013 – 7,882
- **2014 – 8,066**

Conditional Certification

- Plaintiffs in FLSA collective action cases won approximately 70 percent of conditional certification motions.

- Plaintiffs won about 52% of decertification motions.

What's New with the National Labor Relations Board?

NLRB's Ambush Election Rule

On December 15, 2014, the National Labor Relations Board ("NLRB") issued a Final Rule amending 29 C.F.R. Parts 101, 102, and 103 with regard to Case Procedures for Representation Elections. The Rule, unless successfully challenged, will go into effect April 14, 2015. The United States Chamber of Commerce challenged similar rules when the NLRB attempted to implement them back in 2011. The United States District Court for the District of Columbia struck down those rules, not on the merits, but because it held that the Board did not have a quorum. Because of the thousands of comments opposing the new rules, there is a high likelihood that there will be a legal challenge to these rules as well. The National Association of Manufacturers has noted that it "will be pushing back on this ill-advised and completely unjustifiable regulation."

NLRB Joint Employer Litigation

- Complaints were issued in December at McDonald's USA LLC and franchisees as joint employers.

- How will this affect different relationships with direct employers and third-parties?

2014: A Review of What Happened with the Courts

They were busy and so were we!

Integrity Staffing Solutions v. Busk

- Under the FLSA, must you pay employees for going through security screenings?
- Answer: No.
- Why???

Burwell v. Hobby Lobby

- The Court ruled that corporations run by religious families cannot be required to pay for contraception coverage for their female employees.

NLRB v. Noel Canning

- The court limited but did not eliminate presidential recess appointment powers.

Working through Maternity Leave

- *Evans v. Books-A-Million* – 11th Cir.; August 8, 2014
- Evans was granted FMLA leave but worked full-time during her leave. She returned a week early. She was paid her full salary while on FMLA.
- She was subsequently reassigned to Risk Manager which required travel.
- No bonus.
- FMLA interference – "prejudice" by showing employee suffers loss in employment remedied by equitable relief.

Gazing into The Crystal Ball: 2015? Legislatures…

Federal:

- What happens to:
  - OBAMACARE
  - EDNA
  - IMMIGRATION REFORM
  - TAX REFORM

State:

- More indictments?
- Budget woes – where's the money?
- Tax incentives for Economic Development
- Prison reform or judicial intervention

Pregnant Workers Fairness Act (PWFA) H.R. 5647 -- S. 3565

The bill requires employers to make the same sorts of accommodations for pregnancy, childbirth, and related medical conditions that they do for disabilities.

What to Expect in 2015 from the Executive Branch?

- More Executive Orders?
- Expect further efforts to revise the NLRB's election rules.
- A decision on joint employers from the NLRB.
- Continued aggressive enforcement by federal agencies.
- Continued focus by the EEOC on large-scale, systemic cases.
- The EEOC's tactics in litigation will continue.

What to Expect in 2015 from the Executive Branch?
(continued)

- The EEOC will continue its pace; the number of charges will continue to decline as the economy improves.
- A continued focus on wage audits and inclusion of reviews for FMLA compliance.

What to Expect in 2015 from the Judicial Branch?

- There will be continuing challenges to the ACA.
- There will be challenges to state laws banning same sex marriages/benefits.

Cases to Watch before the Supreme Court: *Young v. UPS, Inc.*

UPS has a policy of giving light duty assignments to various categories of employees who are physically unable to do their usual job.

Remember

The PDA states, “women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.”

Ms. Young argued

- When employers give a benefit to some employees who are similar to a pregnant employee in their limitations on working, employers must give that same benefit to the pregnant employee.

- So if UPS gives light duty assignments to an employee injured on the job who has temporary lifting restrictions, they should also give light duty assignments to pregnant employees who have temporary lifting restrictions.

UPS Argued

- The policy is a pregnancy-blind policy and that to win her case Young needed to prove she was denied the accommodation because of bias against her as a pregnant woman.

What did the Fourth Circuit Court of Appeals say about the arguments of the parties?

The Bottom Line

- According to the Court of Appeals, as long as an employer's policy can be described without reference to pregnancy—by identifying in pregnancy-neutral terms the preferred classes of conditions that are entitled to light-duty accommodations— the policy does not discriminate on the basis of pregnancy.

Split of Authority

- Three other appellate courts have also upheld light-duty policies that accommodate some categories of temporarily disabled employees, but not pregnant employees. (5th, 7th, 11th)

- The 6th and 10th Circuits recognize a pregnant female makes out at least a *prima facie* case of discrimination where she can show some employees are accommodated and pregnant women are not.

The “Supremes” Take The Stage (continued)

- May 19, 2014 – Solicitor General filed brief as requested.
- June 2, 2014 – Ms. Young filed a supplemental brief.
- June 3, 2014 – Matter in Conference with the Justices.
- June 4, 2014 – UPS filed a supplemental brief.

Perez v. Mortgage Bankers Association

- Issue: Do federal agencies have to engage in notice-and-comment rulemaking before they significantly alter a rule interpreting an agency regulation?

Mach Mining v. EEOC

- Seventh Circuit held that courts can not delve into whether the EEOC has satisfied its statutory obligation to try to informally resolve claims before suing an employer.

What to Expect in 2015 from State Courts

- Ban the Box will increase.
- Attacks on non-compete clauses.

QUESTIONS?