

AVOID THE MADNESS: MAKE SURE YOUR COMPANY'S AHEAD OF THE EMPLOYMENT LAW GAME THIS MARCH

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ROAD MAP TO TAKING THE LEAD ON THE COURT

- ▣ Taking advantage of the **free throws** addressed by the U. S. Supreme Court;
- ▣ Understanding **backcourt violations** established by the NLRB;
- ▣ Taking a **jump shot** at Issues focused on by the EEOC;
- ▣ Avoiding **technical and offensive fouls** with the Department of Labor; and
- ▣ **Traveling** down the court of other employment law trends of 2013.



U.S. SUPREME COURT “FREE THROWS”

▣ High Court shines Spotlight on DOL’s FLSA Flip-Flopping:

- U.S. Supreme Court agreed to weigh in on what constitutes working time when “changing clothes” under the FLSA.
- Court will take up an appeal lodged by a class of 800 U.S. Steel workers who claim they were unlawfully denied compensation for time spent putting on protective equipment



OTHER U.S. SUPREME COURT “FREE THROWS”

- ***Vance v. Ball State University***: Whether, as the Second, Fourth, and Ninth Circuits have held, the Faragher and Ellerth “supervisor” vicarious liability rule under Title VII:

(i) applies to harassment by those whom the employer vests with authority to direct and oversee victim’s daily work or as the First,

OR

(ii) is limited to those harassers who have the power to hire, fire, demote, promote, transfer, or discipline their victim?



- ***American Express Co. v. Italian Colors Restaurant***: Whether the Federal Arbitration Act permits courts, invoking the “federal substantive law of arbitrability,” to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim?

OTHER U.S. SUPREME COURT “FREE THROWS”

▣ ***U.S. v. Windsor:***

Whether Section 3 of the Defense of Marriage Act violates the 5th Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state?



▣ ***Univ. of TX Southwestern Medical Center v. Nassar:***

Does the retaliation provision in Title VII and similarly worded statutes require a plaintiff to prove but-for causation—that an employer would not have taken an adverse employment action but for an improper motive OR instead, require only proof that the employer had a mixed motive?

What's the EEOC's **Game Plan** for 2013?

- ▣ The Equal Employment Opportunity Commission (EEOC) kept active last year, investigating issues including: social media passwords, domestic violence, and LGBT

- ▣ With the onset of health care reform and an impending Supreme Court decision on the federal benefits afforded to same-sex couples, the coming months will likely bring more changes in the labor sector.



THE EEOC'S **STARTING LINEUP**

- ▣ As 2012 came to a close, the EEOC approved a new Strategic Enforcement Plan (SEP), in which it laid out its top national enforcement priorities for the foreseeable future. According to the guidance, the EEOC is focused on...



PRIORITY #1



▣ Eliminating barriers in recruiting and hiring:

- ***EEOC v. Alliant Techsystems Inc.:***
 - Alliant Techsystems paid \$100,000 to settle an EEOC suit alleging that the company violated Title VII when it refused to hire an African-American woman for technical support because of her race.
 - Alliant Techsystems told the employee that she would be hired, but after a later interview where she put her braids in, she was not hired, and instead a White male was hired.
- ***EEOC v. Bankers Asset Mgmt. Inc.:***
 - Bankers Asset Mgmt. agreed to pay \$600,000 to settle an EEOC lawsuit alleging that the real estate company excluded Black applicants from jobs at the Little Rock location.
 - The firm allegedly retaliated against former and other employees for testifying about the discrimination.

PRIORITY #2



▣ **Protecting immigrant, migrant and other vulnerable workers:**

▪ **Accommodating Accents:**

- 76% increase in complaints based on national origin.
- Trend exemplified in case of truck driver Ismail Aliyev, who filed a discrimination suit against FedEx.

▪ **Transgender Employees:**

- Last year, the EEOC announced that discrimination against transgender employees constitutes sex discrimination under Title VII.
- Now, companies are extending benefits to transgender employees.
- According to a report from the Human Rights Campaign, 207 companies offered benefits to transgender employees in 2012, up from 85 one year earlier.

PRIORITY #3



▣ Addressing emerging and developing employment discrimination issues:

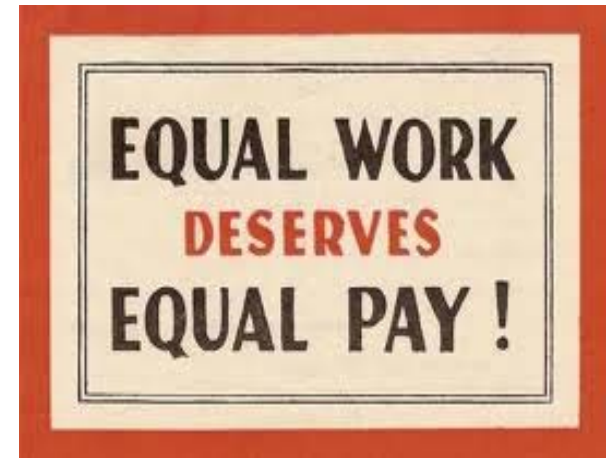
- More than a dozen mass shootings in 2012, with 2 in same week.
- EEOC warns that although domestic violence in the workplace creates security concerns, employers do not have the right to discriminate against victims of abuse or stalking.
- EEOC noted in a recent fact sheet that although neither Title VII, nor the ADA explicitly prohibits discrimination against those workers, companies who treat them differently may be open to complaints based upon sex or real or perceived impairments.
- **“Family Responsibilities Discrimination”** is an EEOC and Obama Administration initiative focused on inherent bias against women in the workplace

PRIORITY #4



- ▣ **Preventing harassment through systemic enforcement and targeted outreach:**
 - **Young Workers:**
 - Increased focus on young workers.
 - The agency has launched a Youth@Work Initiative, designed to educate student workers about their on-the-job rights and responsibilities.
 - The EEOC's policy efforts go hand-in-hand with litigation: In July 2012, the agency won \$1 Million settlement in its suit against the owner of 25 McDonald's restaurants who allegedly allowed male employees to sexually harass female workers, including teenagers.
 - **Companies Lacking Harassment/Discrimination policies:**
 - Several judgments against companies without sufficient methods for handling harassment/discrimination in the workplace.
 - *EEOC v. AA Foundries Inc.*: \$200,000 jury verdict and punitive damages.

PRIORITY #5

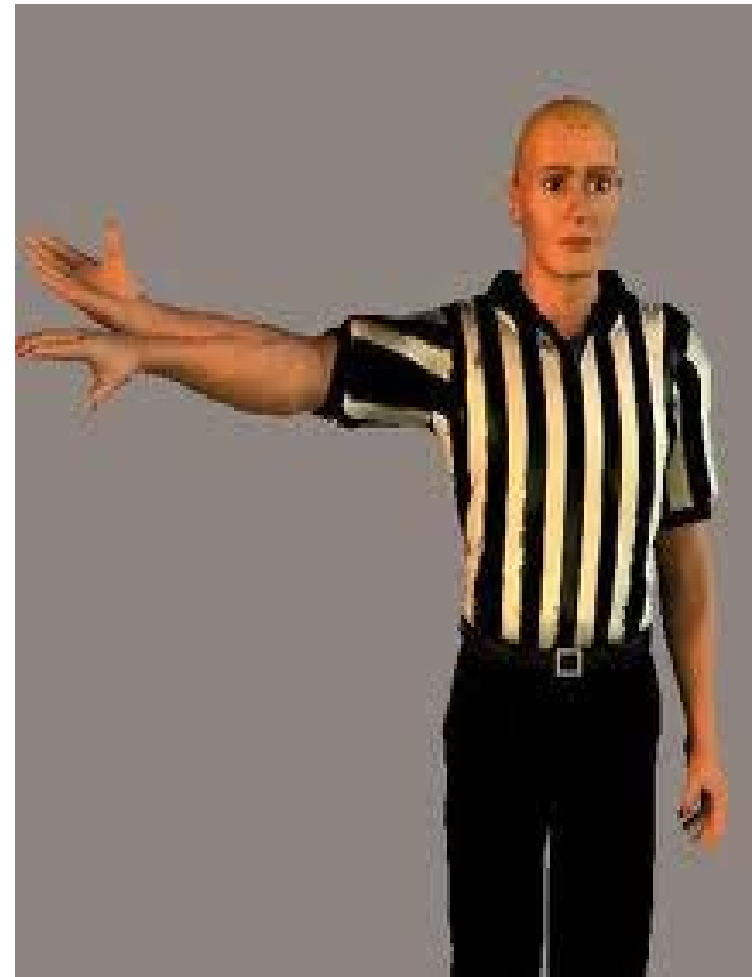


▣ The Equal Pay Act:

- Compare employees working in the same establishment.
- What if it is an integrated operation, managed on a regional basis and compensation set on a regional basis?
- Job duties only need to be “substantially equal.”
- Courts look at the content of the job and don’t necessarily rely on job descriptions and job titles.
- Wages encompass all forms of compensation, including profit sharing, bonuses, etc.
- EEOC can send a letter to an employer asking about the company’s compensation factors and may request data.
- No EEOC Charge needs to be filed.

2013 “BACKCOURT VIOLATIONS” ESTABLISHED BY THE NLRB

- ▣ Companies challenge labor rulings in wake of Washington, D.C. appeals court decision that found President Barack Obama’s board appointments unconstitutional.
- ▣ Companies include: Starbucks, Time Warner Inc. division of CNN America and medical tester Laboratory Corporation of America Holdings.
- ▣ Companies are trying to: overturn or block union elections, undo penalties they were ordered to pay to fired workers and halt enforcement of subpoenas.



OTHER “BACKCOURT VIOLATIONS” ESTABLISHED BY THE NLRB

▣ Social Media:

- On February 7, 2013, NLRB released an advice memo giving further guidance to employers regarding NLRB’s views on employee discipline related to posts on social media.
- Employees’ Facebook posts criticizing a coworker’s job performance considered concerted activity.
- NLRB invalidates Electronic Posting Rule in first published opinion concerning employers limiting how employees use social media.
- Facebook firing lawful where employer’s “courtesy” rule prohibiting disrespectful speech was not a ULP.



UNION “BACK COURT VIOLATIONS”

- ▣ **Union Challenged Boeing Code of Conduct.**
 - Union representing 14,000 employees at Boeing facilities in Washington and California filed charge alleging company’s code of conduct contains overbroad language that restricts employees’ Section 7 rights.
 - NLRB determined that code of conduct did not restrict Section 7 rights where employees would not reasonably construe the Code to restrict their Section 7 rights, given the context of the policy, which should not be read in isolation.
 - Code informs employees that they are expected to adhere to the “highest standards of ethical business conduct,” that they should not “engage in conduct or activity that may raise questions as to the company’s honesty, impartiality, reputation or otherwise cause embarrassment to the company,” and should avoid “any activity that may create a conflict of interest.”
 - Code specifically states that it “does not affect an individual’s ability to exercise his/her constitutional, statutory or other protected rights.”
- ▣ **Unionized employers must bargain about individual discipline in absence of a collectively-bargained grievance process.**
- ▣ **34-year-old precedent overturned: Employers obligation to provide witness statements at Union’s request.**



“BACK COURT VIOLATIONS” REGARDING NON-UNION EMPLOYEES

- ▣ **NLRB NOW REQUIRES EMPLOYERS WHO OWE BACK PAY TO
SUBMIT PAPER WORK TO THE SOCIAL SECURITY
ADMINISTRATION AND TO REIMBURSE DISCRIMINATEES FOR ANY
ADDITIONAL FEDERAL AND STATE INCOME TAX BURDEN**



DOL CLARIFIES **RULES OF THE GAME**

- ▣ **On January 14, 2013, DOL clarified FMLA definition of “Son or Daughter” 18 or Older Incapable of Self Care.**

- ▣ **On February 5, 2013, DOL issued its Final Rule implementing Amendments to the FMLA for military caregivers and airline flight crews.**
 - Rule also clarifies changes regarding calculation of intermittent or reduced schedule FMLA leave.



“Traveling” Down the Court of Other 2013 Employment Law Trends

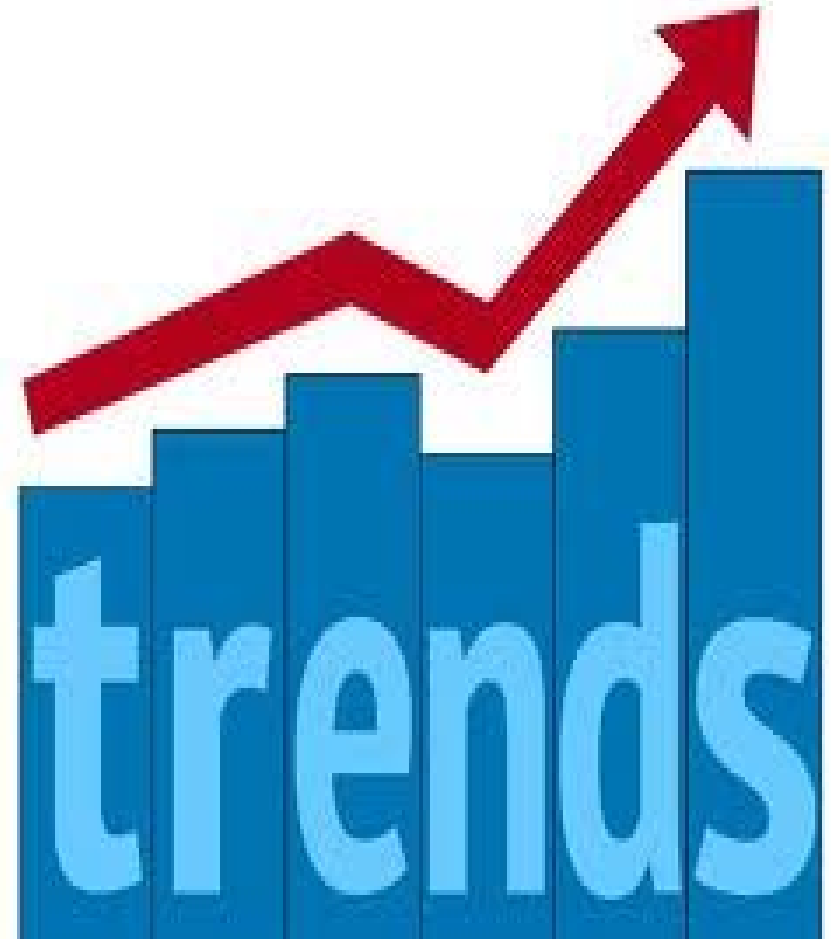


- ▣ **Employers must Adopt New FCRA Summary of Rights Form**
- ▣ **OFCCP Scraps Pay Bias Guidance in Favor of Expanded Investigations**

OTHER EMPLOYMENT LAW TRENDS OF 2013

▣ **ADA amendments have led to increase in lawsuits from workers who were fired after exhausting their FMLA leave and then asking for more time off pursuant to the ADA.**

▣ **Sixth Circuit Rules No FLSA Violation When Employee Failed to Log Work During Meal Breaks**



Questions

