PRESENTATION

Curbing FMLA Leave Abuse:

How to Manage Employees on Intermittent Leave Under the Family and Medical Leave Act – Strategies and Pitfalls

Robert M. Williams, Jr.
Baker Donelson
First Tennessee Building
165 Madison Ave.
Suite 2000
Memphis, Tennessee 38103
rwilliams@bakerdonelson.com

BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

What Is the FMLA?

A federal law that:

- allows eligible employees,
- of a covered employer,
- to take job-protected, unpaid leave,
- for up to a total of 12 work weeks in any 12 months.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least 12-months, have 1,250 hours of service in the previous 12-months, and if at least 50 employees are employed by the employer within 75 miles.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary.

Intermittent Leave/Reduced Leave Schedule

Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason.

Reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday.

There must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule.

Thus, to take intermittent leave, the employee need only provide a medical certification that there is a medical need for such leave.

When can Intermittent Leave or Reduced Leave Schedule be Taken?

For employee's own serious health condition.

For the serious health condition of a spouse, parent, son or daughter.

For a serious injury or illness of a covered service member.

A pregnant employee – for prenatal exams or for her own condition, such as periods of severe morning sickness.

When can Intermittent Leave or Reduced Leave Schedule be Taken? (continued)

For absences where the employee or family member is incapacitated or unable to perform the essential function of the position because of a chronic serious health condition or a serious injury or illness of a covered service member, even if he or she does not receive treatment by a healthcare provider.

When can Intermittent Leave or Reduced Leave Schedule be Taken? (continued)

For a qualifying exigency.

In certain cases where the employer agrees.

Planned Medical Treatment

If an employee needs leave intermittently or on a reduced leave schedule for **planned** medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

Can You Transfer an Employee to Another Position During Intermittent or Reduced Leave Schedule?

Yes, but only for planned medical treatment, and then it is subject to conditions:

- the transfer is temporary.
- the Employee must be qualified.
- the transfer may require compliance with any collective bargaining agreement, the ADA or state law.
- must have equivalent pay and benefits.
- cannot transfer to discourage employee from taking leaves or to work a hardship.
- at end of leave Employee must be reinstated in the same or equivalent position.

Employee Abuse of Intermittent Leave

Unfortunately, a lot of employees assume that because they were approved for intermittent leave, they can use it whenever they want, wherever they happen to be.

Managing employees on intermittent leave is one of the most difficult problems facing employers under the FMLA. Employers may know that an employee is abusing FMLA but they do not know how to manage the problem.

Types of Intermittent Leave Abuse

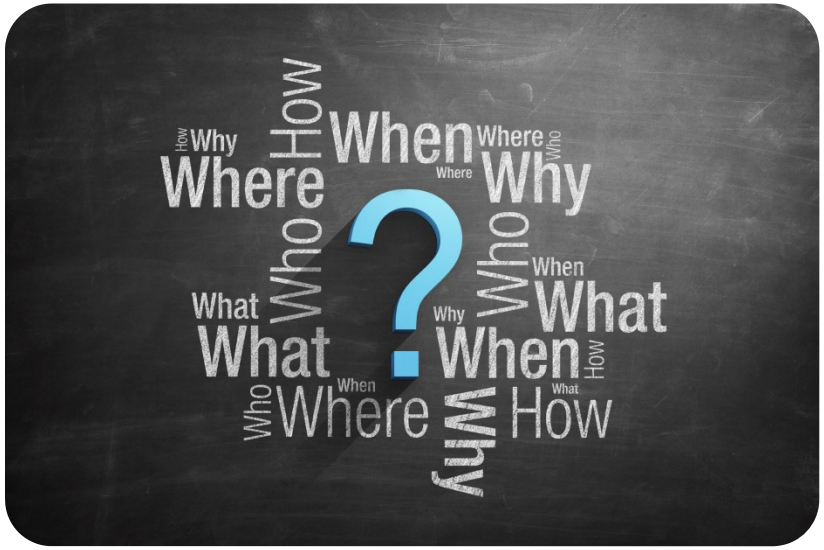
Curbing FMLA Leave Abuse

I. Question the Employee About the Leave Request

a. Example

b. An employee must provide at least verbal notice sufficient to make the employer aware the employee needs FMLA qualifying leave and the anticipated timing and duration of the leave.

c. So what do you do?



Curbing FMLA Leave Abuse (continued)

d. The employer should inquire further if it is necessary to have more information to obtain the necessary details of the leave to be taken.

e. Immediately call the employee back.

f. Ask the employee questions:

- What the medical/condition is?
- Does it relate to previous certificate?
- Is a doctor involved?
- Duration of leave anticipated?
- Why can't perform job?
- When do you expect to return to work?
- Why failed to give proper notice or follow company call-in procedure?

Curbing FMLA Leave Abuse (continued)

II. Require a Leave Request Form for All Absences:

Vacation	FMLA Leave
Sick Leave	Personnel Leave

a. Under FMLA all the employee has to do is make a verbal request.

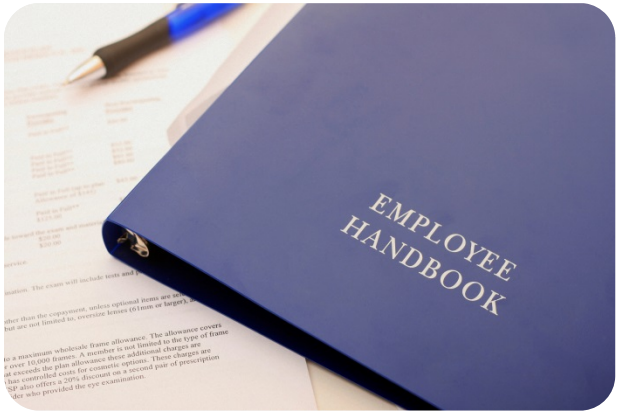
b. Requiring the employee complete a leave form upon request for leave (or thereafter formalizing the process) acts as a deterrent for those who seek to abuse the privilege.

Curbing FMLA Leave Abuse (continued)

c. This requirement should be in your employee handbook.

d. An employer may require that the written notice set forth the reasons for the requested leave, the anticipated start of the leave and the anticipated duration of the leave.

e. Where an employee does not comply with the employer's usual notice and procedural requirements and no unusual circumstances justify the failure to comply, FMLA protected leave may be delayed or denied.



Curbing FMLA Leave Abuse (continued)

III. Establish and Enforce Company Call-In Procedures

a. One of the most important things you can do to curb leave abuse.

b. Helps reduce last minute abuses.

c. Require for all types of absences not just FMLA.

d. Can enforce policy even when leave is unforeseeable.

e. The FMLA regulations provide that an employer may require that an Employee provide written notice of the need for leave and call in all absences.

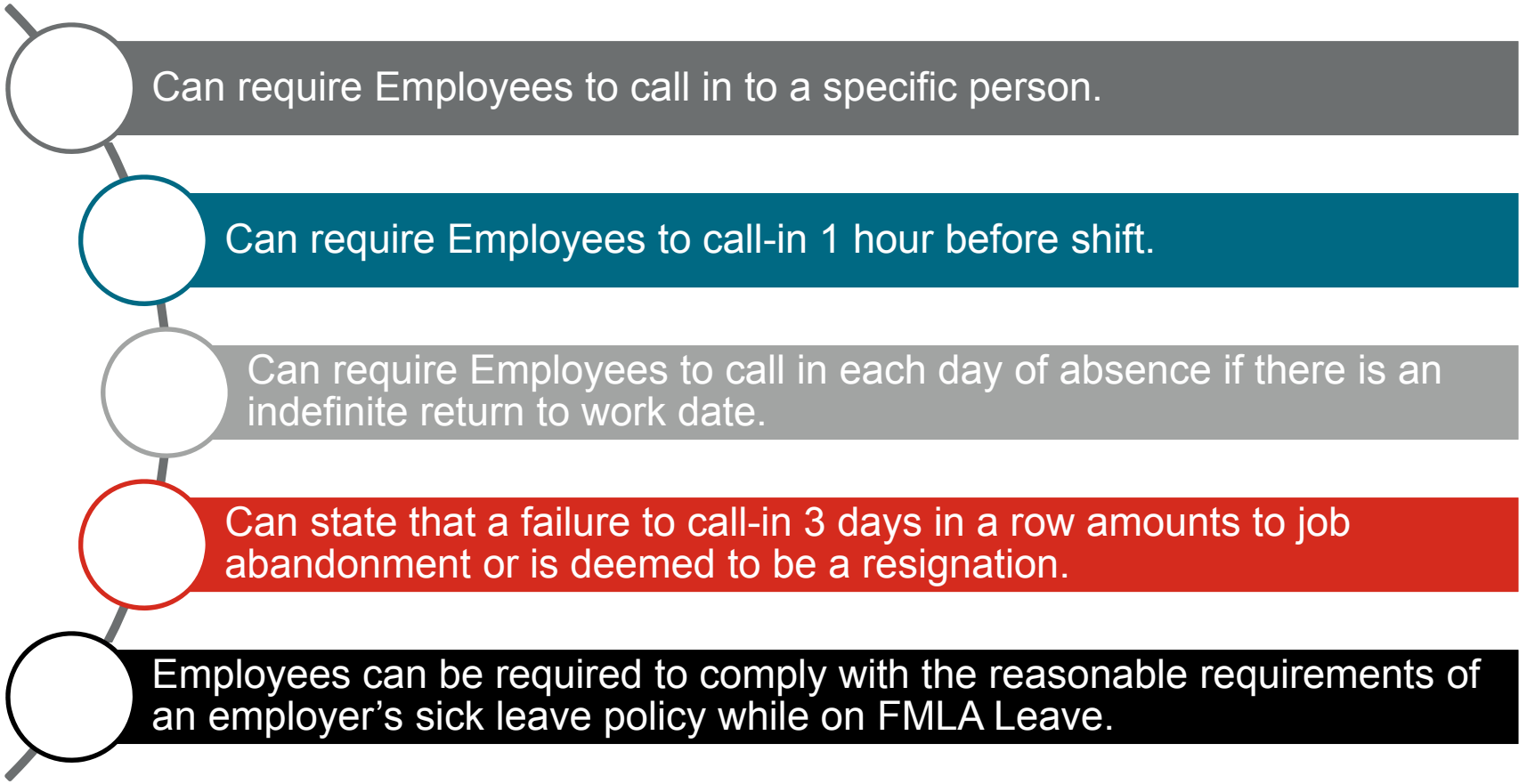
Curbing FMLA Leave Abuse (continued)

f. Where the Employee does not comply with company requirements, and no unusual circumstances justify the failure to comply, FMLA protected leave may be delayed or denied.

g. Example

h. Should be applied consistently for all types of absences

What Employers Can Do?



Policies Employers Can Modify

Absenteeism Policy

Sick Leave Policy

Job Abandonment Policy

Attendance Policy

Must apply consistently for all forms of absences.

Curbing FMLA Leave Abuse (continued)

IV. Require a Medical Certification when Initial FMLA Leave is made

- Valid for 12 month leave period for condition described in the certification unless recertification is warranted.

- Employers must request the medical certification.

- The certification requirements
  - Date serious health condition began
  - Probable duration of condition
  - A statement that the employee is unable to perform the elements of the position because of the serious health condition

Curbing FMLA Leave Abuse (continued)

- If for a family members - a statement that the serious health condition warrants the participation of the employee to provide care during treatment or supervision, and an estimated amount of time the health care practitioner believes the employee will need to provide the care.
- For intermittent leave – in addition:
- The HCP certifies its necessity and circumstances of the leave;
- Should focus on and make clear the medical necessity for leave and how long intermittent leave will be required;
- If absent for treatment, the certification should provide the date that the treatment will begin and the expected duration.

Curbing FMLA Leave Abuse (continued)

- Curing an incomplete or insufficient certification:
  - Element missing, ambiguous or left out.
  - Must put in writing to Employee why the certification was incomplete or insufficient.
  - Employee then must provide this information within 7 days.
  - If Employee does not, leave may be delayed or denied.
  - Must advise Employee at the time Employer requests certification of the consequences of Employee's failure to provide adequate certification.
  - If Employee fails to provide a complete and sufficient certification despite the opportunity to cure or fails to provide the certification, the Employer may deny the taking of FMLA leave.

Authenticate and Clarify the Medical Certification

V. Authentication and Clarification:

- Authentication – to verify the HCP actually prepared the certification.
  - Employer may contact to verify that HCP signed the document.

- Clarification – to clarify the meaning of a response or the handwriting (supervisor cannot contact).

Curbing FMLA Leave Abuse (continued)

- If you have a complete and sufficient certification signed by the HCP, you cannot obtain additional information.

- Employer may contact HCP after it has given Employee an opportunity to cure as stated above.

- Clarification
  - HIPAA applies – therefore need a release from the Employee before you can talk to the HCP
  - If an Employee chooses not to provide the Employer with an authorization allowing Employer to clarify the certification with the HCP, and the Employee does not otherwise clarify the certification with the HCP, the Employer may deny the taking of FMLA.

VI. Request Recertification and Second and Third Opinion

- Request recertification at every opportunity.
- Recertification – the general rule is that an Employer may require a recertification no more than every 30 days, and only in connection with an employee's absence.
- If the certification indicates that the maximum duration of the serious health condition is more than 30 days, the Employer must generally wait until the minimum duration expires before recertification.
- In all cases, an Employer may request recertification of a medical condition every 6 months in connection with an Employee's absence.

- However, an Employer may request recertification in less than 30 days if:
  - the Employee requests an extension of leave;
  - the circumstances described by the previous certification have changed significantly; or
  - the employer receives information which causes it to doubt the Employee's stated reason for the absence or the continuing validity of the certification.

- Lastly, consider obtaining a second or third opinion on the need for intermittent leave.

Curbing FMLA Leave Abuse (continued)

The requirement of advising the Employee of the consequences applies to not only the certification but also to recertification, when Employer requests second or third opinions, for fitness for duty certifications, and for clarifying a certification.

VII. In Particularly Bad Cases Consider Surveillance or Investigation

- Can be a legitimate means of curbing FMLA abuse.
- Sometimes surveillance is only way to determine if Employee is abusing leave.
- Must be conducted in a lawful manner.
- Use of private investigator.

- Before using would want to base on suspicious behavior, such as:
  - Friday – Monday
  - Facebook posting
  - Frequent Absences Inconsistent with Medical Certification
  - Tips from co-workers

- Confront Employee

- Fair Credit Reporting Act?

- Always consult employment attorney before conducting surveillance or using a private investigator.

VIII. Create a no work policy for Employees on Leave

- If an employer has a uniformly applied policy prohibiting outside and supplemental employment, this policy may continue to apply to an Employee on FMLA leave.

- If do not have a policy, an Employer may not deny benefits on this basis.

- A no work policy could apply to:
  - Second job while on intermittent leave
  - Working a side business
  - Performing manual labor
  - Helping a friend or relative in their business

- Consider Implementing a stay-at-home policy as a part of your sick leave policy
  - Employees on sick leave are required to remain at home except for personal needs related to the reason for being on sick leave

- Some courts have enforced this policy.

Conclusion

Managing intermittent leave is one of the hardest things HR Managers do.

The law and regulations favor employees and make it easy for some employees to take advantage of the system.

While abuse cannot be completely eliminated, I have discussed some ways abuse can be discouraged or curbed.

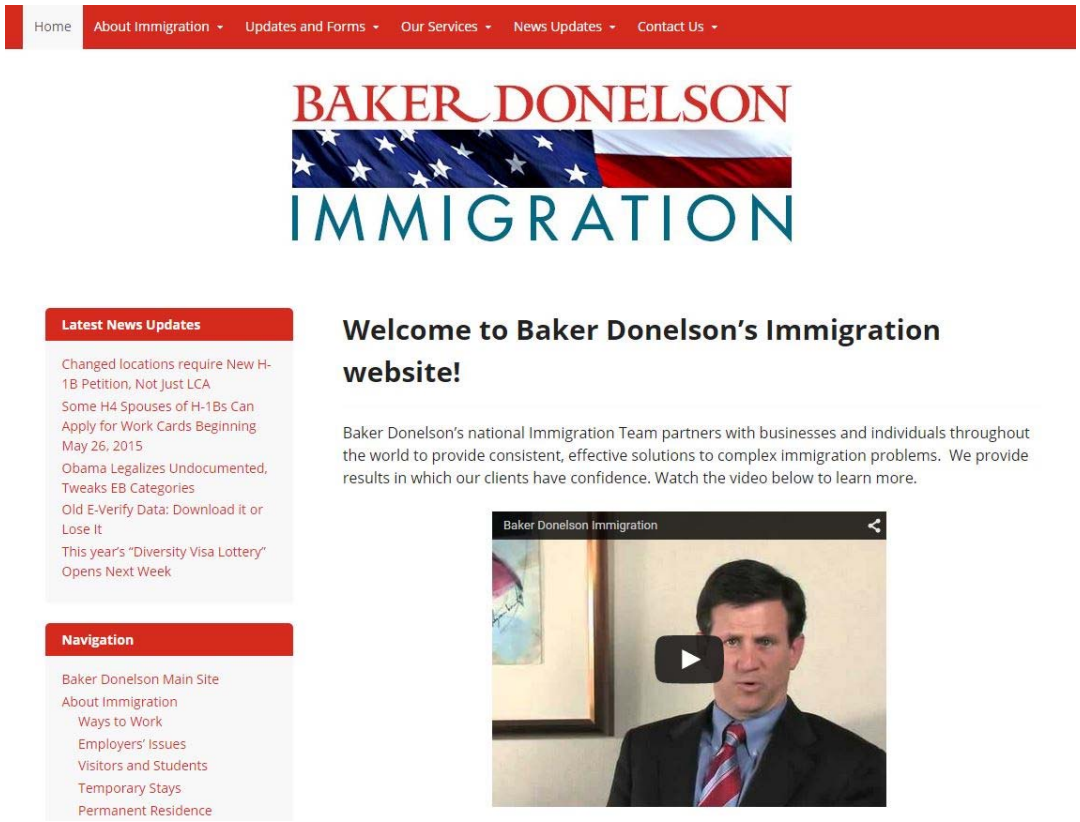
Quick and Easy Guides to Labor & Employment Law App

App-tastic!

Our Easy Guides are now available as an app in the iTunes Store! Now you can have the same great information at your fingertips.

This app contains Quick and Easy Guides to the primary labor and employment laws of the identified states. We've also provided a summary of primary federal laws.

Baker Donelson Immigration



Check out our new immigration website!

Get the latest in immigration news and updates, learn the ins and outs of immigration law, and see how our approach can work for your company.

immigration.bakerdonelson.com/

PRESENTATION

Wage & Hour Update

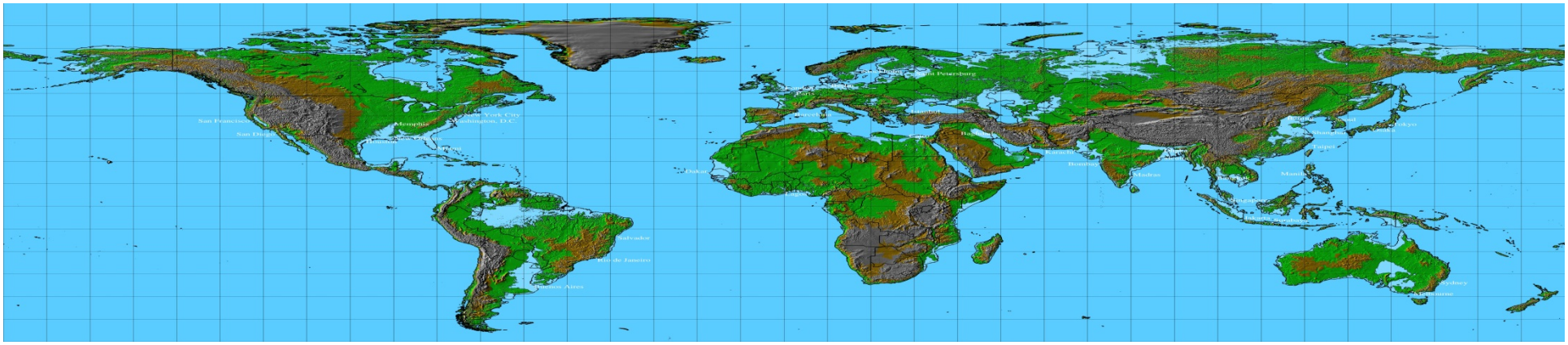
Changes are Upon Us: What you Need to Know to Stay Compliant

Presented By: Whitney Harmon
wharmon@bakerdonelson.com

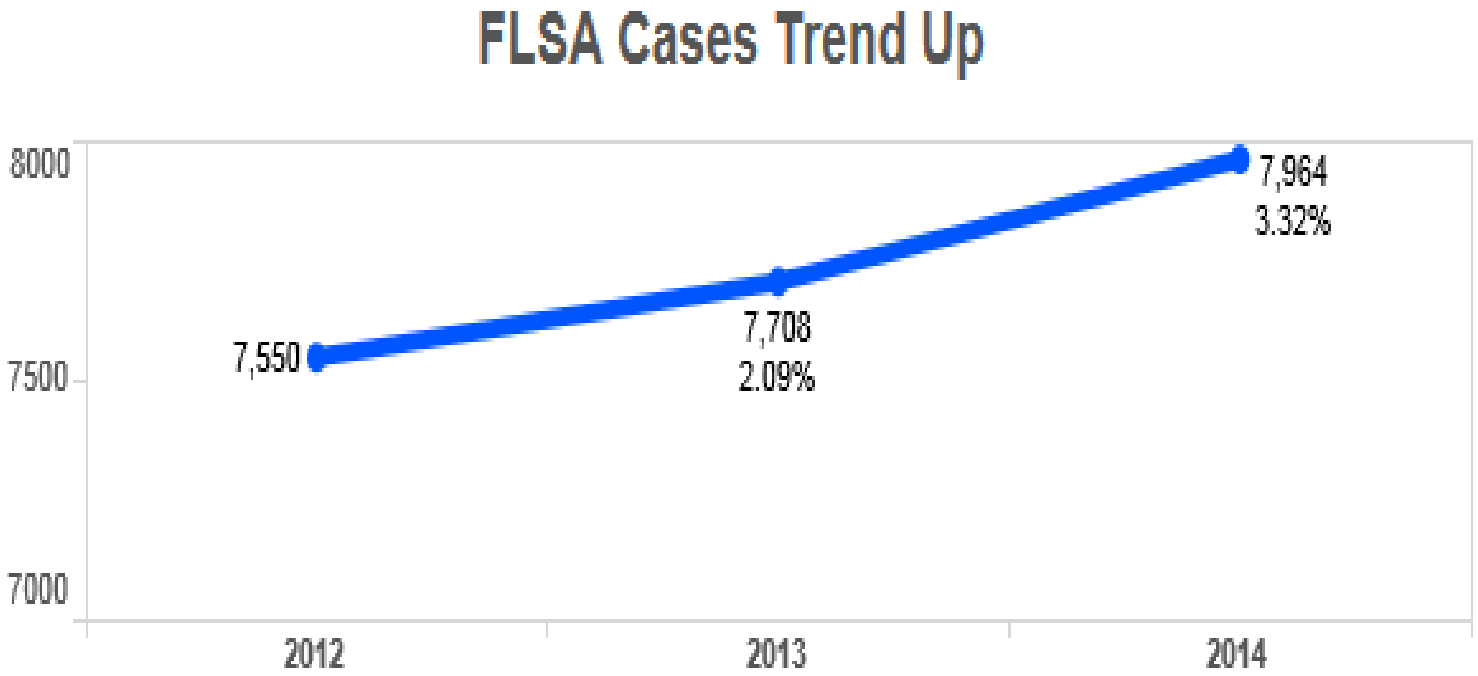
BAKER DONELSON

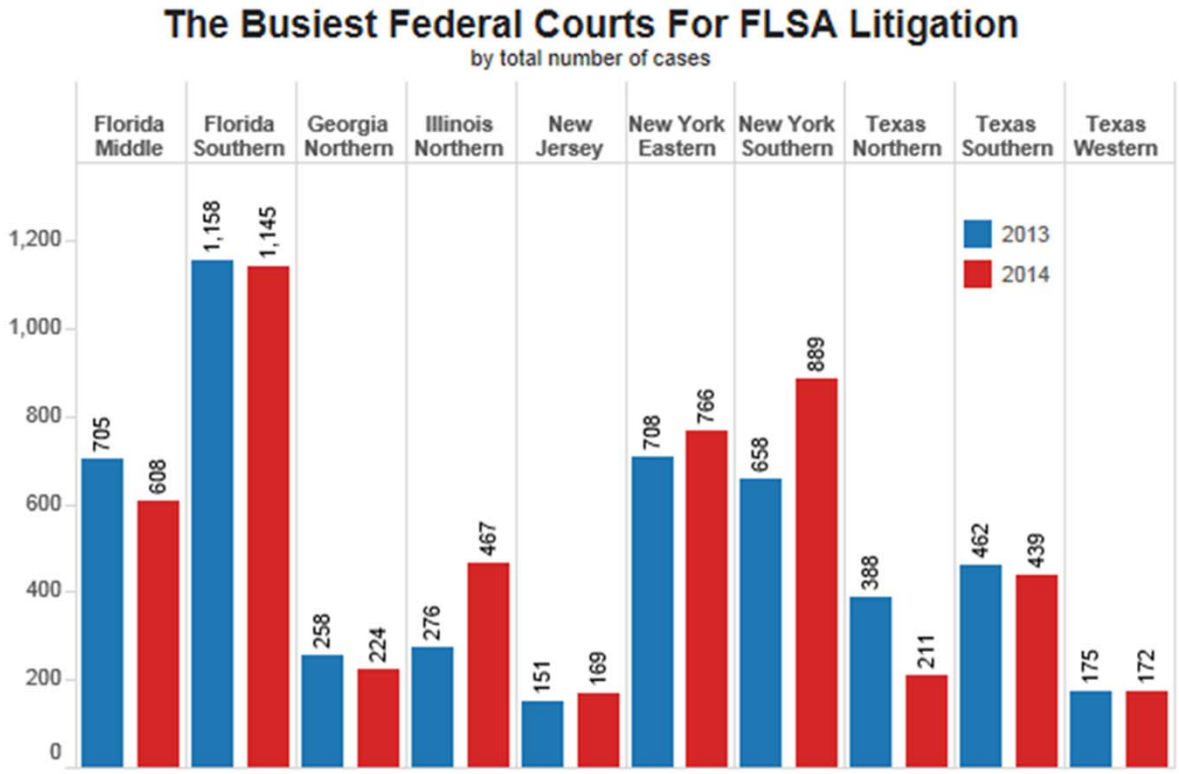
EXPAND YOUR EXPECTATIONS℠

- Where are we?
- Where are we going?
- How do we avoid the wage and hour spotlight?



Wage and Hour Claims are UP!!!





There is some good news…

- The growth is slowing.
- Employers are better educated on the requirements and the pitfalls.
- Employers have put better processes in place to correct problems.
- Still, however, a significant amount of claims.

Why so prevalent?

"I love wage-hour cases. For the most part it is just math, not difficult he-said, she-said. Usually I write a letter and get a check. One employer decided to fight me on a single-plaintiff case, and I had to go to court – the employee got her $15,000, and I got over $200,000 in attorneys' fees."

What are the top claims?

- Overtime Violations
- Minimum Wage Violations
- Working Off-The-Clock – the “Pervasive Workplace”
- Misclassification
- Calculating Overtime Rate of Pay

Top Wage and Hour Claim – Overtime Violations

- What leads to overtime violations?
  - Automatic Rounding
  - Automatic Deductions for Meal and Rest Breaks
  - Improper exempt classification
  - Failure to pay unapproved overtime

Second Highest Claim – Minimum Wage Violations

- Federal Min Wage
- State Minimum Wage
- New OFCCP Minimum Wage!

State	New Rate (per hour)	Effective Date
NY	$8.00	Dec. 31, 2013
AZ	$7.90	Jan. 1, 2014
CO	$8.00	Jan. 1, 2014
CT	$8.75	Jan. 1, 2014
FL	$7.93	Jan. 1, 2014
MO	$7.50	Jan. 1, 2014
MT	$7.90	Jan. 1, 2014
NJ	$8.25	Jan. 1, 2014
OH	$7.95	Jan. 1, 2014
OR	$9.10	Jan. 1, 2014
RI	$8.00	Jan. 1, 2014
VT	$8.73	Jan. 1, 2014
WA	$9.32	Jan. 1, 2014
CA	$9.00	July 1, 2014

Third - Working Off-The-Clock – the "Pervasive Workplace"

This applies to your non-exempt employees.

- The Pervasive Workplace is the ability to work anywhere, anytime. Made possible by smart phones, PDAs, and other technology.

- Are employees "working" during breaks/meals?
  - Sitting at worksite
  - Answering calls
  - Responding to emails

- Are employees "working" when they are outside the workplace?
  - Emails, calls, etc.

- How are employees tracking their time?

Fourth Violation
Wage and Hour Traps – Who is an "employee"???

- Misclassifications – Major DOL Initiative!
  - Why? Misclassification of workers as "independent contractors" costs the government billions in taxes.
- MOUs regarding sharing information with IRS and state governments.
  - The IRS promised 6,000 random audits over a 3 year period.
- Who is an employee, who is an independent contractor?
  - Different tests for different agencies.
- A good start - "Economic Realities" – Is the worker dependent upon alleged employer for his or her livelihood?

Exempt vs. Non-Exempt Employees

- Misclassification problems include exempt and non-exempt classifications.
- Every employee must be paid minimum wage and overtime unless clearly exempt!
- “White Collar” exemptions include – executive, administrative, professional, computer professional, outside sales, and highly compensated.
- Employer has the burden to prove exempt status.
- Detailed criteria from the federal regulations must be met. You CANNOT rely on titles, agreements with the employee, or basis of pay alone!

Exempt vs. Non-Exempt Employees

- There are many other FLSA exemptions, but they are strictly interpreted.
- The general rule for exempt employees: employee must receive a predetermined amount of pay for every work week in which he/she performs any work.
- Exempt employees are paid for the quality not quantity of their work.
- Allowable deductions are limited.
  - whole day missed for personal reasons
  - whole days missed due to sickness or injury, if there is a sick-pay plan
  - first and last weeks of employment
  - a few other…but be careful about deductions for exempt employees. You can easily lose exemption!

Common Misconceptions about FLSA Exemptions

- If an employee receives a salary he/she is exempt.
- If an employee has a title of manager, supervisor, or administrator he/she is exempt.
- if an employee is highly compensated he/she is exempt.
- If an employee is college-educated and performs white-collar office work, he/she is exempt.
- If an employee has an advanced degree he/she is exempt.
- If an employee asks to be paid on a salary and does not want to record time it is okay to pay him/her as exempt.

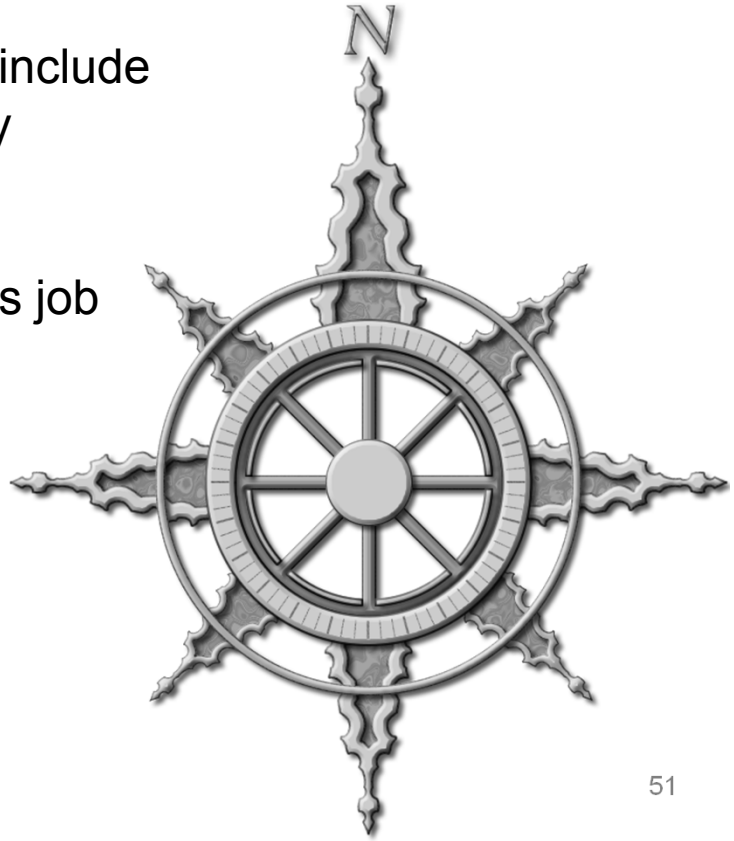
- My favorite: Everyone else in my industry classifies this position as exempt, so it is okay!

Finally, Determining Employee's Regular Rate of Pay

- Regular rate of pay must be based on "all remuneration for employment, paid to, or on behalf of" the employee.
- Amounts other than hourly pay, salary, day rate, etc.
- Payments which must be included: commissions, non-discretionary bonuses, on-call pay, etc.
- Amounts which may be excluded include: paid leave, reimbursement for mileage, discretionary bonuses or gifts.

So where are we going?

- On March 13, 2014, President Obama directed the Secretary of the U.S. Department of Labor to prepare and propose new Fair Labor Standards Act ("FLSA") regulations.
- Any revised regulations would almost certainly include an increase to the $455 minimum weekly salary threshold for exempt workers.
- New regulations would likely change the various job duties tests.



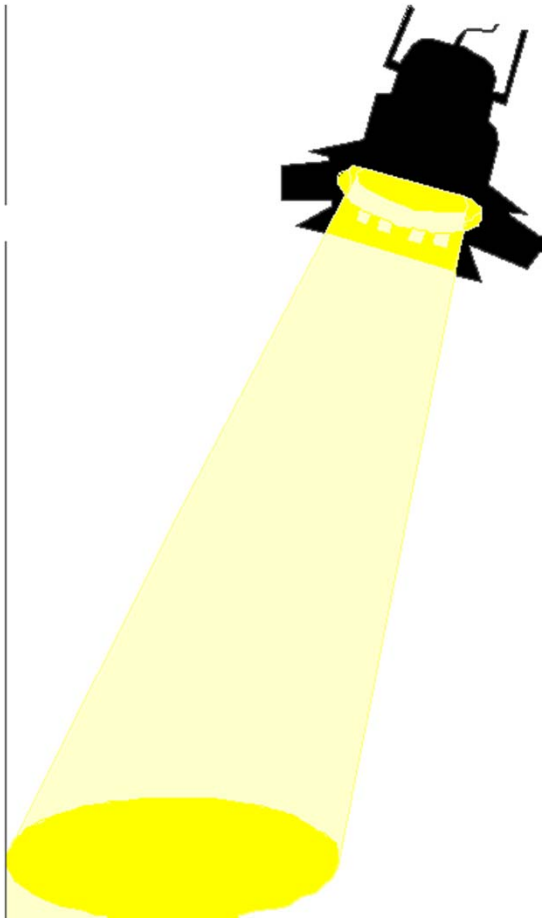
The word according to the Solicitor of Labor…

The top mistakes employers make according to the Department of Labor's Solicitor:

- Cooperating With A Department of Labor (DOL) Investigation.
- Retaliating Against Employees Who Cooperate With DOL.
- Treating Employees As Independent Contractors.
- Ignoring or Not Appreciating Overtime Laws and Standards.
- Ignoring or Not Understanding the Criteria for Unpaid Interns.
- Incorrectly Applying Tip Credit.
- Ignoring Compliance Information on the DOL Website.

Best Practices – Avoiding the Spotlight!

- Conduct a self-audit
- Check your classifications
- Check your job descriptions
- Check your policies
- Check your independent contractor agreements
- Train your managers and supervisors
- Pay attention to changes that are coming



Questions – Comments - Discussion

PRESENTATION

Technology in the Workplace & What You Need to Know

Zachary B. Busey

Connect on LinkedIn & Follow on Twitter, @ZBusey

BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

Cybersecurity & Data Protection

- In the last month: University of Chicago (employee & student data); Bistro Burger (credit cards); Advantage Dental (150K patients impacted); St. Mary's Heath (4,000+ patients impacted); Anthem (est. > 80 Million customers impacted).

- Since December 15, 2014, six putative class actions have been filed against Sony Pictures Entertainment, Inc. by current and former employees affected by the massive hacking attack which resulted in the publication of more than 47,000 employee names, addresses, SS #s, DOBs, passports, salaries, personnel records, criminal background checks, etc.

- The complaints claim that Sony has been the target of successful cybersecurity breaches in the past, but failed to take the necessary steps to protect its employees' confidential information.

Federal Legislation

- Consumer Privacy Bill of Rights Act of 2015
  - Covered entity must conduct a privacy risk analysis if it processes personal data in a manner that is not reasonable in light of context
  - Covered entity must conduct a disparate impact analysis if it analyzes personal data in a manner that is not reasonable in light of context and such analysis results in adverse actions concerning multiple individuals
  - Identify reasonably foreseeable risks
  - Implement and maintain safeguards reasonably designed to ensure the security of personal data
  - Regular assessment, evaluation and adjustment of security safeguards

Federal Legislation

- Consumer Privacy Bill of Rights Act of 2015 (cont.)
  - Implement and maintain procedures to provide access to personal data, ensure accuracy of personal data, and correct or delete personal data
  - Enforcement by the Federal Trade Commission, State Attorneys General
  - Civil penalties up to $35,000 per day or $5,000 per affected consumer, with a maximum penalty of $25 million
    - No private right of action
  - Safe harbor – Enforceable Codes of Conduct
    - Must provide equivalent or greater protections for personal data
    - Must provide for periodic review of code of conduct

Federal Legislation

- Executive Order Promoting Private Sector Cybersecurity Information Sharing
  - Encourage the development of Information Sharing Organizations
  - Develop a common set of voluntary standards for information sharing organizations
    - will include privacy and civil liberty protections
  - Streamline private sector companies' ability to access classified cybersecurity threat information
  - Provide legal safe harbor for companies that share cyber threat information with the government or each other through a special Department of Homeland Security portal

Federal Legislation

- Executive Order Authorizing Sanctions Against Persons Engaged In Significant Malicious, Cyber-related Activities
  - Significant threats to the national security, foreign policy or economic health or financial stability of the United States
    - Critical infrastructure sectors, computers or computer networks, economic espionage
  - Includes persons who aid and abet such activities
  - Identified individuals or entities will be added to list of Specially Designated Nationals and Blocked Persons (SDN List)
    - U.S. assets are frozen
    - Prohibited from doing business with U.S. persons/entities
    - Cannot engage in dollar-denominated transactions (effectively cut off from the U.S. banking system)

Federal Legislation

- Data Security and Breach Notification Act of 2015
  - Companies must implement and maintain reasonable security measures and practices to protect and secure personal information
  - Broader definition of “personal information” than most state data breach laws
  - Only required to provide notice if there is a reasonable risk of identity theft, economic loss, economic harm, or financial harm
  - Must provide notice to affected individuals within 30 days after discovery of a breach
  - Preempt all state data breach notification laws
  - Enforcement by the FTC or state attorneys general (no private right of action)

State Legislation

- Tennessee (Tenn. Code Ann. § 47-18-2107)
  - Application - Any person or business that conducts business in TN, or any agency of TN or any of its political subdivisions (collectively "Entity"), that owns or licenses computerized data that includes personal information ("PI")
  - Security Breach Definition - Unauthorized acquisition of unencrypted computerized data that materially compromises the security, confidentiality, or integrity of PI maintained by the Entity
  - Notification Obligation – Must disclose to any resident of TN whose unencrypted PI was, or is reasonably believed to have been, acquired by an unauthorized person

State Legislation

- Tennessee (Tenn. Code Ann. § 47-18-2107) (cont.)
  - Notification to Consumer Reporting Agencies - If required to notify more than 1,000 persons at one time, must also notify all consumer reporting agencies and credit bureaus that compile and maintain files on consumers on a nationwide basis of the timing, distribution and content of the notices
  - Third-Party Data Notification - Any Entity that maintains computerized data that includes PI that the Entity does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the PI was, or is reasonably believed to have been, acquired by an unauthorized person

State Legislation

- Tennessee (Tenn. Code Ann. § 47-18-2107) (cont.)
  - Timing of Notification – Must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system
  - Personal Information Definition - An individual's first name or first initial and last name, in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted:
    - Social Security Number;
    - Driver license number; or

State Legislation

- Tennessee (Tenn. Code Ann. § 47-18-2107) (cont.)
  - Account number or credit card number or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account
  - PI does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records
  - Substitute Notice Available – If the cost of providing notice exceeds $250,000, or if the number of persons to be notified exceeds 500,000, or the Entity does not have sufficient contact information,
    - Substitute notice must consist of all of the following:

State Legislation

- Tennessee (Tenn. Code Ann. § 47-18-2107) (cont.)
  - Email notice when the Entity has an email address for the subject persons;
  - Conspicuous posting of the notice on the Entity's Web site if the Entity maintains one; and
  - Notification to major statewide media
  - <u>Exceptions</u>
    - An Entity may follow the procedures in its own notification policy if it is consistent with the timing requirements of the statute
    - The provisions of this statute do not apply to any Entity that is subject to the provisions of Title V of the Gramm-Leach-Bliley Act

State Legislation

- Mississippi (Miss. Code Ann. § 75-24-29)
  - Application - Applies to any person who conducts business in Mississippi and who, in the ordinary course of the person's business functions, owns, licenses or maintains personal information ("PI") of any resident of Mississippi.
  - PI – Name and any combination of (i) social security number; (ii) driver's license number; and (iii) or account/financial information.
  - Security Breach Definition - Unauthorized acquisition of PI that has not been secured, encrypted, and is not otherwise unreadable or unusable.
  - Notification Exception - Not required if reasonably determine that the breach will not likely result in harm to the affected individuals.
  - Civil Actions? - No, there is no available civil action.

Recent Cases on Breach/Notifications

- Amedisys, Inc.
  - Loss of 142 laptop computers containing medical information on approximately 6,900 patients
  - Notified federal and state agencies, as well as affected individuals
  - No evidence of hacking, fraud or identity theft
  - Notifications sent “out of an abundance of caution”
  - Missing laptops were used by employees who left the company between 2011 and 2014
  - Missing laptops equipped with 256-bit disk encryption, administrator restrictions and additional security measures designed to protect the patient data
  - Not a data breach, but can’t be certain of low risk of breach

Top 10 for Employers

1. Wearable Tech
2. Data Access Points
3. BYOD
4. Telecommuting
5. CFAA Section 1030
6. Passwords
7. Discipline Policies
8. Data Retention
9. Updated Training
10. Data Mining/Analytics

What is Social Media?

A type of online media where information is uploaded primarily through user submission. **Web surfers are no longer simply consumers of content, but active content publishers.** Many different forms of social media exist including more established formats like Forum and Blogs, and newer formats like Wikis, podcasts, Social Networking, image and video sharing, and virtual reality.

Everyone's Doing it . . .

- Social media accounts for **16 minutes** out of every **1 hour** spent online.
- Instagram acquired a user base of **4.25 Million** in only **7 months** – **42 Million** photos posted every **day**.
- Businesses are paying **Twitter $120,000** to **sponsor** or **trend** an **account** or **topic**.
- **Facebook** has over **1.1 Billion** users and **Google** handles over **100 Billion queries** per **month (37K / sec.)**
- Every **two** days there is **more information** created than between the **dawn** of **civilization** and **2003**.

. . . And Employees Too

- Network Box reported that **7 out of 100 URLs** accessed by businesses were directed to **Facebook** and **10%** of Internet **bandwidth** went to **YouTube**.

- One study determined that **Facebook costs employers $28 Billion** per year in productivity-loss . . . **"Cyberloafing"** is now a thing and a concern.

- A research by Convergys Corp. has shown that **one negative** customer **review** on YouTube, Twitter, or Facebook can **cost** a company about **30 customers**.

The Food Critic Employee

Facts: Sales employee terminated after posting: "Sales event food: wieners and stale chips! Sucked! Miniature apples & caramel were good."

Result: Could be protected "concerted activity" because "food" relates to Employee's earnings. *Knauz BMW*, NLRB Case No. 13-CA-46452.

The All-Seeing Supervisor

Facts: Supervisor installs GPS tracking devices on company vehicles. Terminates Employee based on results.

Result: GPS tracking presents little problems for now. *Jones* & Location Privacy Protection Act.

The "Wonderful" Employee

Facts: B.D. Employee anonymously posts on a product review site: "B.D.'s Power Points are the most reliable. I only buy B.D.!!"

Result: Failure to disclose "material connection" could violate new FTC Guidelines on Advertising, B.D. could be liable.

The Pregnancy Proclamation

Facts: Supervisor "likes" Employee's Facebook Post: "I love my boss, my job, & I'm pregnant!" Next day Supervisor terminates Employee.

Result: Supervisor will soon be defending a Pregnancy Discrimination Act claim.

The Ingenious Interviewer

Facts: Male Manager creates female Facebook account to view male applicant's profile.

Result: *Could* lead to a criminal violation of Section 1030 of the CFAA. Male Manager "exceeded" Facebook's terms of use: the little "I agree" box.

The Mischievous Manager

Facts: Manager "strong-arms" Employee for username & password to Employee-run "gripe site" with "let the sh*t talking begin" motto. The talking began, & the Employees were terminated.

Result: Federal jury verdict for Employees, violation of the Stored Comms. Act. *Pietrylo v. Hillston Rest. Group.*, Case No. 06-5754 (D.N.J. 2009).

The Timely Tweeter

Facts: Following interview, Employee Tweets: "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work!"

Result: Cisco Manager Tweeted Back: "Who is the hiring manager? I'm sure they would love to know that you will hate the work. **We here at Cisco are versed in the web.**"

PRESENTATION

NLRB Update for All Employers: Just When You Thought Things Couldn't Get Worse

Ed Young
Baker Donelson
First Tennessee Building
165 Madison Ave.
Suite 2000
Memphis, Tennessee 38103
eyoung@bakerdonelson.com

BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

National Labor Relations Act

Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining…and shall also have the right to refrain from any or all of such activities…"

EMPLOYEE HANDBOOKS

- On March 18, 2015, the NLRB's General Counsel issued a "Report of the General Counsel Concerning Employer Rules"
- "During my term as General Counsel, I have endeavored to keep the labor management bar fully aware of the activities of my Office. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues. This report presents recent case developments arising in the context of employee handbook rules. Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well intentioned rules that would inhibit employees from engaging in activities protected by the Act. Moreover, the Office of the General Counsel continues to receive meritorious charges alleging unlawful handbook rules. I am publishing this report to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful."

- Under the Board's decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity.
- The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example.
- Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.

Employer Handbook Rules Regarding Confidentiality

- Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment— such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act.
- Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel“ information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications.
- In contrast, broad prohibitions on disclosing "confidential" information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information.

Unlawful Confidentiality Rules

- **Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses.“**
- **"You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy).“**
- **Prohibiting employees from "[d]isclosing ... details about the**
- **[Employer]."**
- **"Sharing of [overheard conversations at the work site] with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited."**
- **"Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.. .. Do not discuss work matters in public places."**
- **"[I]f something is not public information, you must not share it."**

Lawful Confidentiality Rules

- **No unauthorized disclosure of "business 'secrets' or other confidential information."**
- **"Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."**
- **"Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.“**
- The above were facially lawful because: 1) they do not reference information regarding employees or employee terms and conditions of employment, 2) although they use the general term "confidential," they do not define it in an overbroad manner, and 3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications

Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

- Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful,“ "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful.
- Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited.

Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

- On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties.
- In addition, rules prohibiting conduct that amounts to insubordination would also not be construed as limiting protected activities.

Unlawful Rules Regulating Employee Conduct towards the Employer

- **“Be respectful to the company, other employees, customers, partners, and competitors."**
- **Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."**
- **"Be respectful of others and the Company."**
- **No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.**
- **"Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."**
- **"Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.**

Contrast…

- **"Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.**

Unlawful Rules Regulating Employee Conduct towards the Employer

- **"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."**
- **"[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."**
- **Do not make "[s]tatements "that damage the company or the company's reputation or that disrupt or damage the company's business relationships."**
- **"Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself."**

Lawful Rules Regulating Employee Conduct towards the Employer

- When an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe that such a rule prohibits Section 7-protected criticism of the company.
- **No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.**
- **"Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.“**
- **"Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.“**
- **"Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."**

Unlawful Employee-Employee Conduct Rules

- **"[D]on't pick fights" online.**
- **Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments.“**
- **"[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.“**
- **Do not send "unwanted, offensive, or inappropriate" e-mails.**
- **"Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail...."**

Lawful Employee-Employee Conduct Rules

- When an employer's professionalism rule simply requires employees to be respectful to customers or competitors, or directs employees not to engage in unprofessional conduct, and does not mention the company or its management, employees would not reasonably believe that such a rule prohibits Section 7-protected criticism of the company.
- **"Making inappropriate gestures, including visual staring."**
- **Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message."**
- **"[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."**
- **No "harassment of employees, patients or facility visitors."**

Unlawful Rules Regulating Third Party Communications

- **Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.**
- **"[A]ssociates are not authorized to answer questions from the news media. .. . When approached for information, you should refer the person to [the Employer's] Media Relations Department.“**
- **"[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions.“**
- **"If you are contacted by any government agency you should contact the Law Department immediately for assistance."**

Lawful Rules Regulating Employee Communications with Outside Parties

- **"The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons."**

Unlawful Rules Banning Employee Use of Logos, Copyrights, or Trademarks

- **Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.**
- **Do not use "other people's property," such as trademarks, without permission in social media.**
- **"Use of [the Employer's] name, address or other information in your personal profile [is banned].. . . In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material.“**
- **"Company logos and trademarks may not be used without written consent ...."**

Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

- **"Respect all copyright and other intellectual property laws. For [the Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer's] own copyrights, trademarks and brands."**
- **"DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on [Employer] logos, brand names, taglines, slogans, or other trademarks."**

Unlawful Handbook Rules Relating to Restrictions on Leaving Work

The following rules were unlawful because they contain broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts.

- **"Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job‘ during a scheduled shift" is prohibited.**
- **"Walking off the job ..." is prohibited.**

In contrast, the following handbook rule was considered lawful:

- **"Entering or leaving Company property without permission may result in discharge."**

WENDY'S INTERNATIONAL LLC

NLRB Update

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 Representation Case-Procedures Fact Sheet

(Prepared by the NLRB)

The National Labor Relations Board's (NLRB) Final Rule governing representation-case procedures is designed to remove unnecessary barriers to the fair and expeditious resolution of representation questions. The Final Rule will streamline Board procedures, increase transparency and uniformity across regions, eliminate or reduce unnecessary litigation, duplication and delay, and update the Board's rules on documents and communications in light of modem communications technology. The amendments provide targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, accurately and expeditiously resolving questions of representation

- Full Fact Sheet available at www.nlrb.gov

“Free Speech” Under the NLRA

Section 8(c) of the Act provides:

- The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

This language authorizes “employer campaigning,” such as dissemination of information to employees and “captive audience” meetings with employees.

Overview

1. Notice of Hearing within eight (8) days. But apparently no guarantee of a hearing.
2. Notice of Petition for Election posted by employer within two (2) business days after service of the Notice of Hearing.
3. Statement of Position by the Employer by noon the day before the date and time set forth in the Notice of Hearing.
4. Disputes concerning individuals' eligibility to vote in the election postponed until after the election in most all cases.

Overview (continued)

5 The election shall be scheduled for the earliest date practicable.

6 Employer required to post the Board's Notice of Election at least three (3) full working days prior to 12:01 a.m. of the day of election.

7 Within two (2) business days after issuance of the direction for election, the employer shall provide a voter list.

8 Time for filing objections to the conduct of the election or conduct affecting the results of the election and offers of proof must be made within seven (7) days after the tally of ballots.

Overview (continued)

9 Post-election hearing will be set for twenty-one days after the tally of ballots or as soon as practicable thereafter.

10 The Board has discretion whether to grant a request for review of the post-election hearing.

Overview (continued)

11 Provides for increased amount of electronic transmission of documents.

12 Blocking charge must be backed at the time of filing by a written offer of proof.

The Details

I. Notice of Hearing within eight (8) days.

A. After a petition for election has been filed, if the regional director finds reasonable cause that a question of representation affecting commerce exists, the regional director will set a hearing for a date eight (8) days from the date of service of the Notice of Hearing to the parties involved

1. Hearing may be postponed for up to two (2) business days if a party shows special circumstances.

2. Hearing may be postponed for more than two (2) business days upon showing of extraordinary circumstances.

The Details (continued)

B. Purpose of hearing is to determine if a question of representation exists; NLRB jurisdiction; scope of the bargaining unit.

   1. Scope of bargaining unit is crucial.
   2. NLRB jurisdiction is rarely an issue.

C. Hearing to continue day-to day until completed.
   1. Continuance allowed only under extraordinary circumstances.

D. Compare to old rules that required no set time for a pre-election hearing.

The Details (continued)

II. Notice of Petition for Election posted by employer within two (2) business days after service of the Notice of Hearing.

A. The Notice will be mandatory and will specify that a petition has been filed, the proposed unit, describe procedures that will follow, and list employees' NLRA rights.

B. Current Notice is voluntary and less detailed.

C. The new Notice has not yet been published.

The Details (continued)

III. Statement of Position by the Employer by noon the day before the date and time set forth in the Notice of Hearing.

A. Statement of position shall include:

1. whether the employer agrees that the Board has jurisdiction and provide requested information concerning the employer's relation to interstate commerce;

2. whether the employer agrees that the proposed unit is appropriate, and, if the employer does not agree, state its position as to what unit would be appropriate;

The Details (continued)

3. identify individuals that the employer intends to contest at the pre-election hearing and the basis for the contention(s); identify individuals who are contested: Add or exclude

    a. supervisors
    b. leads
    c. temps
    d. full time/part time
    e. truck drivers
    f. seasonal
    g. administrative
    h. separate facilities.

The Details (continued)

4. raise any election bar, e,g, election held within one year, or an existing bargaining unit;

5. state the length of the payroll period for employees in the proposed unit and most recent payroll ending period;

6. employer's position concerning type, date, time and location of the election and eligibility period;

7. any other issues the employer plans to raise at the hearing;

The Details (continued)

8. Name, title, contact information of the individual who will serve as the employer representative and accept service of all papers;

9. list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and, if the same information for the individuals if the employer contends that the unit is not appropriate;

10. the above list must be in alphabetical order and in electronic format.

The Details (continued)

B. FAILURE TO RAISE ISSUES IN THE STATEMENT OF POSITION WAIVES THOSE ARGUMENTS, EXCEPT CHALLENGES TO THE BOARD'S JURISDICTION.

C. Employer may amend its Statement of Position if it can show good cause.

D. No Statement of Position required under old rules.

E. No preliminary voter list required under old rules.

The Details (continued)

IV. Disputes concerning individuals' eligibility to vote in the election postponed until after the election in most all cases.

If the number of disputed voters makes a difference in the outcome, the eligibility of the disputed voters will be litigated.

A. Hearing officer will inform the parties that the regional director will issue a decision as soon as practicable as to whether an election will be directed and the parties' obligations under the rules.

The Details (continued)

V. The election shall be scheduled for the earliest date practicable.

A. As a practical matter, counting the time frames herein, it would seem that the earliest an election could be held would be 10 days, but most likely between 10 and 20 days.

B. In contrast, it is estimated that on average, under the old rules, an election would take place approximately 40 days from the direction of election.

VI. Employer required to post the Board's Notice of Election at least three (3) full working days prior to 12:01 a.m. of the day of election.

A. If the direction of election provides for individuals to vote subject to challenge the Notice shall advise employees that they are neither included in, nor excluded from, the bargaining unit and that their eligibility will be resolved, if necessary, following the election.

B. Notice must remain posted until the end of the election.

The Details (continued)

VII. Within two (2) business days after issuance of the direction for election, the employer shall provide a voter list.

A. List must be alphabetized overall or by department and be in electronic format and include:

1. Full names, work locations, shifts, job classifications, and contact information, including:

a. home addresses, available personal email addresses, and available home and personal cell phone numbers.

2. Separate list that includes the same information for those individuals who will be permitted to vote subject to challenge.

B. Seven days to provide list under the old rules.

The Details (continued)

VIII. Time for filing objections to the conduct of the election or conduct affecting the results of the election and offers of proof must be made within seven (7) days after the tally of ballots.

A. Regional Director may extend time for filing the written offer of proof upon request of a party showing good cause.

B. Under the old rule, offers of proof could be filed within 14 days after an election.

The Details (continued)

IX. Post-election hearing will be set for twenty-one days after the tally of ballots or as soon as practicable thereafter.

A. Used to resolve objections to the conduct of the election or conduct affecting the results of the election.

B. Old rules did not specify a time frame for the post-election hearing to be held.

X. The Board has discretion whether to grant a request for review of the post-election hearing.

A. Under the old rules, the Board's review of pre-election disputes was discretionary, but the Board's review of post-election disputes was mandatory.

The Details (continued)

XI. Provides for increased amount of electronic transmission of documents.

XII. Blocking charge must be backed at the time of filing by a written offer of proof.

A. The party's offer of proof must describe evidence that, if proven, would interfere with employee free choice in an election.

B. The offer of proof shall provide the names of the witnesses who would testify in support of the charge and a summary of their testimony.

C. The written offer of proof shall not be served on any other party.

The Details (continued)

XIII. ACTIONS TO TAKE:

A. Vulnerability audits

1. Documents to prove supervisory positions
2. Interchange for additional units or employees
3. Common supervision
4. Common policies
5. Why unions are counter-productive in electronic format, ready to use on short notice
6. Company position on unions in handbook

The Details (continued)

B. Litigation
   1. Chamber of Commerce
   2. National Association of Manufacturers
   3. National Right to Work Committee

- The U.S. Senate and House of Representatives have passed resolutions to block the National Labor Relations Board from implementing its contentious new union election rule, but those will likely run into a veto when it hits President Barack Obama's desk, with the White House having publicly stated that it is against the measure. The NLRB rule makes only small changes to the union election system that the administration believes will "help level the playing field" for workers, according to the White House.