PRESENTATION

Labor and Employment Law Update: 2014 Year In Review and Looking Ahead to 2015

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Today's Agenda
Civics 101

The Legislative Branch

The Executive Branch

The Judicial Branch

LEGISLATIVE HAPPENINGS

Significant Changes in Tennessee

- **Workers' Comp. Reform Act of 2013**
  - Signed into law on April 29, 2013
  - Took effect on July 1, 2014
  - Applies to injuries occurring on or after July 1, 2014

Photo by Jed DeKalb, Chief State Photographer
via Murfreesboro Post

Change in Definition of Injury

Old Definition

- An injury is compensable if it "arises out of, and in the course of employment"
- Essentially creates a "could be" standard

New Definition

- An injury is compensable if it "arises ***primarily*** out of and in the course and scope of employment"
- This means: the employee must prove that when all other possible causes are considered, employment contributed more than 50% in causing the injury

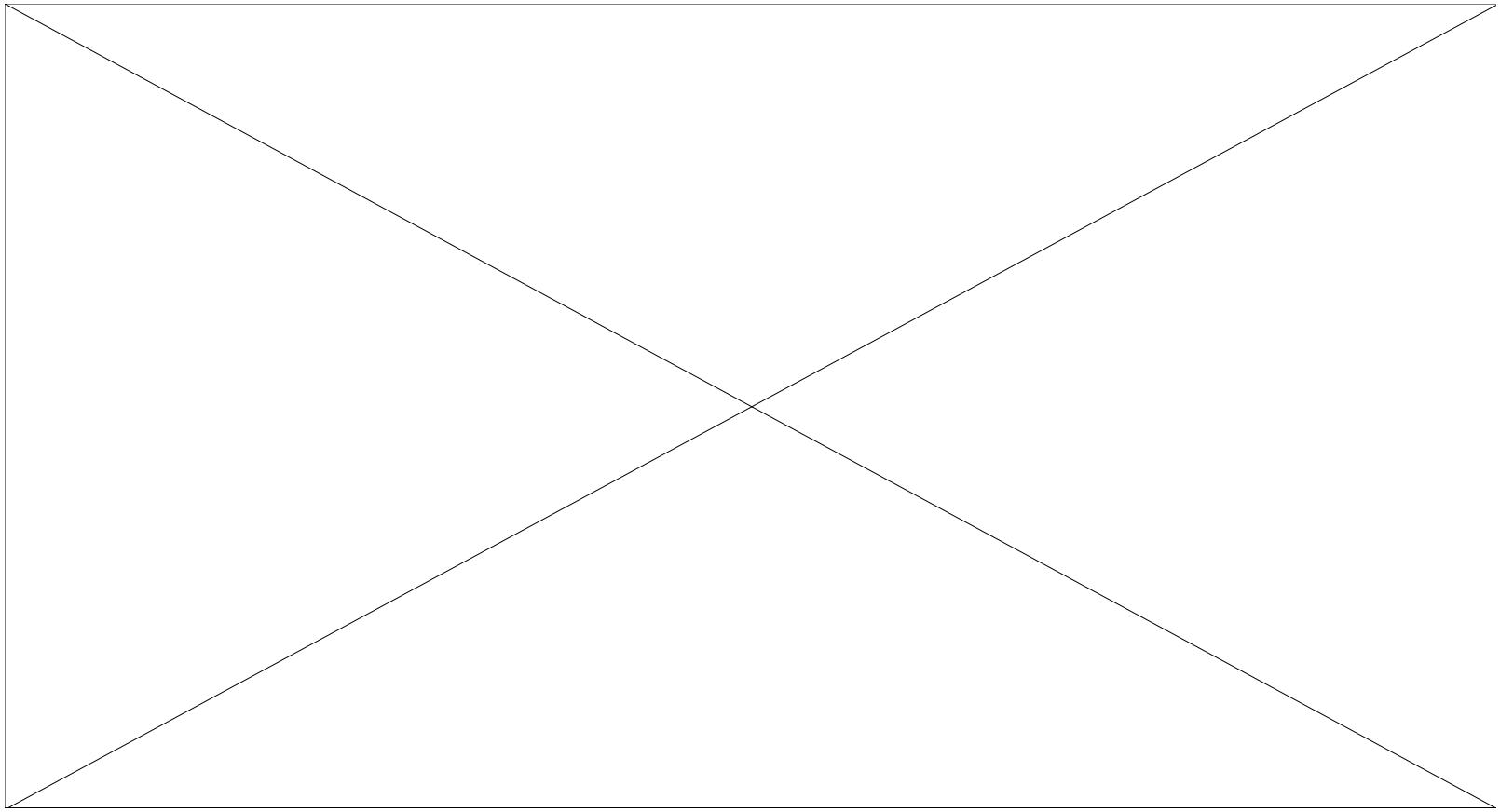
Significant Changes In Tennessee

- No personal liability under THRA for supervisors/managers.
- New caps on damages for pain and suffering, humiliation, embarrassment, etc.
- Employees are now barred from bringing common law whistleblower claims.
- Only whistleblower relief is under TN Statute which requires “sole cause” standard of proof.

Significant Changes In Tennessee

- Employees are now prohibited from bringing two cases (one in state court and one in federal court) based on the same set of facts.
- Employer can move to dismiss the state court action if the same case is also filed in federal court.
- New laws took effect July 1, 2014.

WHAT ABOUT CONGRESS?



EXECUTIVE BRANCH

- EEOC
- NLRB
- DOL

EEOC Guidance

- Many of the recent developments in the labor and employment field are EEOC-issued guidance and other documents
- EEOC guidance is not legally binding on courts, but is nevertheless a good indicator of what kinds of actions the EEOC would prosecute
- Courts may also consider EEOC-issued documents to be persuasive authority

EEOC Statistics

- FY 2011 – 99,947
- FY 2012 – 99,632
- FY 2013 – 93,727
- **FY 2014 – 88,778**
- In 2013, 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
- However, in 2014, EEOC “only” recovered $296.1 million in monetary relief for private sector workers

EEOC Priorities

- Expanding Title VII to include transgender and sexual orientation with the prohibition against sex discrimination.
- Pursuing litigation to ensure equal pay for women.
- Pushing employers to accommodate working parents.
- Expanding the Pregnancy Discrimination Act.

Criminal Background Checks

- On March 10, 2014, the EEOC and FTC jointly issued documents intended to clarify expectations of employers and employees with regard to background checks
- The reports are broken down into recommended steps prior to obtaining a background check, how to use a background check, and how to dispose of a background check

EEOC – Clarification on Use of Criminal History

- Risk of Title VII liability when using criminal history information because minorities tend to be disproportionately affected
- Screening must be targeted – nature and timing of offense and job sought
- Should give the applicant an opportunity to address/explain or make an "individual assessment"
- Must be job related and consistent with business necessity

Transgender and Sexual Orientation

- EEOC still processing administrative charges for both types of discrimination under Title VII.
- In September 2014, the headlines show the EEOC is serious about pushing this issue for acceptance by our Federal Courts.

EEOC Files Sex Bias Suits For Transgender Workers 9/25/14

- Two separate suits – one against a funeral home and one against an eye clinic.
- President Obama recently issued an executive order prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity.
- Employment Nondiscrimination Act still pending in the House.

EEOC Pursuing Litigation/Equal Pay

"Discrimination is changing. It's important for us to think about what barriers remain to advancement in the workplace — sometimes they may be very common practices that people rely upon, whether it be negotiation of a salary matching prior job experience, which, in fact, can cause disparities that may not be job-related."

EEOC Vice Chairwoman Jenny Yang

June 5, 2014

EEOC Key Issue: Accommodating Working Parents

- Caregiver discrimination guidelines from 2007.
- EEOC pushes employers to accommodate parents with flexible work schedules and telecommuting opportunities.
- Although “parents” are not a protected class, different treatment for male/female employees with regard to parenting or caregiver obligations can lead to viable claims of sex discrimination.

Discussion Scenario

- Mary began working at ABC Manufacturing in March 2014. She works on the manufacturing line. ABC is a leading manufacturer of widgets and employs over 300 people at its plant in Tennessee.
- On January 5, 2015, Mary informs the company that she is 4 months pregnant and that her physician has placed her on restrictions that will not permit her to perform the essential functions of her job. The restriction are solely due to the fact that she is pregnant – there is no underlying medical condition.
- The company currently has no light duty positions available.
- What should the company do?

EEOC Tries To Expand the Pregnancy Discrimination Act

EEOC Takes a Position (albeit divided)

In 1997, 3,900 EEOC Charges were filed alleging pregnancy discrimination.

In 2013, 5,342 EEOC Charges were filed.

With an increasing number of charges, on July 14, 2014, the EEOC issued guidance on the PDA.

EEOC Issues Pregnancy Discrimination Enforcement Guidance July 14, 2014

- http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
- Covers the interaction between the ADAAA and pregnancy discrimination.
- Clarifies who the pregnancy discrimination law covers.
- Defines who is similarly situated to a pregnant female with work restrictions for the purpose of analyzing discrimination claims.
- Discusses EEOC's position on light duty and pregnancy.

EEOC's Position on Pregnancy and the ADAAA

- Pregnancy itself is still not a disability.
- Changes to the definition of the term "disability" make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADAAA.
- Reasonable accommodations available to pregnant workers with disabilities might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position.

When She Says Baby: What Should an Employer Do?

Per the EEOC Guidance an employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignment, leave, or fringe benefits.

The EEOC's Controversial Gambit (continued)

Thus, the EEOC contends, an employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job.)

But wait….

THE JUDICIAL BRANCH

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.

The Peggy Young Case (continued)

- Pursuant to its collective bargaining agreement UPS only allowed light duty in the following circumstances:
  1. Employees with limitations arising from on the job injuries;
  2. Employees considered “disabled” under the ADA; and
  3. Employees who temporarily lost DOT certification.

The Facts . . .

- Ms. Young gives her supervisor a doctor's note stating she should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter.
- The supervisor gives the note to HR.
- HR informs Ms. Young that she is not among the categories of employees that are entitled to light duty.
- Ms. Young takes unpaid leave for the duration of her pregnancy losing income as well as her medical coverage months before the birth of her child.
- Ms. Young sues UPS for pregnancy discrimination under Title VII of the 1964 Civil Rights Act.

And loses

Twice

Other EEOC considerations…

- Severance Agreements
- Wellness Programs

Severance Agreements

- Strategic Enforcement Plan – target “settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination.”
- Non-disparagement clauses
- Cooperation clauses
- Nondisclosure provisions prohibiting disclosure of confidential information
- No pending action provisions
- Covenants not to sue which require the employee to pay the former employer’s attorneys’ fees in the event of a breach

Wellness Programs

- EEOC is promising to issue new regulations in 2015 to provide employers guidance on how to offer wellness programs without running afoul of the ADA and GINA
- Incentives v. Penalties

What's New with the Department of Labor

Collective Actions
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.

White Collar Overtime Exemption Regulations

- DOL has set a deadline of the end of February for a proposed rule to implement President Obama's directive to modernize and streamline the white collar exemptions
- What to expect?
  - raising the minimum salary level
  - duties test: possibly remove concurrent duties section under executive exemption and implement a quantitative test similar to California that requires an exempt manager to spend more than 50% of his/her time supervising employees
  - clarification of computer professional employee exemption

Proposed Rule on Requirement to Report Summary Data on Employee Compensation

- On August 6, 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs issued a Notice of Proposed Rule Making proposing that covered federal contractors and subcontractors with more than 100 employees to submit an annual, Equal Pay Report on employee compensation. OFCCP is proposing to collect total W-2 earnings, total number of employees and total hours worked by sex, race and ethnicity for each EEO-1 job group (broad occupational categories like managers, professionals, sales workers and craft workers).
- The proposed rule applies to prime contractors and first tier subcontractors who are required to file EEO-1 Report(s), have more than 100 employees, and have a federal contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days (including modifications).

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."

FEBRUARY 19 BREAKFAST BRIEFING

DETAILED DISCUSSION OF ELECTION RULE

Email Access

- Purple Communications, Inc.'s Policy:
  - Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.

Email Access

- “Consistent with the purposes and policies of the act and our obligation to accommodate the competing rights of employers and employees, we decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.”
- The majority called its decision “carefully limited,” noting that it applied only to workers who have already been granted access to their employer's email system and that a business may justify a complete ban on nonwork use of email if it can point to special circumstances that make such a prohibition necessary.
- Decision also suggests that if employees are allowed to use their employers’ email systems for nonwork emails at other times, they will be able to use the systems for communication about unions and terms of conditions during working times as well.

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?

THE JUDICIAL BRANCH

U.S. Supreme Court Highlights

- *Vance v. Ball State University* – a supervisor for purposes of vicarious liability under Title VII is someone who is empowered by the employer to take tangible employment actions (hiring, firing, failing to promote, reassignment with significantly different responsibilities, change in benefits)
- *University of Texas Southwestern Medical Center v. Nassar* – plaintiff is required to prove that retaliation would not have occurred "but for" the wrongful actions of the employer – no longer "motivating factor" standard
- *Lawson v. FMR LLC* – SOX applies to: (1) public companies; and (2) private companies who provide services to public companies (contractors, subcontractors and their employees)

QUESTIONS?