

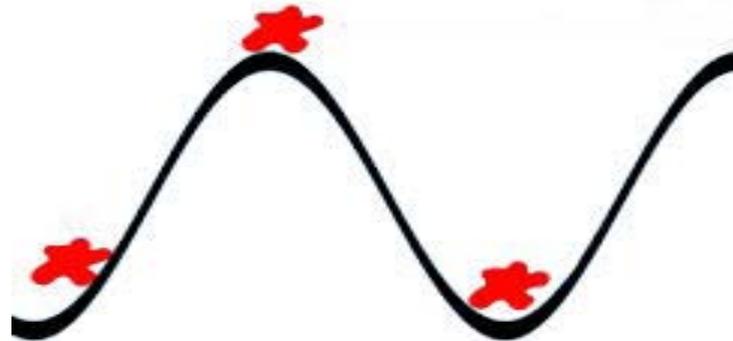
2015: Emerging from the Year of the Highest Highs & the Lowest Lows: Can We Catch Our Breath

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2014: A Busy Year for Labor and Employment Law

- New Tennessee statutes and amendments
- 2014 EEOC guidance and trends
- Immigration reform
- National Labor Relations Board rulings
- Pregnancy discrimination
- Big verdict stings employer
- DOL agenda for 2015



Tennessee Amendments Are Largely Pro-Employer

- Tennessee passed several laws and amendments in 2014 that are pro-employer
- The laws limit employer liability under the THRA and TDA, make it harder to bring whistleblower lawsuits, and provide immunity for hiring former criminals in certain instances



Tennessee Amendments Limit Employer Liability in Certain Instances

- The Tennessee General Assembly passed a few amendments this year that limit pain, suffering, humiliation & embarrassment damages for Tennessee Human Rights Act and Tennessee Disability Act violations based on the number of employees the respective employer has
- Effective July 1, 2014
- Employees can't bring two cases
- \$50k limit for employers with 15-101 employees
- \$300k limit for employers with 500+ employees
- No personal liability for supervisors/managers



Whistleblower Claims Harder to Bring in Tennessee

- The Tennessee General Assembly eliminated the Tennessee common law cause of action for whistleblower claims
- The statutory cause of action remains, but it is harder to meet
- The end result is that workers can't get damages for their refusal to participate or remain silent unless the refusal/reporting was the *sole* cause of their termination (formerly *substantial factor*, under common law)



Criminal Backgrounds and Certificates of Employability

- Tennessee also passed a law providing for a procedure for individuals with criminal backgrounds to petition the court for a certificate of employability if they meet certain criteria
- If an individual meets the criteria and the court issues the certificate, the employer is generally immune from claims of negligent hiring or supervision



Online Privacy Act



- Effective January 1, 2015
- Applies to employers with one or more employees
- Limits an employer's ability to gain access to personal internet accounts
- Prohibits employers from asking for passwords to allow access to personal accounts, from compelling employees to add employer as "friend" or contact, from compelling employees to access accounts while employer watches, and from taking adverse action because of refusal
- Employers can require disclosure if required to conduct investigation and where there is specific information on account related to compliance with laws, regulations, policies OR to protect proprietary information

Anti-Bullying Law

- Tennessee also passed a new anti-bullying law recently, the Healthy Workplace Act
- The HWA only applies to public employers, but may provide a model for private employers to adopt policies on their own
- The law defines abusive conduct, and provides for compliant policies, among other things

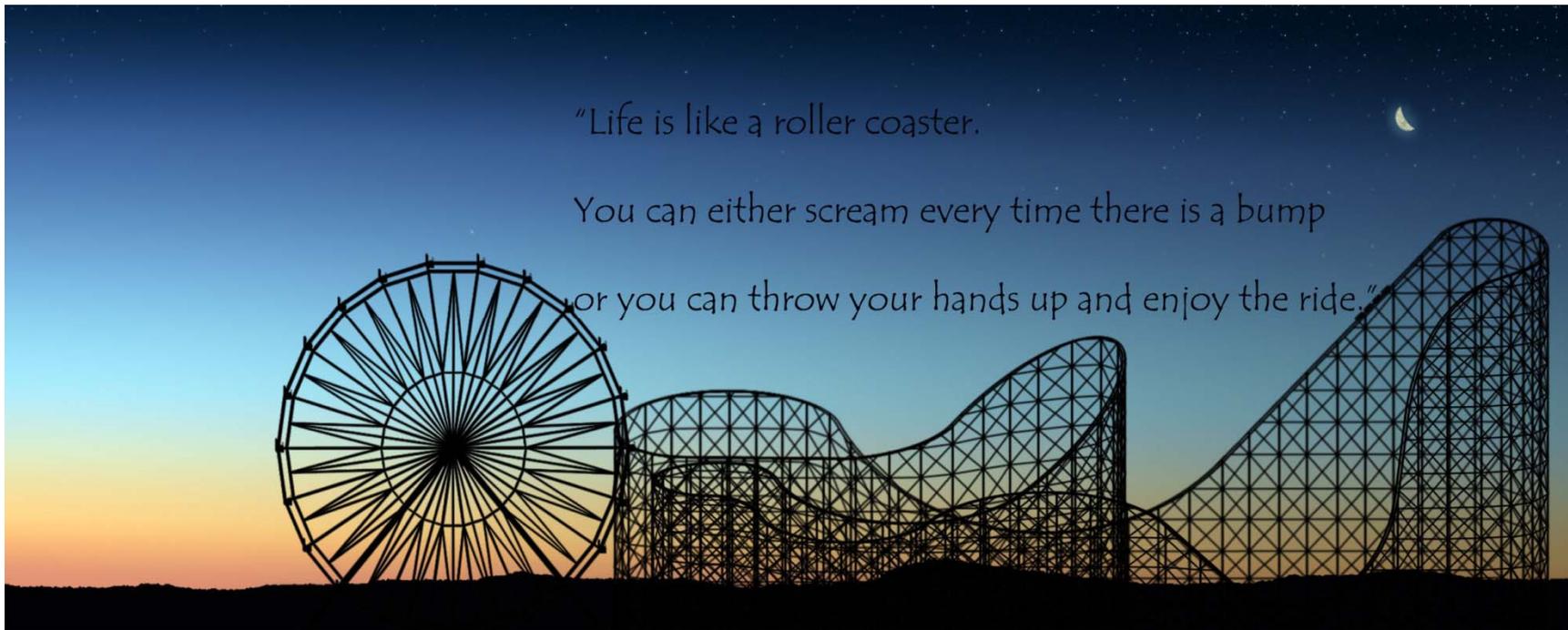


Most Significant Changes to Workers' Compensation

- Transition from court to administrative system
- Definition of Injury
- Change in Construction of Law
- Change in Physician Panels
- Enhanced Mediation
- New Impairment Rating Process
- Change in Calculation of Permanent Partial Disability Benefits
- New Penalties for Non-compliance



The Ups & Downs in the Federal Arena



"Life is like a roller coaster.

You can either scream every time there is a bump

or you can throw your hands up and enjoy the ride."

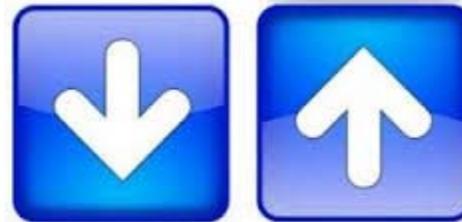
EEOC Trends

- There were significantly fewer charges this past year than previously, the EEOC brought back much less money than prior years, and the EEOC got a new director (which may increase its zealously, at least temporarily)
- Although cases and money receipts are down, enforcement priority areas (such as pregnancy discrimination) are likely to be hot topics in 2015

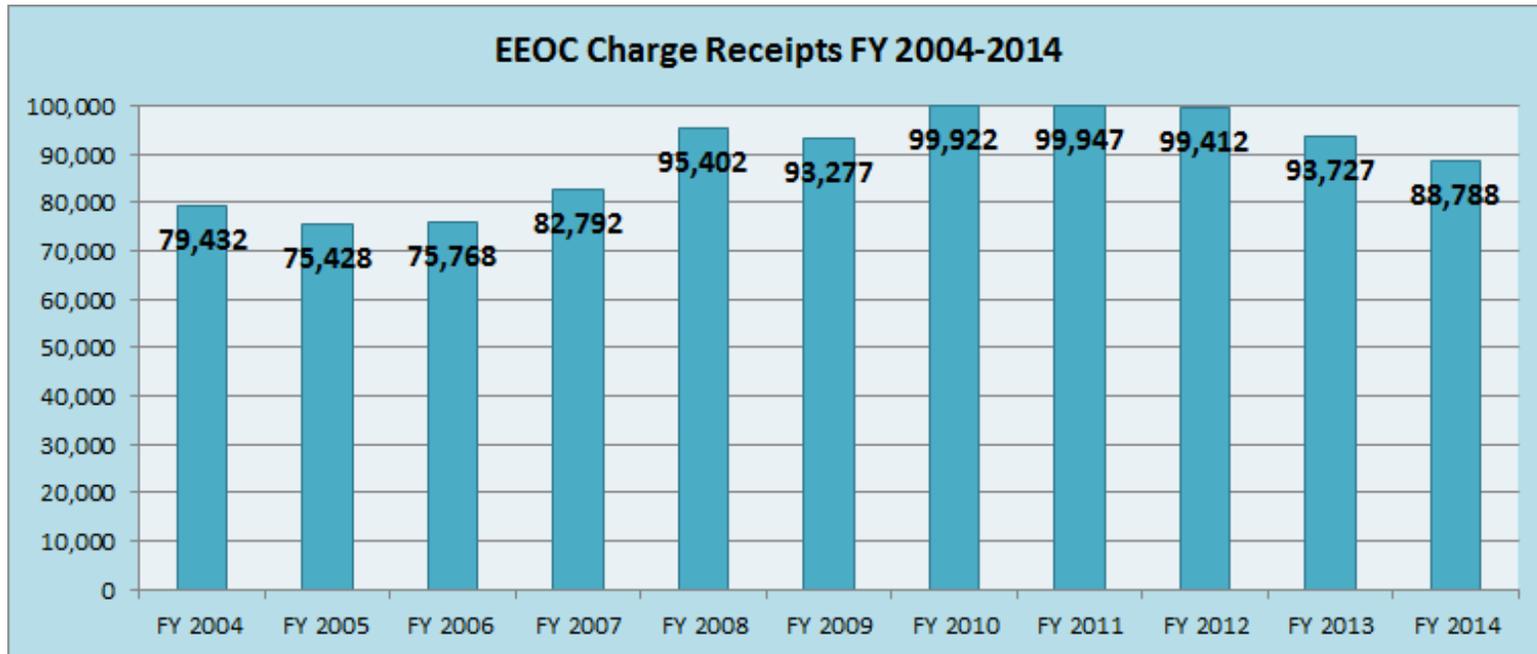


EEOC Money Recoveries and Bias Charges Decline

- The EEOC brought back \$76 million less in 2014 than 2013
- There were also 5,000 fewer claims year to year
- The EEOC brought back \$372.1 million total in 2013, and less than \$300 million in 2014
- Total EEOC charges declined from roughly 100k in 2012 to 93,727 in 2013, to 88,778 in 2014
- The overall trend is positive for employers, but it could always go back up



EEOC Charges at a Glance



New EEOC Director

- Jenny R. Yang was named chairwoman of the EEOC on September 2, 2014
- Ms. Yang has said that pregnancy discrimination and gender discrimination are top targets for the EEOC going forward
- Ms. Yang will likely step up pregnancy and gender discrimination enforcement in the coming months



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
- Challenging employer classifications of independent contractors
- Expanding the Pregnancy Discrimination Act

Pregnancy Discrimination Charges on the Rise

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

In 2013, 5,342 EEOC Charges were filed alleging pregnancy discrimination.

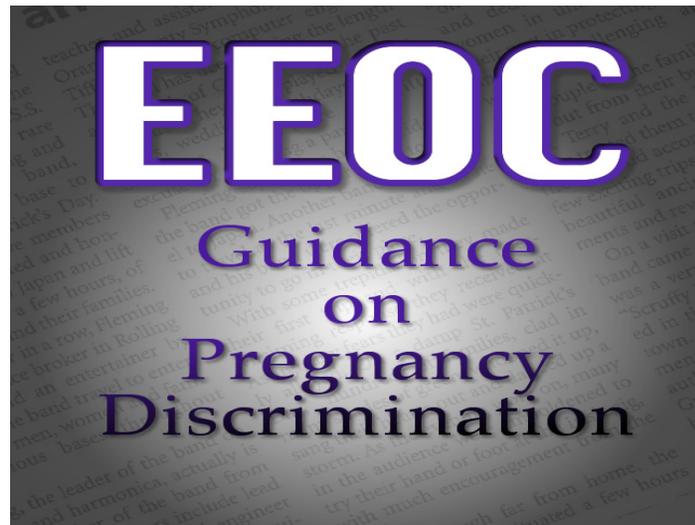
With an increasing number of charges, on July 14, 2014, the EEOC issued guidance on the PDA.

New Pregnancy Discrimination Guidance

- The EEOC issued new pregnancy discrimination guidance on July 14, 2014 due to the increasing number of claims
- The guidance is intended to help businesses comply with the law, and notifies everyone what the EEOC considers to be compliant versus a violation
- Key take aways:
 - Employers have to provide reasonable accommodations for pregnant employees regardless of Americans with Disabilities Act eligibility
 - Employers should review all policies to ensure compliance with the guidance

New Pregnancy Discrimination Guidance

- The guidance is extensive, and is available for free at eoc.gov or through Google
- It would be a good idea to read through all of the guidance to ensure compliance, because it contains more information than we have time for today



Supreme Court Expected to Rule Against UPS in Pregnancy Discrimination Case

- Experts expect the U.S. Supreme Court to overrule the 4th Circuit's decision against Peggy Young and for United Parcel Service
- UPS forced Young to go on unpaid leave because she could not lift more than 20 pounds during her pregnancy
- Young claims the unpaid leave constituted discrimination under the PDA
- The Supreme Court heard oral arguments on December 3, 2014
- The case has received a lot of publicity because it potentially affects many businesses (and women) across the country





What to Do

What should Employers do in the meantime?

- 1** The Guidance requires employers to provide reasonable accommodations for pregnant employees, regardless of whether they are disabled under the ADAAA.
- 2** Employers should engage in the interactive process with pregnant employees and provide the accommodation if it has provided a similar accommodation to a non-pregnant employee.
- 3** Employers should review all policies (especially light duty policies) and procedures to ensure compliance with the Guidance.
- 4** Training

Employment Discrimination Suit Stings Autozone

- A California jury stuck Autozone Inc. for a whopping \$186 million in a gender and pregnancy discrimination case
- The verdict includes roughly \$185 million in punitive damages to punish Autozone for egregious behavior, which will likely be reduced



Employment Discrimination Suit Stings Autozone (cont.)

- Another notable case is *Michaels v. McPherson Police Department*, in October 2014, where a federal jury awarded the plaintiff \$1 million for being fired for falling asleep on duty, allegedly due to sleep apnea
- The takeaway is to be very weary of employment suits and to make sure to comply with applicable laws such as the ADA, PDA, etc.
- Making a plan, documenting all hiring/firing decisions, and having proper procedures are essential to avoiding discrimination lawsuits



Executive Immigration Action

- The biggest recent news on the immigration front is the executive action that President Obama announced on November 20, 2014
 1. Childhood arrivals and parents of citizens and legal permanent residents are going to be eligible for deferred action
 2. Provisional waivers of unlawful presence will be expanded from immediate relatives to beneficiaries of any family-based immigration petition
 3. Advance parole will not be considered to be “departing” the U.S. any longer
 4. Certain employment-based visas will be broadened
 5. Naturalization applications will be more flexible

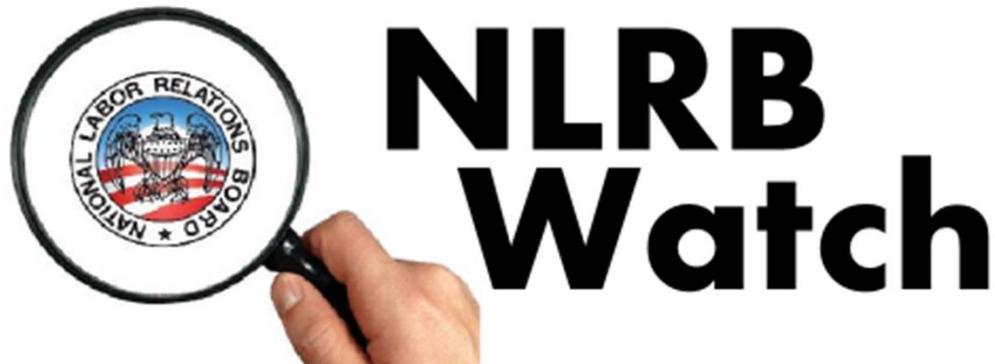
Executive Immigration Action (cont.)

- The initiatives launched by President Obama are not yet fully implemented, but are indicative of the direction the policies should shift once fully implemented



National Labor Relations Board – Recent Activity

- NLRB has regulated a great deal in the last few weeks
 - Board member Nancy Schiffer’s term expired in December 2014, and typically there is a lot of activity right before someone steps down
- Union election rules finalized on December 12, 2014
- Right to use employer email for certain purposes found by NLRB
- Lastly, NLRB recognized joint employer status



NLRB Action – Union Election Procedure

- The NLRB finalized its new “ambush election” rules for union elections on December 12, 2014
- The new rule gives employers much less time to prepare an anti-union campaign, shortening the time from petition to election from roughly 38 days to as few as 10 days
- The new rule goes into effect April 14, 2015 – OR DOES IT?

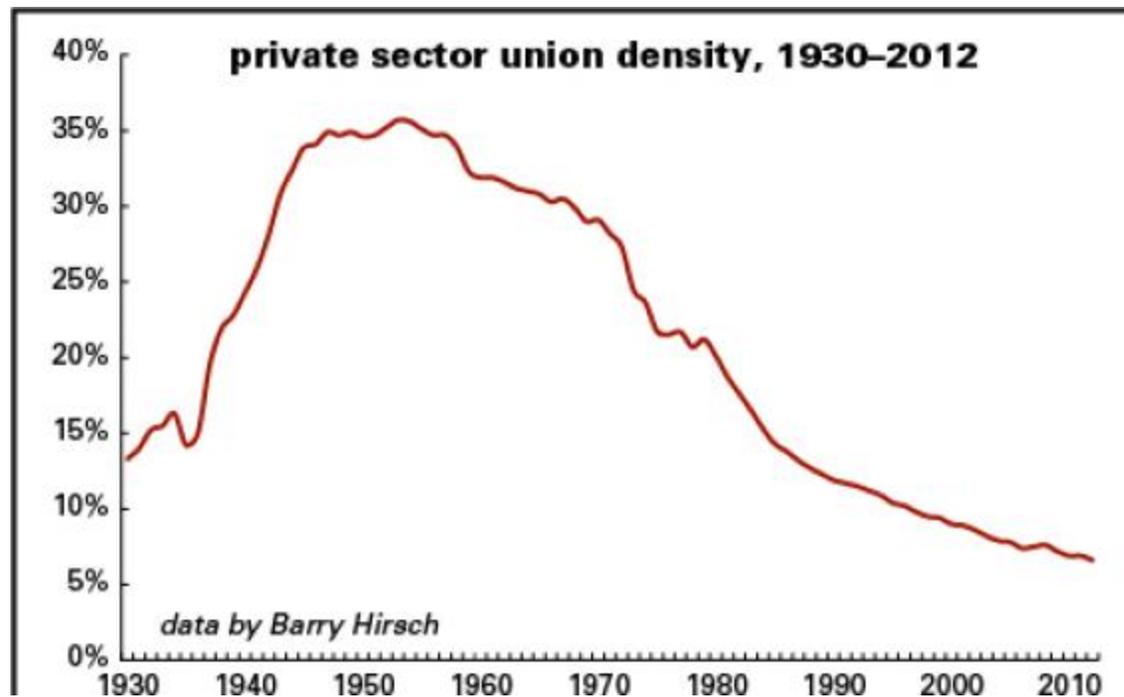


Analysis of the New NLRB Union Petition Rule

- As a practical matter, union organizers spend many weeks or months preparing the workforce before they file the formal election petition
- In many cases, the first an employer hears of union organization is the election petition
- There used to be approximately 38 days between filing the petition and the election
- The new rules allow as few as 10 days
- This will almost certainly increase unionization of workforces across the country, because employers will be less prepared to deal with the threat

Analysis of the New NLRB Union Petition Rule (cont.)

- Union membership is down, so unions will likely use the new union-friendly petition rule (and any other pro-union laws) to jump start campaigns across the country



NLRB Action – Right to Use Employer Email

- The NLRB held in early December 2014 that employees given access to employer email systems for work purposes are presumptively permitted to use those systems for union organizing during non-working time
- Specifically, the NLRB said that Purple Communications' restrictive email policy interfered with employees' free choice in union elections
- The takeaway here is that corporate email policies cannot prohibit protected activity, including union organizing



NLRB Action – Joint Employer Status

- The NLRB issued complaints against McDonald's franchisees and McDonald's USA as joint employers on December 19, 2014
- This is fairly novel, because ordinarily employees have only one legal employer
- A McDonald's spokesperson is quoted saying the NLRB actions "improperly and dramatically strike at the heart of the franchise system"
- The NLRB's stance could have far-reaching consequences



Department of Labor Agenda

- The DOL already finalized a rule effective December 8, 2014 providing for a minimum wage of \$10.10 for federal contractors
- The DOL is also expected to revise white collar FLSA standards, to begin utilizing a new definition of “spouse” for FMLA purposes, and to revise the rule addressing persuasion of employees about their right to organize collectively



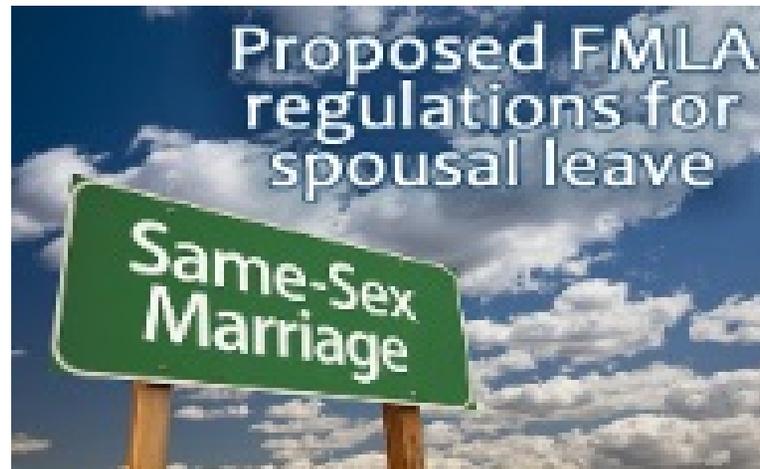
Department of Labor Agenda (cont.)

- The DOL is expected to issue new regulations in February 2015 that will modernize FLSA regulations for white collar workers
- It is unclear exactly how the DOL will handle the redefinition, but it is likely that it will increase the salary-basis test to at least \$550 per week since that is an area that is easy to change
- The DOL may choose to require or prohibit certain job duties to determine FLSA classification as well



Department of Labor Agenda (cont.)

- Final rule re: definition of “spouse” now promulgated; takes effect 03/7/15
- amends the definition to include all individuals in legal marriages, regardless of where they live; “legal” is as defined or recognized in the state of celebration



Department of Labor Agenda (cont.)

- The DOL is expected to issue a new rule in mid 2015 that revises its interpretation of Sec. 203(c) of the Labor Management Reporting and Disclosure Act, which addresses persuasion of employees about their rights to organize and bargain collectively
- The proposed rule would make several activities that are now subject to the advice exception (and therefore currently allowed) “persuader activity”



CAN WE CATCH OUR BREATH?



QUESTIONS?

