

The Merry-Go-Round of Employment Law: Your 2015 Edition

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Employment Law Update

- **State Law Update**
- **U.S. Supreme Court**
- **OSHA**
- **EEOC**
- **FLSA**
- **FMLA**
- **OFCCP**



State Law Update



“The Parking Lot Rule”

Effective August 1, 2013



Employee may “possess” a gun in the workplace parking lot under certain conditions



Employer may not discipline an employee for possessing a firearm in the workplace parking lot

If an employer violates the statute, the employee may sue the employer

New Gun Bill

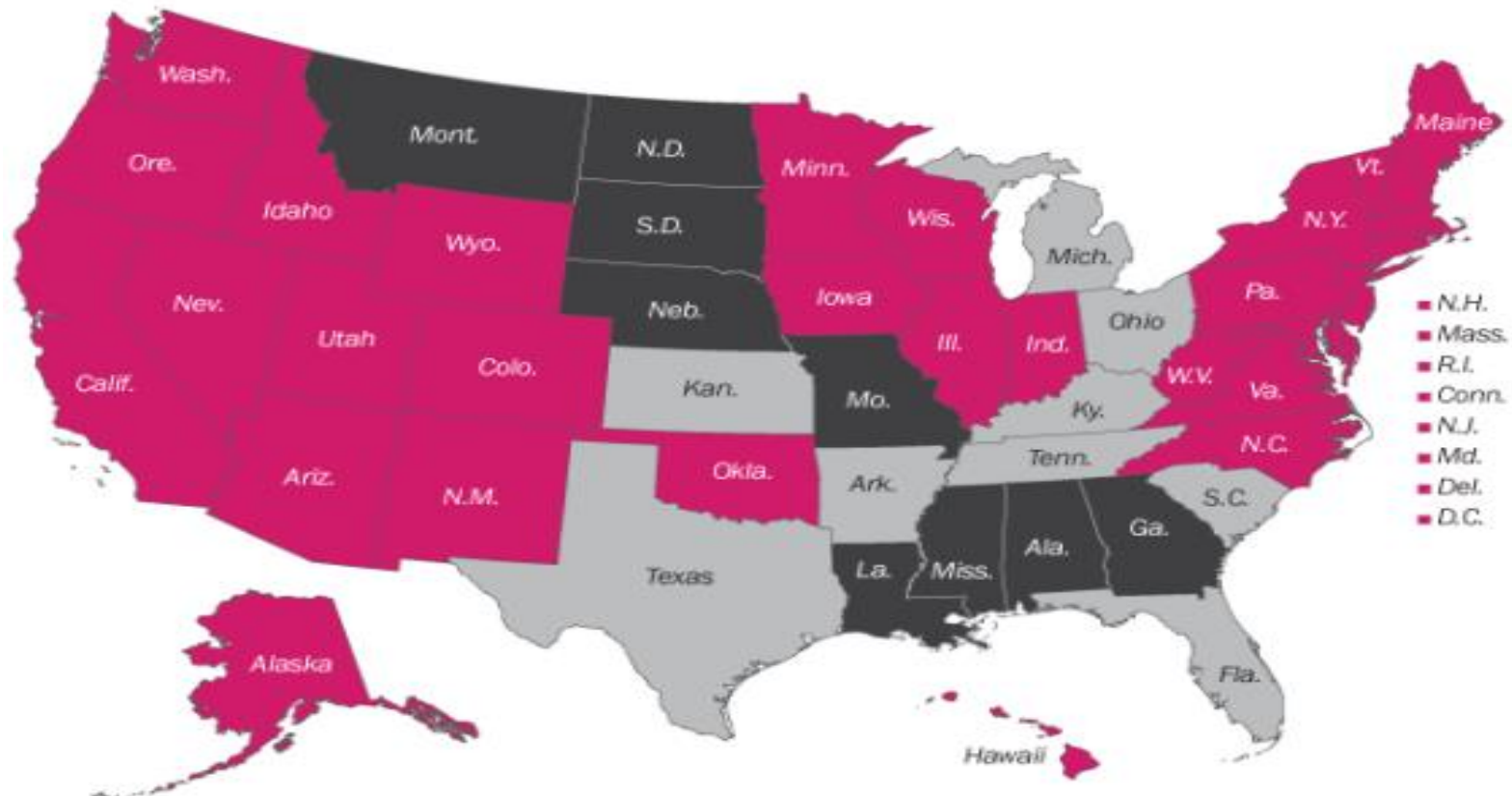
- Current law requires handguns to be locked away unless the owner has CWP
- New bill drops that requirement
- State Sen. Gerald Allen (R)-Tuscaloosa
- Bill passed State Senate in 2014, but died in House
- Sheriff's Association and other law enforcement agencies oppose the bill



Supreme Court Ruling on Same-Sex Marriage

As of October 17, 2014

- States where gay marriage is legal
- States where gay marriage is outlawed
- States pending appeal



Searcy and McKeand v. Luther Strange

- U.S.D.C., Southern District of Alabama
- Alabama Marriage Protection Act and state constitutional amendment both unconstitutional
- 11th Circuit denied State's motion to stay pending outcome of U.S. Supreme Court ruling on 6th Circuit case
- Several same-sex marriage cases pending in state



Impact on Health & Welfare Plans

- No more imputed income for health plan coverage of same-sex spouse
- Can make pre-tax contributions for same-sex spouse coverage
- FSAs can reimburse same-sex spouse medical expenses
- Same-sex spouses eligible for COBRA
- Special enrollment rights

Impact on Health & Welfare Plans

- Should no longer be imputing federal income tax
- Review plans, SPDs, other plan materials to identify necessary changes
- Expand coverage for FSA and HRA reimbursements and HSA maximums
- Consider requesting updated beneficiary elections

Supreme Court Update



Young v. United Parcel Service

- U.S. Supreme Court decision on March 25, 2015
- Created new standard for establishing *p.f.* case for pregnant workers
- Vacated 4th Circuit's judgment for UPS and remanded



EEOC Developments



EEOC Developments

- Class-based recruitment & hiring practices:
 - Criminal background checks
 - Credit checks
 - Other recruitment and hiring practices



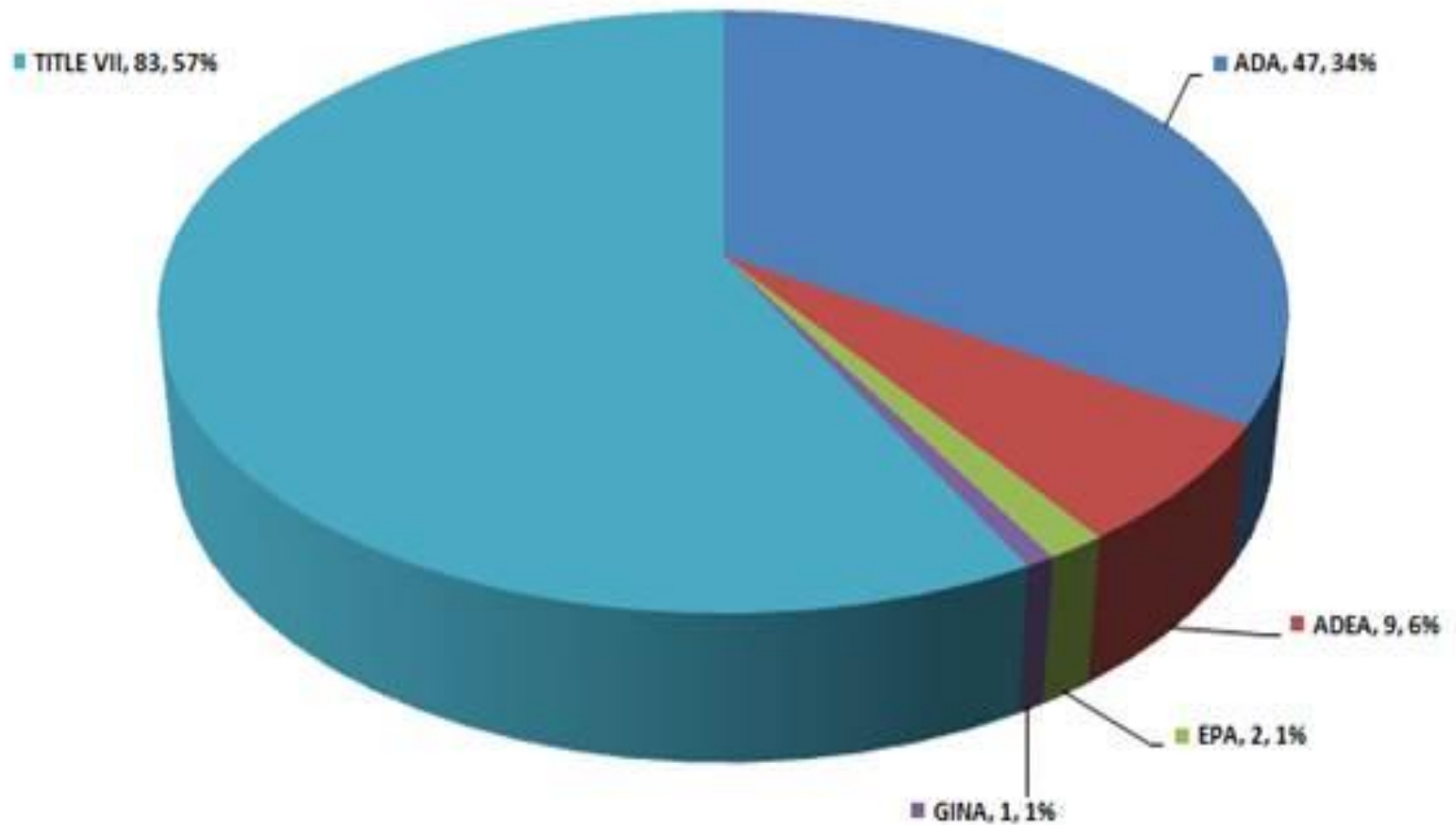
EEOC Developments

- Preserving access to the legal system:
 - Retaliation claims
 - Overly broad waivers
 - Settlement provisions restricting agency

EEOC Developments

- Emerging & Developing Issues:
 - LGBT Discrimination Claims
 - Demographic changes (e.g., aging workforce, growth of limited English speaking workforce)
 - ADA coverage issues (post-ADAAA)
 - Pregnancy accommodations under ADA

EEOC Cases Filed FY 2014 by Statute



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EEOC Developments

# of Charges Received by EEOC	FY 2010	FY 2011	FY 2012	FY 2013
Pregnancy Discrimination	4,029	3,983	3,745	3,541
All Statutes	99,922	99,947	99,412	93,727
Percentage of All Charges	4.03%	3.98%	3.76%	3.79%

EEOC Developments

- Since 2011, the EEOC has filed over 45 lawsuits involving pregnancy discrimination.
- The Commission has recovered approximately \$3,500,000 -- as well as injunctive and other case-specific “make whole” relief.



EEOC Developments

- LGBT Discrimination under Title VII
 - “Emerging and Developing Issues Priority”
 - No power to amend the law
 - Investigated as claims of sex discrimination
 - Transgender or gender-identity
 - Sexual orientation



EEOC Developments

- B.O.L.O. in 2015:
 - *EEOC v. Mach Mining* – U.S. – Conciliatory efforts
 - *EEOC v. Ford Motor* – 6th Cir. – ADA and telecommuting
 - 4/16/15 – EEO published a Notice of Proposed Rulemaking on the ADA's application to employer wellness programs.

EEOC Developments

Continue to Expect Aggressive Investigative Tactics.

- Extensive requests for information not germane to charge.
- Increased threat/use of subpoenas.
- Increased demand for on-site investigations.
- Increased number of witness interviews.
- Aggressive behavior in settlement negotiations.

EEOC Developments

Best Practices:

- Respond to request in the narrowest terms possible.
- Be careful when handing over personnel files; consider limiting the information sent to the EEOC from the personnel file.
- Prepare management for on-site interviews as if you were preparing for a deposition.
- Attend the interviews of non-management employees.

EEOC Developments

Increased Cross-Pollination of Agency Investigations

- EEOC conducts on-site investigation—Contacts DOL
- OSHA or OFCCP conduct on-site investigation—Contacts EEOC
- Aggressive enforcement posture for all agencies
- Tri-Agency Working Group—EEOC, DOJ, and DOL



OFCCP Update



Executive Orders

Minimum Wage

- Required to pay \$10.10/ hr
 - Effective January 1, 2015
 - Increases annually beginning January 1, 2016, as determined by Secretary of Labor
 - Future increases based on Consumer Price Index
- Tipped Employees, \$4.90/ hr
 - Effective January 1, 2015
 - Formula for annual increases until it is 70% of the minimum wage

Executive Orders

- No Retaliation for Pay Discussions/Complaints
 - Inquiring about, Discussing, or Disclosing compensation
 - Employee or applicant, self or other
- Already prohibited by NLRA
 - Section 7 of NLRA protects employee rights to discuss
 - Wages
 - Hours
 - Working Conditions
 - Considered “unfair labor practice” for employers to “interfere with, restrain, or coerce employees”

Executive Orders

- Compensation Data Tool (Equal Pay Report)
 - Directs DOL to adopt rules requiring summary pay data broken down by sex and race
- Who has to file?
 - EEO-1 Report
 - > 100 Employees
 - Gov't contract/subcontract/PO for at least \$50k for at least 30 days
 - Filed by March 31 of each year

Executive Orders

- Must include:
 - Total number of workers by job category, race, ethnicity, & sex;
 - Total W-2 wages for all workers by job category, race, ethnicity, & sex; and
 - Total hours worked by all employees by job category, race, ethnicity, & sex



Executive Orders

LGBT

- Specifies “sexual orientation and gender identity” as an element of sex discrimination
- No religious exemption
- Effective April 8, 2015



FLSA and FMLA Updates



Changes to Exempt Status

- Current salary minimum \$455/wk. = \$23,660/yr.
- Substantial increase is likely
- Between \$42,000-\$69,000/yr.
- Between \$807/wk. to \$1326/wk.



Required Lactation Breaks

ACA amended the FLSA to Require
“Lactation Break” (March 2013)

- *What:* “reasonable break time”
- *When:* **Each time** the employee needs to express breast milk for up to one year
- *Where:* “A place, other than a bathroom that is shielded from view and free from intrusion from coworkers and the public”



Lactation Breaks Cont'd

Who is covered?

- Employers with more than 50 employees
- Employers with less than 50 employees - Unless compliance constitutes an undue hardship



Medicinal Marijuana in the Workplace

- 23 states and D.C. have legalized medical marijuana.
- Can employers still drug test?
- Can employers still maintain a drug-free workplace?
- Do employers have to accommodate?

New Rule for Same-Sex Marriages

- Previously, only qualified for FMLA if in a state where same-sex marriage is recognized
- Now, all same-sex married couples entitled to FMLA leave regardless of state recognition
 - Definition of “spouse” amended
 - Rule change conforms with Supreme Court decision in *U.S. v. Windsor*
 - Effective as of March 27, 2015



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