

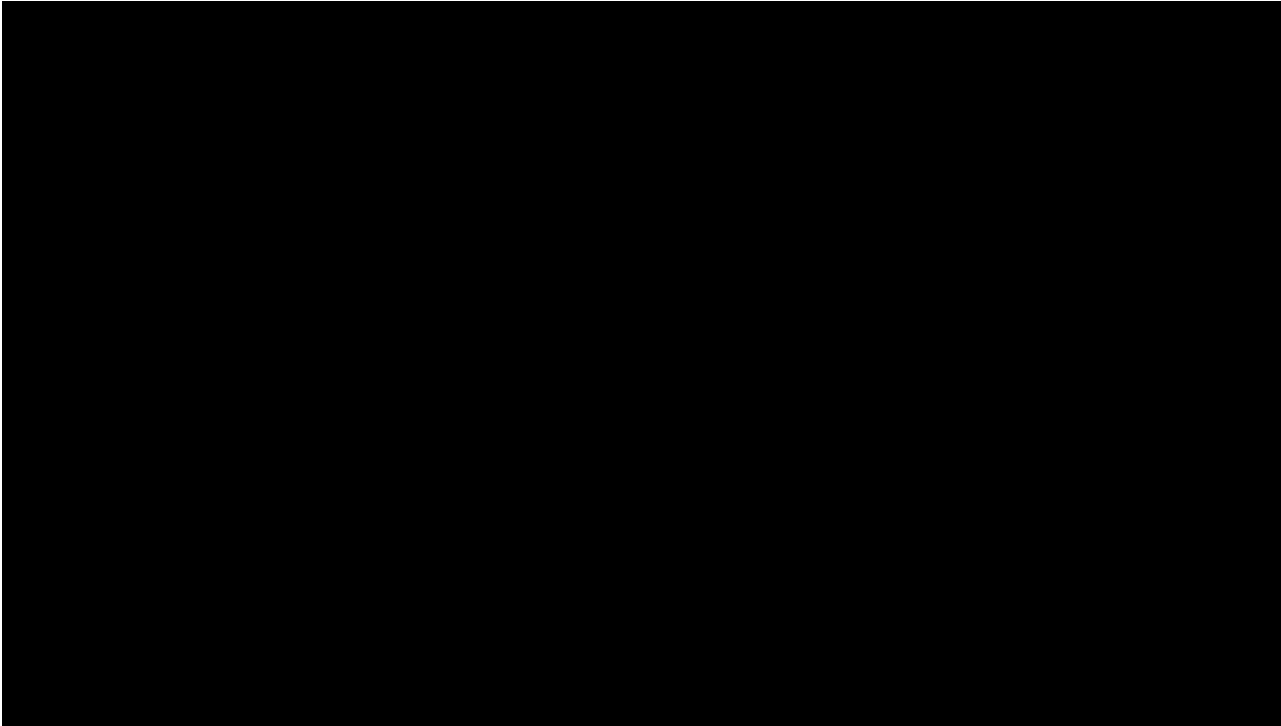


EMPLOYMENT LAW UPDATE



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EMPLOYMENT LAW UPDATE - AGENDA



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EMPLOYMENT LAW UPDATE - AGENDA

- ▼ **Politics in the Workplace**
- ▼ **FLSA Exemptions Update**
- ▼ **EEOC Trends**
- ▼ **Pregnancy Discrimination & Disability Leave**
- ▼ **Same-Sex/Transgender Issues in the Workplace**
- ▼ **NLRB and Employee Handbooks**
- ▼ **Wellness Programs – EEOC and Otherwise**
- ▼ **Benefits In Review**



Politics in the Workplace

- ▼ Campaign 2016! – Prepare for possible workplace disruption generated by political discussions and affiliations
- ▼ Federal Law
 - ▼ Private employers are not subject to free speech laws (public employers are)
- ▼ State Law
 - ▼ Alabama – Voting Leave
 - ▼ “On Duty Limitations” (Louisiana, California, Connecticut, South Carolina)
 - ▼ “Off Duty Limitations” (California, Colorado, New York, North Dakota)
- ▼ Action Steps: Employers should review their policies and procedures related to political speech, harassment, etc.
 - ▼ Consider whether it is necessary to communicate to employees regarding political speech
 - ▼ Update and post your harassment policies/complaint system
 - ▼ All or none approach is best – consistency is key (Example: Race Discrimination)



THE PUSH FOR HIGHER WAGES



FLSA'S WHITE COLLAR EXEMPTIONS

- ▼ **Executive**: \$455 per week; primary duty of management; supervise 2 or more FTEs
- ▼ **Administrative**: \$455 per week; primary duty of office/non-manual work directly related to management/operations of the business; and exercise of independent judgment/discretion over matters of significance to management/operations
- ▼ **Professional**: \$455 per week; performance of work requiring advance knowledge in a field of science/learning, obtained through a prolonged course of advanced, specialized intellectual instruction; consistent exercise of independent discretion/judgment
- ▼ **Computer Employee**: \$455 per week; employed as analyst, programmer, engineer; primary duty of design, development, or systems analysis
- ▼ **Outside Sales**: \$0 minimum salary; primary duty is to make sales away from the employer's workplace

DOL'S SOLUTION

- ▼ DOL proposed several changes to executive, administrative, professional and computer exemptions (white collar)
- ▼ Proposed rule would more than double the minimum salary to qualify for an executive, administrative, professional, or computer employee exemption from the current \$455 per week (\$23,660 per year) to *approximately* \$970 per week (\$50,440 per year)
 - ▼ Adjusted annually for wage inflation
 - ▼ DOL projects a \$2 billion cost to employers in Year 1, and substantial wage growth
- ▼ No proposal to change the duties tests applicable to the FLSA exemptions
- ▼ No proposal to increase minimum wage (for now)

TIMELINE FOR DOL'S SOLUTION

- ▼ Notice of Proposed Rulemaking (July 6, 2015) - Received more than 250,000 comments
- ▼ On March 14, 2016 – DOL sent the final draft to the Office of Management and Budget (OMB) for review
 - ▼ Prior DOL indications suggested this would occur in July
 - ▼ May be due to the Congressional Review Act and President Obama's upcoming departure
- ▼ Changes?
- ▼ Expected Effective Date?
 - ▼ May 2016 – Congressional Review Act
 - ▼ Labor Day – September 5, 2016?
 - ▼ November 1, 2016 – Just before the election?
 - ▼ January 1, 2017?

PRACTICAL CONSIDERATIONS

- ▼ Not likely to achieve DOL's stated goal of increasing wages
- ▼ Most likely to affect front line managers throughout almost every industry
- ▼ First challenge will be to determine options for previously exempt employee who is no longer exempt:
 - ▼ Difficult to convert salary to an hourly rate AND account for overtime
 - ▼ Employers need to collect data to know how much overtime such an employee might work
 - ▼ Evaluate whether to take the full-time position and break it into 2 or more part time positions to avoid overtime/benefit costs
- ▼ Second, if you do convert formerly exempt employee to non-exempt, how will you account for his/her time?
 - ▼ Responding to after hours demands, calls, e-mails
 - ▼ Other off-the-clock work
 - ▼ Creating time cards and having them approved

ACT NOW...

- ▼ Evaluate the effect on staffing, policy, compensation, benefits, culture, morale, production, supervision, customer contracts, and budgets
- ▼ Find out who in your organization is classified exempt and on what basis.
- ▼ If classified executive, administrative, professional, or computer employee exempt AND employee earns less than \$60,000 per year, track these employees on a spreadsheet.
- ▼ Meet with these employees and implement a time-keeping procedure ASAP. Have them turn in hours (may need to define what they should record) in a manner in which hours can be tracked on a weekly basis.
- ▼ Do not use the data to pay anyone differently—at least not yet.
- ▼ Evaluate the data to determine what an effective hourly rate might need to be in order to account for the employee's probability of working overtime.
- ▼ Experiment with methods to control overtime for these employees.
- ▼ Use your data to establish potential models for how your organization might respond if and when DOL's rule becomes final.

EEOC Trends

- ▼ EEOC Secured Over \$525M in 2015
- ▼ More than \$356.6 million through mediation, conciliation and settlements in private sector and state and local government workplaces (\$60.5 million more than 2014).
- ▼ Additional \$65.3 million in litigation recoveries (\$42.8 million more than 2014's figure).
- ▼ \$105.7 million for federal employees and applicants
- ▼ Received 89,385 charges
- ▼ Filed 142 discrimination lawsuits
- ▼ Recovered more than \$33.5 million in remedies through the resolution of 268 systemic investigations prior to litigation (\$20.5 million more than it recovered through the 260 systemic investigations completed in 2014)
- ▼ At the end of the year, the agency said it had a total of 218 active cases on its docket

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Receipts	80,680	79,591	77,444	79,898	80,840	84,442	81,293	79,432	75,428	75,768	82,792	95,402	93,277	99,922	99,947	99,412	93,727	88,778	89,385
Resolutions	106,312	101,470	97,846	93,672	90,106	95,222	87,755	85,259	77,352	74,308	72,442	81,081	85,980	104,999	112,499	111,139	97,252	87,442	92,641
Resolutions By Type																			
Settlements	3,992	4,646	6,094	7,937	7,330	8,425	8,401	8,665	8,116	8,500	8,834	8,831	8,634	9,777	10,234	9,524	8,625	7,411	8,221
	3.8%	4.6%	6.2%	8.5%	8.1%	8.8%	9.6%	10.2%	10.5%	11.4%	12.2%	10.9%	10.0%	9.3%	9.1%	8.6%	8.9%	8.5%	8.9%
Withdrawals w/Benefits	3,635	3,219	3,593	3,753	3,654	3,772	3,700	3,827	4,072	4,052	4,122	4,790	4,892	5,391	5,689	5,438	5,497	5,162	5,301
	3.4%	3.2%	3.7%	4.0%	4.1%	4.0%	4.2%	4.5%	5.3%	5.5%	5.7%	5.9%	5.7%	5.1%	5.1%	4.9%	5.7%	5.9%	5.7%
Administrative Closures	30,077	27,118	23,570	19,156	18,636	19,633	15,262	15,416	12,659	12,298	12,865	16,615	16,189	17,330	18,053	16,459	15,456	14,748	15,440
	28.3%	26.7%	24.1%	20.5%	20.7%	20.6%	17.4%	18.1%	16.4%	16.6%	17.8%	20.5%	18.8%	16.5%	16.0%	14.8%	15.9%	16.9%	16.7%
No Reasonable Cause	64,567	61,794	58,174	54,578	51,562	56,514	55,359	53,182	48,079	45,500	42,979	47,152	52,363	67,520	74,198	75,511	64,159	57,376	60,440
	60.7%	60.9%	59.5%	58.3%	57.2%	59.3%	63.1%	62.4%	62.2%	61.2%	59.3%	58.2%	60.9%	64.3%	66.0%	67.9%	66.0%	65.6%	65.2%
Reasonable Cause	4,041	4,693	6,415	8,248	8,924	6,878	5,033	4,169	4,426	3,958	3,642	3,693	3,902	4,981	4,325	4,207	3,515	2,745	3,239
	3.8%	4.6%	6.6%	8.8%	9.9%	7.2%	5.7%	4.9%	5.7%	5.3%	5.0%	4.6%	4.5%	4.7%	3.8%	3.8%	3.6%	3.1%	3.5%
Successful Conciliations	1,041	1,343	1,578	2,040	2,365	1,940	1,432	1,217	1,319	1,141	1,137	1,128	1,240	1,348	1,351	1,591	1,437	1,031	1,432
	1.0%	1.3%	1.6%	2.2%	2.6%	2.0%	1.6%	1.4%	1.7%	1.5%	1.6%	1.4%	1.4%	1.3%	1.2%	1.4%	1.5%	1.2%	1.5%
Unsuccessful Conciliations	3,000	3,350	4,837	6,208	6,559	4,938	3,601	2,952	3,107	2,817	2,505	2,565	2,662	3,633	2,974	2,616	2,078	1,714	1,807
	2.8%	3.3%	4.9%	6.6%	7.3%	5.2%	4.1%	3.5%	4.0%	3.8%	3.5%	3.2%	3.1%	3.5%	2.6%	2.4%	2.1%	2.0%	2.0%
Merit Resolutions	11,668	12,558	16,102	19,938	19,908	19,075	17,134	16,661	16,614	16,510	16,598	17,314	17,428	20,149	20,248	19,169	17,637	15,318	16,761
	11.0%	12.4%	16.5%	21.3%	22.1%	20.0%	19.5%	19.5%	21.5%	22.2%	22.9%	21.4%	20.3%	19.2%	18.0%	17.2%	18.1%	17.5%	18.1%
Monetary Benefits (Millions)*	\$178.7	\$169.2	\$210.5	\$245.7	\$247.8	\$257.7	\$236.2	\$251.7	\$271.6	\$229.9	\$290.6	\$274.4	\$294.2	\$319.4	\$364.7	\$365.4	\$372.1	\$296.1	\$356.6

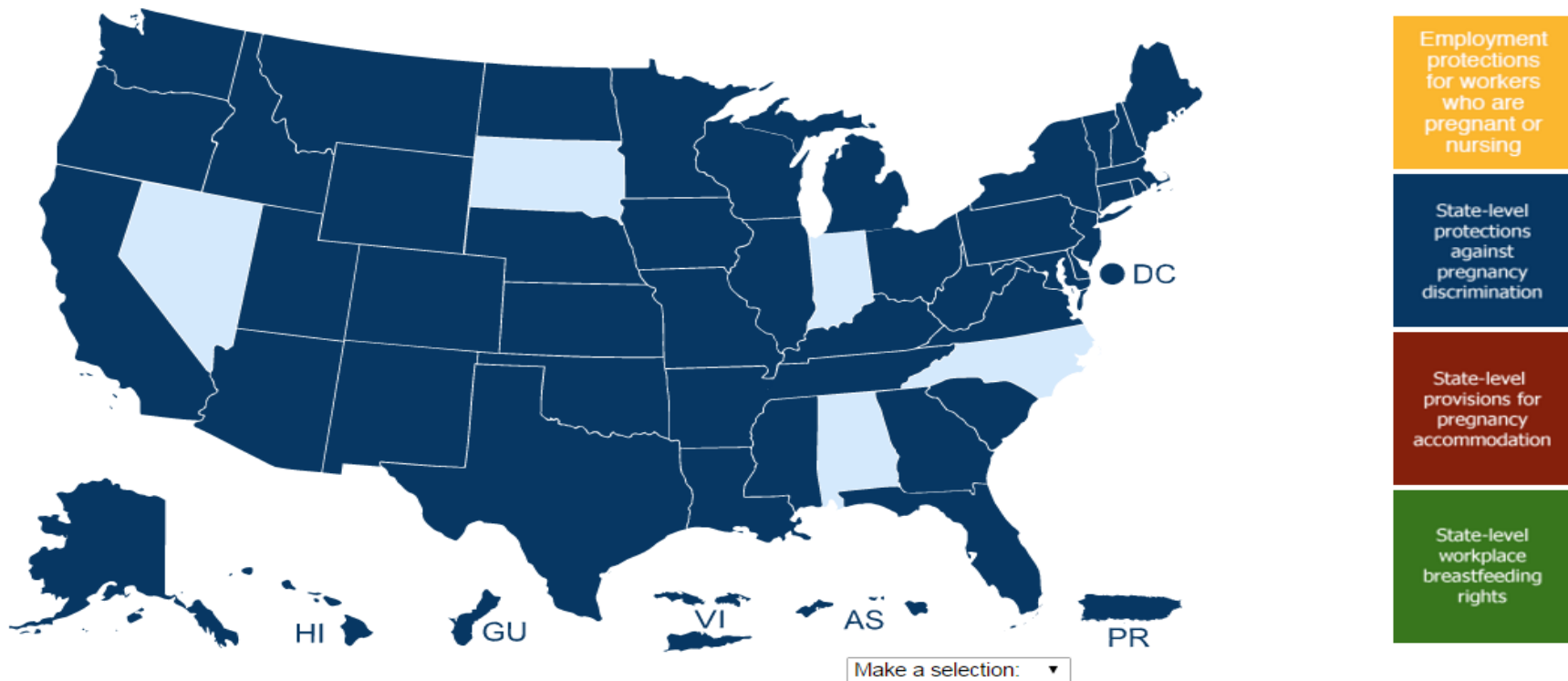
EEOC Releases New Guidance on Unpaid Leave as a Reasonable Accommodation Under the ADA

- ▼ Employers must provide employees with disabilities access to leave as an accommodation on the same basis as similarly situated employees without disabilities
- ▼ May also be required to modify its policies to provide leave for a disability even where the employer does not offer leave to other employees because “the purpose of the ADA’s reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work” (emphasis in original)
- ▼ Common Issues:
 - ▼ Undue hardship
 - ▼ Requests for “indefinite” leave
 - ▼ Maximum leave policies
 - ▼ Reassignment
 - ▼ Return to work issues – including so-called “100% healed” policies

Workplace Pregnancy Rights Around the Country

- ▼ 48% increase in pregnancy related EEOC charges from 1997-2014
- ▼ Many states have taken steps to provide protections, including by:
 - ▼ Expanding upon FMLA
 - ▼ Reducing coverage threshold for FMLA coverage to as low as 10 employees
 - ▼ Enacting laws allowing for more generous maternity leave lengths that allow longer absences, time away for raising children
 - ▼ Requiring paid leave
 - ▼ Treating pregnancy as a temporary disability eligible for paid benefits under disability insurance laws or as a disability subject to reasonable accommodations absent an undue hardship
- ▼ Pregnant Workers' Fairness Act (H. 1769/S. 1512) is a model law that is making its way around the states and is under review in Congress

State-Level Protections Against Pregnancy Discrimination



On the map above, the darkly shaded states and territories represent those which offer state-level protections against pregnancy discrimination. Click on those states to learn more about these laws.

Source: <https://www.dol.gov/wb/maps/2.htm>

When does an employer have a duty to accommodate pregnancy?

▼ FMLA

- ▼ 12 weeks unpaid leave

▼ Pregnancy Discrimination Act (PDA)

- ▼ prohibits sex discrimination on the basis of “pregnancy, childbirth, or related medical conditions” and
- ▼ Employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”

▼ ADA?

- ▼ Not technically covered, but...

Young v. United Parcel Service, 135 S.Ct. 1338 (2015)

- ▼ All UPS drivers required to lift up to 70lbs, although Young's duties usually required delivering letters and small packages
- ▼ Peggy Young, part time delivery driver, after becoming pregnant, presented a doctor's note with a 20lb max lifting restriction
- ▼ She asked for an accommodation of light duty
- ▼ UPS refused the light duty and instructed her to remain on leave, because lifting over 20lbs was an essential function of the job
- ▼ UPS maintained a light duty work program and provided accommodations for employees who experienced on-the-job injuries, ADA disabilities, and who had lost their DOT certifications
- ▼ Young sued for discrimination under PDA

TAKEAWAYS

- ▼ Court held that, in the context of accommodation, a plaintiff can show pretext by demonstrating that an employer's policies impose a "significant burden" on pregnant workers and that the employer's justifications are not "sufficiently strong."
 - ▼ The legitimate reason may not be based on the expense or inconvenience of accommodating pregnant employees on similar terms as non-pregnant employees
- ▼ ADA standard not required under the law
 - ▼ No requirement to always provide a reasonable accommodation unless it presents an undue hardship
- ▼ Although pregnancy is not an ADA disability (yet), even though pregnancy complications are covered as temporary impairments, would it not be more prudent to treat it like one?

Transgender Issues in the Workplace



- ▼ OSHA - A Guide to Restroom Access for Transgender Workers
 - ▼ “Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.”
 - ▼ Focus is on OSHA’s Sanitation Standard (1910.141)
 - ▼ Suggested alternative approaches:
 - ▼ Single-occupancy gender-neutral (unisex) facilities; and
 - ▼ Use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

Transgender Issues in the Workplace



- ▼ Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sex, including pregnancy, gender identity, and sexual orientation
- ▼ EEOC – Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964
 - ▼ Denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination
 - ▼ Employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure
 - ▼ Employer cannot restrict transgender employees to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it)

Same-Sex Marriage Issues in the Workplace

- ▼ *Obergefell v. Hodges* – States must perform and recognize same-sex marriage
- ▼ Constitutional protections apply only between governments and their citizens—such rights are not guaranteed from private employers
- ▼ Still no federal statute providing cause of action for discrimination on the basis of sexual orientation
- ▼ Benefits?
 - ▼ Public Employers - Likely required to treat same-sex married couples equally for purposes of benefits eligibility
 - ▼ Private Employers - Does not change ERISA requirements for private employers

SAME SEX MARRIAGE – BENEFIT IMPLICATIONS

▼ ERISA Preemption of State Law

- ▼ ERISA preempts state law with regard to self-funded plans.
- ▼ Because ERISA allows employers to define spousal eligibility (“spouse” is not defined in ERISA for purposes of health and welfare benefits), ERISA preemption generally precludes state law from requiring same-sex spousal coverage
- ▼ Indirect Regulation - State laws applicable to insurance carriers may indirectly require same-sex spousal coverage for fully-insured plans

▼ Health Plans:

- ▼ If same-sex spouses covered under a health plan, which is not required, treat as spouses for purposes of COBRA, HIPAA and other federal laws that apply to the benefits

▼ Pre-Tax Premiums

- ▼ If employer chooses to allow coverage of same-sex spouse under health plan, then required to allow same-sex spouse premiums to be paid pre-tax under any cafeteria plan offered by employer

SAME SEX MARRIAGE – BENEFIT IMPLICATIONS

- ▼ **Take-Away:** Define “spouse” carefully in plan materials
- ▼ **BEWARE...**
 - ▼ Potential litigation and negative publicity
 - ▼ Protection for “benefits” of marriage to same-sex couples
- ▼ **Wait & See...**
 - ▼ The Court’s reasoning is similar to the reasoning underlying constitutional protections based on gender, race, disability, etc. (*i.e.*, equal protection and due process)
 - ▼ Expect agency action at the local, state, and federal level

NLRB Continues Expansion of Jurisdiction

- ▼ National Labor Relations Act applies to union and non-union employees alike.
- ▼ Section 7 gives virtually all private sector employees the right to engage in “concerted” and “protected” activities.
- ▼ NLRB has repeatedly taken the position that “overly broad” employment policies can hinder this right – Social Media Policies
- ▼ Latest NLRB rulings invalidate routine handbook policies

NLRB Continues Expansion of Jurisdiction

- ▼ For example, the Board recently found the following policies to be overly broad and unlawful:
 - ▼ A “Workplace Conduct” policy requiring that employees “maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, client, co-workers, and management.”
 - ▼ A rule prohibiting employees from making recordings in the workplace in an effort to prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information.
 - ▼ A policy prohibiting conduct that “impedes harmonious interaction and relationships.”
 - ▼ A rule that barred “negative or disparaging comments” of employees or physicians.
 - ▼ A rule against “never swearing,” “especially about clients.”
- ▼ Don’t Panic...

EEOC Wellness Programs – Proposed Final Rules

- ▼ Issued Monday, May 16 (yesterday)
- ▼ Address wellness program requirements under ADA and GINA
 - ▼ ADA & GINA include an exception related to employee health programs and voluntary health or genetic services, respectively—these include wellness programs
- ▼ Rules only apply to programs that ask employees to respond to genetic or disability-related inquiries and/or undergo medical examinations
- ▼ Effective Date: First day of the first plan year that begins on or after January 1, 2017
- ▼ Includes HIPAA-like confidentiality requirements and safeguard requirements

Wellness Programs – EEOC ADA Regs

- ▼ Voluntary - must provide a notice that explains the medical information that will be obtained, how it will be used, who will receive it, and the restrictions on disclosure; and must comply with the incentive limits described in the rule.
- ▼ Reasonably Designed – must be reasonably designed to promote health or prevent disease if the program
 - ▼ Not reasonably designed if it collects health information but does not use it to provide follow-up information or advice to individual participants or to design a program that addresses at least some conditions identified in the responses (e.g., a program to help manage diabetes if aggregate information shows that a significant number of employees in the employer's workforce have diabetes).
- ▼ Limit on Incentives – Generally, limited to 30% of total cost of self-only coverage

Wellness Programs – EEOC GINA Regs

▼ Inducements

- ▼ Employer may not offer an inducement as part of a wellness program in exchange for genetic information about the employee or children
- ▼ Employer may offer a limited inducement to an employee whose spouse provides current or past health status information as part of a wellness program.
- ▼ Inducements may be financial or in-kind (e.g., premium reduction, time-off awards, prizes, and other items of value).
- ▼ Same 30% limit as ADA regs

▼ Authorization – Employer must obtain prior, knowing, written, and voluntary authorization from the spouse





Wellness Programs & EAPs

- ▼ **ACA Wellness Program Requirements**
- ▼ **ERISA Considerations**
- ▼ **Group Health Plan Requirements**
- ▼ **COBRA Considerations**
- ▼ **HIPAA Privacy and Security Requirements**

Benefits In Review

- ▼ **Renewed Attention to Misclassification of Employees as Contractors**
- ▼ **Republican House members win Obamacare funding challenge**
- ▼ **ACA Reporting – June 30, 2016**
- ▼ **Form 5500s & “Small” Plan Exception**
 - ▼ **Only for fully-insured or unfunded plans**

ANY
QUESTIONS
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