Volume 7 : Issue 6

HR PROFESSIONALS MAGAZINE™

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Highlights of **2017 SHRM Talent Management Conference & Exposition** in Chicago April 24-26

Don't Write Off **Obamacare** Yet!

7th Circuit Holds Sexual Orientation Now a **Protected Class**

Hank Jackson, President & CEO, Society for Human Resource Management

DOL Fiduciary Rule

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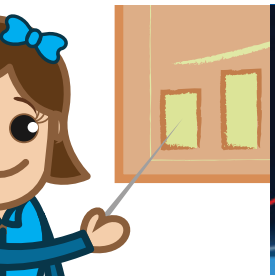

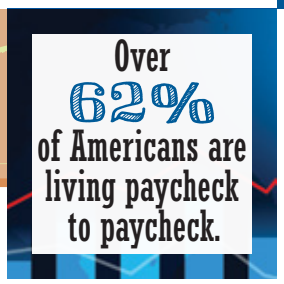

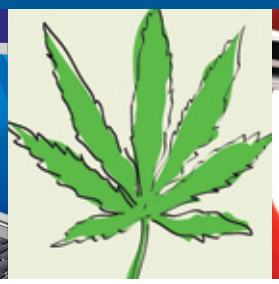

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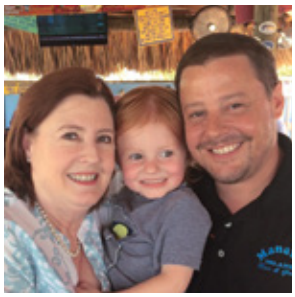
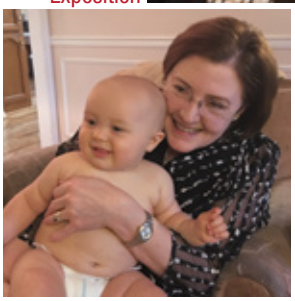
At Trump International Hotel & Tower in Chicago during the SHRM Talent Management Conference & Exposition



With son Thomas and grand, "TJ," in Fort Pierce during the St. Lucie HRA and Treasure Coast HRA Joint Conference



With our youngest grand, "Bo," six months old in Birmingham during the ALSHRM State Conference

What an honor to have **Hank Jackson, President and CEO of the Society for Human Resource Management,** on our June cover. I know you will enjoy reading about his fabulous career on Page 5. I have had the pleasure of meeting Hank in person, and I must say he is a very gracious and warm person. I want to extend a special thanks to him for this honor. It is such a pleasure working with the SHRM staff and especially the great public affairs team at **SHRM.**

The June issue is one of my favorites because we feature the **Super Lawyers in Labor and Employment Law from Alabama, Arkansas, Georgia, Kentucky, Mississippi and Tennessee.** As HR professionals we work with these attorneys every day. This is an opportunity to spotlight them and to say thank you for all you do for the HR profession. We could not do our jobs without you! If you see your attorneys listed in this special section, be sure to reach out and congratulate them on achieving this very prestigious honor.

May was another exciting month of SHRM Conferences beginning with the **WTSHRM 7th Human Resources & Employment Law Spring Conference on May 10** in Jackson. The Conference was sponsored by the **West Tennessee SHRM Chapter** in coordination with **Rainey, Kizer, Reviere & Bell, P.L.C.,** with offices in Jackson and Memphis. We always enjoy covering the Spring and Fall Conferences, which are held at the Union University Carl Grant Center in Jackson. I hope you enjoy the highlights of the Conference on Page 47.

On May 15 we took a road trip down to Birmingham for the **2017 ALSHRM Conference & Expo,** which was May 16-17 at the Sheraton Birmingham and Birmingham Jefferson Convention Center. It was our first time to cover this conference. What a great time we had meeting Birmingham SHRM State Council and all the SHRM members at the Conference! We will have full coverage in our July issue. But you can preview the coverage on Facebook, LinkedIn and Twitter @cythomps now. It was also great fun being in Birmingham and visiting with the grands while we were there.

We flew from Birmingham to West Palm Beach on May 18 for the **Joint St. Lucie HRA and Treasure Coast HRA Conference in Florida** on May 19. I was honored to be the closing keynote speaker at this excellent Conference held at the Indian River State College in Fort Pierce. My topic was "Strategic Leadership - the Alpha Model." We caught an opportunity to visit our grandson there.

We took another road trip on May 23 down to Jackson to cover the **Mississippi Business Group on Health** meeting in Jackson, MS, on May 24. Great to see Murray Harber, Executive Director, and the folks with Southern Farm Bureau Life Insurance who are charter sponsors of HR Professionals Magazine.

In this issue we also have highlights from the **SHRM Talent Management Conference and Exposition held April 24-16** in Chicago. What a great city to visit and tour! I look forward to seeing everyone in New Orleans at the **Annual SHRM Conference June 18-21,** or maybe we will run into you on Bourbon Street or in one of the many fine restaurants there. We will have highlights of the **TNSHRM Strategic Conference in Nashville,** the **TPMA Conference in Chattanooga,** and the **ALSHRM Conference in Birmingham** in the July issue. Our July issue will feature **educational programs for HR professionals.**

Watch your email for our next complimentary **HRCI ISHRM Virtual Event** sponsored by **Data Facts on June 29.** The topic is **"Gen Z in the Workplace."** Watch your email for your invitation! If you are not currently receiving our monthly invitation, you can subscribe on our website at www.hrprofessionalsmagazine.com.

Hank JACKSON

HENRY G. (HANK) JACKSON
President & Chief Executive Officer

Jackson came to SHRM from Howard University in Washington, D.C., where he was senior vice president/chief financial officer and treasurer of the university. In this role, he oversaw the financial well-being of the university's 11 schools and colleges, hospital, public television station, and commercial radio station. He served in several previous positions at Howard University, including comptroller, deputy comptroller, and systems accountant, before becoming senior vice president.

Prior to joining Howard University, Jackson worked in public accounting with Hurdman Main and KMPG as senior auditor and a computer audit specialist. For several years, he was a consultant for the Southern Association of College and University Business Officers.

Jackson earned his Bachelor of Science degree in accounting from Stonehill College in Massachusetts. He is a certified public accountant.

Henry G. (Hank) Jackson is the president and CEO of the Society for Human Resource Management (SHRM), the world's largest HR professional Society. He previously served as the Society's interim president and CEO, and as chief global finance and business affairs officer.

Under Jackson's leadership, the Society has grown to a record 290,000 members and hosted its largest-ever Annual Conference and Exposition. To better serve a diverse and more complex HR profession, the Society expanded its global reach and impact, formed partnerships with the Council for Global Immigration and SHRM's Executive Network, HR People and Strategy, and opened its first state office in California, home to the largest concentration of HR professionals in the U.S.

During Jackson's tenure, the Society developed and launched its competency-based certification—the accredited SHRM-Senior Certified Professional and SHRM-Certified Professional—to further advance the HR profession. Within two years, the number of SHRM-certified professionals grew to more than 100,000 worldwide.

At the helm of SHRM during the economic downturn, Jackson spearheaded the Society's initiatives on pressing HR and employment issues such as workforce readiness, veterans' employment, and long-term unemployment. The Society has also strengthened its position as a highly sought-after voice on workplace public policy, as HR and workplace issues have increasingly been part of national discussions and public policy debates.

Jackson believes that the HR profession is at an exciting and pivotal moment, calling it the "Decade of Human Capital." Businesses are beginning to better understand and embrace human resource management as the most critical contributor to the strategic direction of their organizations, and the HR profession is being propelled into a key business leadership position.

A long-tenured SHRM employee, Jackson has ensured as CEO that the organization remains an employer of choice and invests in a world-class workplace and work environment. In 2013, *Washingtonian* magazine recognized SHRM as a Great Place to Work in the Washington, D.C. area. ■

2017 SHRM **Talent** Management

HYATT REGENCY CHICAGO

Conference & Exposition

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1


2


3

1 Letty Kluttz, SHRM-SCP, director conference programming & development at SHRM, welcomes attendees. **2 Elissa O'Brien**, SHRM-SCP, vice president, membership at SHRM, discussed SHRM's initiatives. **3 Molly Fletcher**, CEO and sports agent, was the opening session keynote speaker. Her topic was "Transform Your Business Relationships."


4


5

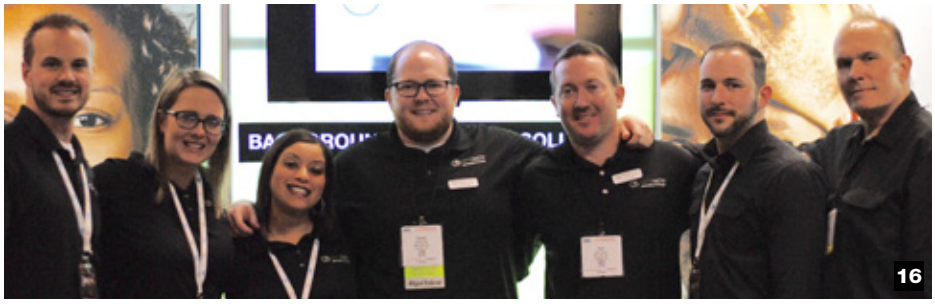

6

4 David Novak, executive chairman and former CEO of Yum! Brands and author, was a keynote speaker on Tuesday. His topic was "Innovate. Impact. Interact. Initiate." **5 Frans Johansson**, innovation expert and author, was the closing session speaker on Wednesday. He spoke on "The Rise of the New Intersectional Leader." **6 Kris Dunn**, chief people officer, Kinetix, Atlanta, GA, presented "Seven Ways Recruiters Can Deal More Effectively With Difficult Hiring Managers."

7 Whitney Martin, president, ProActive Consulting, Louisville, KY, discussed "The Death of Guess: Using Data to Make Better People-Related Decisions." **8 Ann Tardy**, president, LifeMoxie, Red Bank, NJ, spoke on "Strategic Mentoring to Engage People, Develop Talent & Achieve Business Objectives." **9 Paul Endress**, founder and CEO, Maximum Advantage, Harrisburg, PA, presented "Hiring Superstars: Using Assessments to Put the Right Person in Every Job."

10 Carol Quinn, CEO, Hire Authority, Delray Beach, FL, discussed "The Art of the Interview." **11 Mary Gormandy White**, SHRM-SCP, co-founder/director of talent development, MTI Business Solutions, Mobile, AL, spoke on "Creative (and Free!) Ways to Make the Most of LinkedIn as a Recruiting Tool." **12** "Presenting with Impact: Nine Fundamentals to Elevate Any Presentation" was presented by **Penny Zenker**, CEO, SmartMoves Coaching, Devon, PA.

13 Marjorie Brody, president/CEO, BRODY Professional Development, Jenkentown, PA, discussed "Who Needs a Title? Influence Without Authority." **14 Dr. Lepora Menefee**, senior director, talent management, Equifax, Mableton, GA, presented, "Ditch the Performance Evaluation Tool! Let's Talk Leading Instead of Managing Performance." **15 Paul Falcone**, vice president, human resources, Cox Communications, Inc., La Jolla, CA, spoke on "Redesigning Your Performance Review Template to Drive Individual and Organizational Change."



16 The Data Facts, Inc. Team at the SHRM Talent Management Exposition.

What Hively's Impact on Title VII Could Mean for You

By FRANK L. DAY, JR.

What is "sex?" Much ink has been spilled on this subject, mainly by tabloid magazines that have long sought to offer their readers a better understanding of this three letter noun. Today the quest to define and understand sex finds its way to HR Professionals Magazine courtesy of the Seventh Circuit's eight to three landmark decision in *Hively v. Ivy Tech Community College of Indiana,* which adopted a definition of sex that, for the first time, made sexual orientation a protected category under Title VII of the Civil Rights Act of 1964.

Title VII prohibits discrimination in employment "because of . . . race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e *et seq.* The term "sex" is not defined in the statute, and the legislative history includes few references that can be used to help determine what Congress intended. Hence, it has fallen on the courts to determine Congressional intent by relying on the rules of statutory interpretation.

Since the statute was adopted, the case law has expanded the definition of what qualifies as discrimination on the basis of sex, but, until recently, the appellate courts for each circuit had unanimously held that "sex" is not the same as "sexual orientation." Although LGBTQ individuals were protected under the laws adopted in many states, federal appellate courts had consistently held that the prohibition on sex discrimination contained in Title VII did not provide such protections. In 2015, the EEOC adopted the view that sexual orientation is protected under Title VII, but its regulations do not have the force of law.

On several occasions, Congress has considered expanding the reach of Title VII to protect sexual orientation. The Equality Act of 1974 was the first legislative attempt to add sexual orientation as a protected category. Subsequently, in 1994, the Employment Non-Discrimination Act sought to expand the protections provided by Title VII. These legislative efforts failed. Accordingly, until *Hivley,* federal courts continued relying on existing precedent to hold that sexual orientation is not a valid basis for a Title VII discrimination claim.

The majority in *Hivley* acknowledged the history of the issue and concluded that the prohibition of discrimination on the basis of sex is broad and that it encompasses sexual orientation. The opinion explains the break with the historic understanding of the term "sex" by stating that the Congress that adopted the law "may not have realized or understood the full scope of the words it chose."

In a concurring opinion, Judge Posner agreed with the outcome, but he disagreed with the rationale. Specifically, Posner stated that it is more intellectually defensible for the court to openly acknowledge that it is breathing new life into the statute by applying the modern definition of sex rather than suggesting that the statute was always broad enough to prohibit discrimination on the basis of sexual orientation, even if Congress did not realize it at the time.

Three judges dissented, explaining that they do not believe it is consistent with the role of the judiciary to reinterpret the law in such a way as to make sexual orientation a protected category, and they rejected the reasoning of the majority. In opposition, the dissent argued that sexual orientation is not a male or female trait and that it therefore cannot qualify as a form of discrimination on the basis of sex. Hence, the dissent viewed the majority holding as amending Title VII, which it viewed as a Congressional function.

Although the *Hivley* decision holds that sexual orientation discrimination is a prohibited form of sex discrimination, this outcome only applies to the Seventh Circuit, which includes Illinois, Indiana, and Wisconsin. No other federal circuit courts of appeal that have addressed the issue recognize claims of sexual orientation discrimination under Title VII as valid. Nonetheless, the *Hivley* decision will have a national impact as it provides a basis in law for judges to revisit existing precedent and will permit them to possibly re-decide whether Title VII's protections cover sexual orientation. This trend has already started.

Since the *Hivley* decision, the Second Circuit Court of Appeals in *Christiansen v. Omnicon Group* held that sexual orientation discrimination is not a prohibited form of sex discrimination, but the judge who authored the opinion noted that the precedent on point should be revisited. The plaintiff in that case has now petitioned for an *en banc* review from the Second Circuit, which would allow the appellate court as a whole to overrule the prior precedent just as the Seventh Circuit did in *Hivley.* The Second Circuit has not yet ruled on the petition for *en banc* review. Nonetheless, a federal district court judge within the circuit recently broke from the controlling Second Circuit case law and held in *Philpott v. State of New York* that sexual orientation discrimination is a form of prohibited discrimination. Although the district court's decision does not apply to the circuit as a whole, it does increase the odds that the Second Circuit might review the issue *en banc.* Companies operating in the Second Circuit (New York, Connecticut and Vermont) should pay special attention to the *Christiansen* case and other cases presently pending in the Circuit that address LGBTQ rights. Given the outcome in *Philpott,* employers who are currently in the early stages of litigation may want to reconsider the cost effectiveness of pre-answer motion practice in LGBTQ-related claims.

Employers should continue to monitor the Circuit Courts as they further develop the boundaries of Title VII as related to sexual orientation discrimination. Although the *Hivley* decision offers new protections under Title VII, many employers are already subject to state laws that protect LGBTQ rights. It is generally a good rule for employers to (a) explicitly prohibit sexual orientation discrimination and harassment in the workplace; (b) provide their employees with a mechanism for bringing such complaints of discrimination or harassment to the employer's attention; and (c) create thorough investigation procedures for management to utilize if such complaints are received. Such policies make sense even for companies that operate only in states that do not prohibit discrimination on the basis of sexual orientation, since any adverse decision made on the basis of an employee's failure to conform to gender stereotypes can qualify as discrimination on the basis of sex under Title VII and lead to liability.

Employers should also take note that while these recent cases have focused on sexual orientation discrimination and harassment, the holdings will likely impact other LGBTQ issues in the employment setting. Finally, covered federal contractors remain subject to the Obama-era Executive Order prohibiting LGBTQ workplace discrimination against employees working on covered contracts.

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Top 5 Things
Plan Administrators Should Know About the DOL Rule

By JEANNE J. FISHER

Just days before implementation of the long-awaited Fiduciary Rule, the Department of Labor announced a 60 day delay. Now it sort of seems as though all of Washington is taking bets on whether or not the rule will be implemented in its current form. Secretary of the Labor Department, Alexander Acosta, has maintained his poker face despite multiple requests for his opinion on the matter, and it's almost impossible to predict how this will end.

Despite the political delay, just anticipation of the rule has already led to significant changes in the industry. A report commissioned by the Financial Services Institute predicted that compliance with the rule would cost broker-dealers between $1.1 and $16.3 million. By August of last year Ameriprise had already reported spending $11 million and assigning 400 staff to training and compliance. For the last couple of years, firms have been full-steam ahead designing new products, restricting service models, training staff and updating policies and procedures to be compliant with the rule. Any firm serious about being compliant had already implemented significant changes by April 4th (the day the DOL announced the delay). Furthermore, it's highly unlikely firms will do an about-face and unwind all of the changes they spent so much time and money on.

Not to be overlooked, is the increasing awareness of plan sponsors and administrators. "Fiduciary" has been the buzzword the past several years and it's not uncommon for plan sponsors to ask outright if the advisor is serving as a fiduciary. Fidelity cited "Concerned about fiduciary duties" as the number one reason why plan sponsors were looking to add an advisor to their 401k plan in 2016.

The very composition of 401k plans has also evolved over the past few years. In 2015, passively managed funds took the title from actively managed funds and accounted for 51.8% of all plan assets. The surge in passive funds can be attributed to the increasing pressure of lowering overall plan expenses. We've also seen a 35% increase in zero-revenue sharing line-ups over the last 5 years as advisors shy away from revenue-sharing and towards increased fee-transparency. The threat of the DOL Fiduciary Rule is encouraging advisors toward level compensation and avoiding the conflict of interest that arises when a lineup is composed of funds with varying revenue sharing.

So regardless of the rule actually being implemented politically, you can be sure some in the industry are already striving to evolve to the higher fiduciary standard. We've identified the top 5 things we believe you should be aware of as a plan administrator.

1. **You Too May Be a Fiduciary** – The rule centers on advisors and labeling anyone who provides investment advice on a qualified plan a fiduciary. Keep in mind that anyone with discretion over a plan is held to a fiduciary standard. If you exercise any control over the plan, make decisions or vote on a committee, you are also held to the high standard and expected to act in the best interest of the plan participants and their beneficiaries. Fiduciaries are personally liable for fulfilling this duty.

2. **May Require New Paperwork and Advisor Compensation May Change** – There are different ways advisors can choose to comply with the rule, and one of the easiest is to move to flat or levelized advisory fee. Doing so may require additional paperwork, changes to the underlying fund line-up or new service contracts.

3. **The Rule Could be Considered a "Double-Edged Sword"** – The intent of the rule is certainly pure, but it can place additional pressure on the plan sponsor. The DOL is requiring advisors to explicitly state the level of service they are providing, their exposure as a fiduciary and the cost for their services. Now that you are armed with the information, you will need to thoroughly understand the relationship, fees for services and how that compares to others in the industry. Remember, as the plan sponsor your job is to provide a plan that is in the best interest of your employees and you'll need to prove you completed the due diligence necessary to make that call.

4. **Some Recordkeepers May Reduce Services** – The Recordkeepers and TPAs I have communicated with have no intention of becoming advisors and taking on the fiduciary standard. Now that the definition has been expanded, they will become extra careful to not cross that line by providing investment recommendations to your participants. This could mean that call centers become even more scripted and unable to answer participant questions.

While there is a carve-out for general education, representatives from the recordkeeper that come on site will heavily emphasize hypothetical illustrations. You should determine what level of advice your participants need. Only financial advisors, willing to serve as fiduciaries, will be able to provide the custom financial advice most plan sponsors are looking for.

5. May See Increased Number of Terminated Participants – The DOL has clearly stated their belief that investors are harmed by rolling their 401(k) balance into an IRA (Individual Retirement Account) because of higher fees. Once a participant leaves the plan they lose the economies of scale and generally see an increase in cost. While advisors should be able to clearly communicate the benefits of the IRA and how they justify the higher cost, more will become hesitant to do so. Advising a client to roll out of the plan will increase liability to an advisor and some may not find it worth the effort. Thus, more terminated participants could leave their balance in the plan, resulting in a greater administrative burden for you. A terminated participant is still a participant and you are responsible for distributing all of the required notices. This can be nearly impossible, since most participants don't update previous employers of their address changes.

In recent years the retirement plan industry has faced significant regulation. As a result, 401k fees drastically reduced, recordkeepers are providing more robust services, and specialty 401(k) advisors have created a niche profession. If you haven't had your 401k plan and investment lineup reviewed in the last 3-5 years, it is highly recommended you do so. In my experience, it doesn't take long for a plan to become outdated or overpriced, and it is almost always a complete surprise to the plan administrator.

Sources:

1. Financial Services Institute "Economic Consequences of the U.S. Department of Labor's Proposed Fiduciary Rule". August 18th, 2015
2. Investment News "Ameriprise spends $11 million-plus this year on DOL fiduciary rule". Greg Lacurci. July 29, 2016
3. Fidelity's Plan Sponsor Attitudes Survey, 7th Edition.
4. "Passive Investment Train Overtakes Active in Corporate DC Plans" Robert Steyer March 20, 2017 via Pension and Investments Online
5. Plan Advisor "The Rise of Zero Revenue Share Funds". Matt Cirillo. November/December 2016

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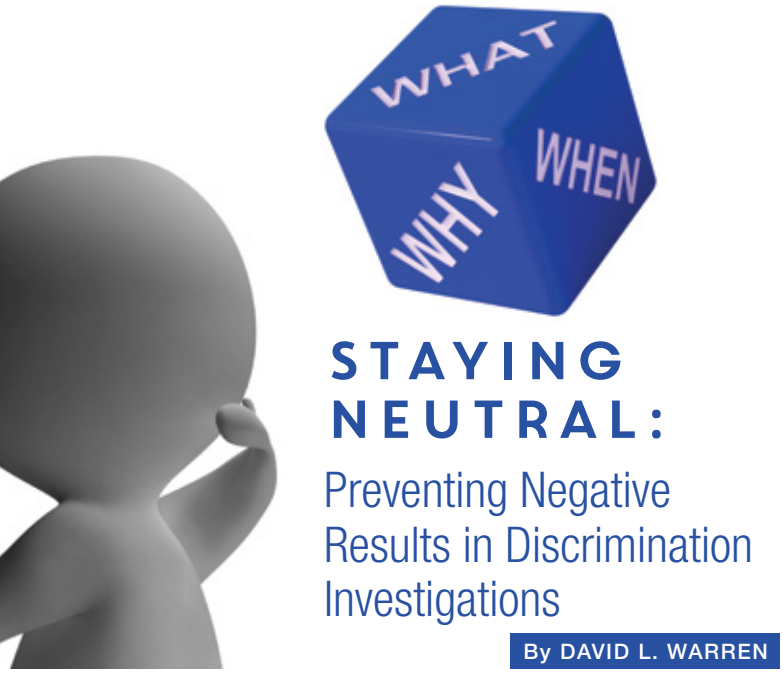

STAYING NEUTRAL:

Preventing Negative Results in Discrimination Investigations

By DAVID L. WARREN

Let's say you are the Human Resources Director for your corporation. One of your local Human Resources managers, Lyle, just called. Your notes from the call look like this:

Carol (female 'ee) –complains sex harass/HWE by cowrkr Harvey.

Touching.

Inappropriate language.

2 witnesses: Tim and Vicki (cowrkrs).

You did not write down that:

- Lyle said he regularly hunts and fishes with Harvey and he used to date Vicki when they both worked for a competitor.
- Lyle assured you he and Vicki are not currently dating.
- Vicki broke it off after he came to work here, but she later decided to work here too. He has (so far) resisted her efforts to "reconnect."

While Lyle is eager to investigate Carol's internal complaint, your gut tells you that he may not be the best person for the job. You pick up the phone to call Lyle back because…

LYLE IS BIASED.

So what? Lyle is a good HR manager. He knows the employees at his location. Why does it matter that he used to date one of the witnesses, and hunts and fishes with the accused?

Positive or negative bias from the investigator toward or against a complaining employee, the accused, or potential witness, or from the employees toward or against the investigator, not only reduce the likelihood of uncovering the truth, but also increase the employer's exposure to liability in an employment discrimination case.

How? An investigator biased *against* a complaining employee may not thoroughly interview the complainant or named witnesses, and may outright dismiss some of the alleged misconduct. An investigator biased *toward* the complaining employee may disregard the accused's side of the story, fail to take complete interview notes, or not interview all relevant witnesses. An investigator could also have a bias rooted in the complaint allegations presented, which could affect how the person approaches the inquiries.

On the flip side, a witness biased toward the *investigator* may tell only what the witness thinks the investigator wants to hear. A witness biased against an investigator may clam up, not fully answering the questions. Collection of incomplete and/or inaccurate information ultimately hamstrings the employer's defenses and the ability to prove whether the complaining party has established the elements of the claim.

EVERY BIAS HAS ITS THORN…AT TRIAL.

Bias can be a thorny problem in sexual harassment claims like the one Carol presents. To win in litigation, Carol must show: "(1) that [ ] she belongs to a protected group; (2) that [she] has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable." *Webb-Edwards v. Orange County Sheriff's Office,* 525 F.3d 1013, 1026 (11th Cir. 2008). As for that fifth element, the liability basis test differs depending upon whether the alleged harasser is a supervisor or a co-employee (like Harvey).

With supervisor harassment, the employer will be strictly liable if the supervisor's conduct culminated in a tangible adverse employment action against the plaintiff. If it did not, then the employer may escape liability if it can prove that it exercised "reasonable care to prevent and promptly correct any harassing behavior," and that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid being harmed. *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998). Where the alleged harasser is a coworker, the employer may be held "directly liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action," *Miller v. Kenworth of Dothan, Inc.,* 277 F.3d 1269, 1278 (11th Cir. 2002), which has been defined as "immediate and appropriate corrective action," and action "reasonably likely to prevent the misconduct from recurring." *Stancombe v. New Process Steel LP,* 652 Fed. Appx. 729, 736 (11th Cir. 2016) (citations omitted).

Plaintiffs' attorneys likely will exploit any perceived bias in employer investigations of their clients' internal complaints once the matter progresses to litigation. In the supervisor context, they may argue that a one-sided investigation entitles them to a trial on the merits on whether the employer exercised "reasonable care to promptly correct" the bad acts. In the co-employee context, they may contend that because of the prejudiced investigation, the employer's action was not reasonably likely to prevent the alleged misconduct from recurring. Depending upon the circumstances, plaintiffs' counsel may even assert that partiality in an investigation is evidence of discriminatory animus against their client. *See, e.g., Planco v. City of Austin, Tex.,* 78 F.3d 978, 978-80 (5th Cir. 1996).

If Carol's discrimination case goes to trial, her lawyer is also likely to impeach Lyle's testimony for overall credibility and truthfulness. Lyle's hunting and fishing and dating history not only jeopardizes key affirmative defenses, but his potentially discredited testimony could sway the members of the jury to find for Carol on the merits of the case.

WHO IS THE IDEAL INVESTIGATOR?

A skilled questioner steeped in Human Resources experience that carries no preconceptions about the complainant, the accused, or witnesses would fill the bill for most situations. In smaller operations, it may be difficult to find that unicorn within your available pool of investigators because some biases are inherent and unavoidable due to the constraints of the particular work environment. Sometimes, the employer simply lacks a robust Human Resources staff, and it may be necessary to reach out to someone from another work location, the corporate office, or a third-party consultant or attorney.

When hiring an external investigator, employers should take care not to squander their resources by later having the person also advocate for the company against the employee because doing so undermines the investigator's neutrality. What if Lyle conducts the full-blown investigation of Carol's complaint, and then writes the position statement in response to her subsequent Equal Employment Opportunity Commission ("EEOC") charge? The EEOC investigator (or Carol's attorney) will have ample ground to challenge all aspects of Lyle's investigation because, they will say, as investigator/advocate, Lyle is patently slanted in favor of the company and against Carol, rendering the complaint process as a whole a futile effort for Carol. Exposure to that kind of attack can manifest regardless of whether the investigator comes from within or without the company. Particularly when you hire outside counsel, the rules of ethics governing attorneys generally prohibit them from acting as an advocate at trial in a case where they are likely to be a necessary witness. (BTW, your investigator is your chief witness at trial).

KEEPING A SAFE DISTANCE

Plaintiffs' attorneys not only look for evidence of favoritism before and during an investigation, they also look for it in the aftermath. If the person designated as your "neutral investigator" later plays the role of decision-maker for the complaining party, you may lose your case before it gets to court. In terms of general litigation trends, plaintiffs continue to find success in retaliation claims even when the underlying discrimination claim lacks merit. Carol's complaint of harassment is protected activity that shields her from retaliation. If Lyle later becomes involved in a decision, say, to demote Carol or reduce her pay--whether he is the decision-maker or merely recommends the action--then Lyle lays the foundation for a retaliation claim related to that decision.

Because bias can so easily arise, Human Resources professionals should consider regular training on how to keep an appropriate, professional distance with the employees they serve. Maintaining the balance presents a critical challenge to HR managers because of the need to be readily accessible, friendly, and welcoming to all employees to encourage the workforce to bring forward complaints or concerns. One way to strike the balance lies in understanding that when an HR representative befriends certain employees outside of work, including on social media, he or she risks creating the perception of favoritism and bias toward his or her friends in the workplace, which can cause problems not just in investigations. It behooves the company to safeguard both actual and perceived neutrality in investigations.

BEST PRACTICES:

- Question your investigator about personal relationships with those employees who will be investigated.
- The investigator should not also be a decision-maker in employment actions related to the complaining party.
- Investigate or advocate, but not both.

WHAT ABOUT LYLE?

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The Role of Human Resources in Mergers and Acquisitions

By GARY PEEPLES

Mergers and acquisitions activity in the United States continues at a near-record pace. Although there were fewer total deals over the first three months of 2017 than there were over the same time period in 2016, large deals (defined as deals of $1 billion or more) are up by nearly seven percent in 2017. But mergers and acquisitions aren't relevant only to the financial pages; indeed, these transactions benefit from the contributions of human resources professionals. This article provides an overview of the role of human resources departments in mergers and acquisitions.

First, it is useful to explain briefly what mergers and acquisitions are. The classic example of a merger (although it's almost never true in the real world) involves the combination of two equal-sized companies into a single entity. By contrast, a classic acquisition involves a scenario in which a larger company buys a smaller company. The smaller company (sometimes called the "target company") no longer exists following an acquisition. In a classic merger, however, the merging companies each cease to exist and an entirely new entity is formed. Again, in practice, many so-called mergers are acquisitions in disguise.

The buyer must decide at the outset whether it wants to acquire the stock of the target company (and, consequently, make an offer to the target company's shareholders) or whether it wants to buy some or all of the target company's assets. Each transaction type (stock purchases and asset purchases) has advantages and disadvantages; the limited scope of this article doesn't permit any substantive discussion of this issue. The general rule of thumb is that an asset purchase permits (with many exceptions) a buyer to pick and choose which liabilities of the seller that it wishes to assume. In contrast, a stock purchase typically means that a buyer acquires all of the seller's assets and liabilities (i.e., there's no picking-and-choosing).

Any proposed transaction, whether a merger or an acquisition, requires due diligence work. Due diligence involves an investigation of the target company by the acquiring company. The investigation is necessarily in-depth and wide-ranging; after all, the acquiring company doesn't want any unwelcome post-acquisition surprises about the target company's financials or its operations.

Human resources professionals can play an essential role in the due diligence process. This is because many areas in which human resources professionals have expertise are relevant during mergers and acquisitions. Some of these areas are discussed below.

Benefits and compensation serve as an example of an area in which human resources professionals can play a crucial role as part of the due diligence team. In the course of due diligence, the acquiring company's human resources department should be prepared to analyze executive compensation (particularly if the acquiring company hopes to retain certain key executives at the target company), the cost of benefits at the target company, and related issues. When the acquiring company intends to retain one or more executives at the target company, it can sometimes be difficult to integrate the target company's executive compensation arrangements with the arrangements at the acquiring company. One example is deferred and incentive-based compensation for executives, which varies greatly among companies.

As for benefits, human resources professionals should at minimum be prepared to review summary plan descriptions and plan documents at the target company. The existence of a pension plan at the target company may trigger withdrawal liability under the Multi-Employer Pension Plan Amendment Act irrespective of whether the contemplated transaction involves an asset sale or a stock purchase, so any pension plan merits special scrutiny during the course of due diligence.

Next, human resources professionals at the acquiring company should review the overall employment structure at the target company. This is a multi-faceted review. Among the items that should be reviewed are (1) organizational charts, (2) department-level charts (i.e., a breakdown of employees by department), (3) executive-level charts, (4) job descriptions, and (5) salary grades. Each item may offer insight regarding the target company.

Additionally, if the target company is a party to one or more collective bargaining agreements, then the employer-union relationship should be examined carefully. An acquiring company, depending on the language of the collective bargaining agreement and how much of the target company's workforce it retains, may have an obligation to bargain with the incumbent union(s) at the target company. Human resources professionals should also be mindful of when the pertinent collective bargaining agreements expire; the renegotiation of a union contract during the pendency of a merger or an acquisition might delay (or, in rare cases, derail) the deal if material changes occur to the target company's financials (e.g., the target company takes on a significant financial obligation or makes a large concession) or operations (e.g., a lockout or a strike) in the course of negotiating a new collective bargaining agreement. Finally, where an employer-union relationship exists, human resources professionals should ascertain whether the target company has a history of unfair labor practice charges, work stoppages, and the like. Likewise, human resources professionals at the acquiring company should do their homework regarding the union; some unions (and locals within those unions) have more contentious relationships with management than others.

The acquiring company's intentions regarding the target company's employees can be an important issue in mergers and acquisitions. Human resources professionals at the seller should have a clear idea of how the target company's workforce will be affected (if at all) by the acquisition. This information is relevant because of the Worker Adjustment and Retraining Notification Act ("WARN Act") and its state-level equivalents. Specifically, the WARN Act and the various state laws modeled after it require advance

written notice to employees who will be affected by a mass layoff or a plant closing. The WARN Act, in the context of the sale of a business, also allocates the burden of notice between the target company and the acquiring company. Human resources professionals should accordingly acquaint themselves with the WARN Act and any similar state-level laws that might apply if the acquiring company intends to close a plant or otherwise effectuate a mass layoff.

Another area in which human resources professionals can offer significant value in a merger or an acquisition is the analysis of the target company's potential employment law exposure. This exposure might arise in any number of ways. To minimize post-acquisition exposure, human resources professionals at the acquiring company should request and review records from the target company relating to (1) any affirmative action plans; (2) employee compensation (including the classification of employees – exempt vs. non-exempt and employee vs. independent contractor); (3) employee records (e.g., I-9 forms); (4) employment contracts (including non-competes and non-disclosure agreements); (5) government agency audit information (e.g., Occupational Health and Safety Administration audits); (6) injury records; (7) internal complaints of discrimination, harassment, or retaliation and notes from any resulting investigations (whether internal or external); and (8) litigation relating to labor or employment issues over a sufficiently long period.

The review of the above records (the list above is illustrative, not exhaustive) in connection with a potential merger or acquisition is essential because, under federal law, an acquiring company may be deemed to be a successor employer. Successor status means that the acquiring company inherits all of the liability of the predecessor employer (i.e., the target company). The various tests for successor liability vary based on the statutory scheme (e.g., the Fair Labor Standards Act ("FLSA"), the Family and Medical Leave Act ("FMLA"), and Title VII of the Civil Rights Act of 1964 ("Title VII")), but the underlying principle is always the same; namely, that a predecessor employer shouldn't be excused from providing relief to aggrieved employees just because of a corporate acquisition.

This article is too limited in scope to provide a complete discussion of successor liability, but a brief example from the Western District of Tennessee is instructive. In *EEOC v. 786 South, LLC,* the district court was faced with the question of whether to impose successor liability on a restaurant franchisee (the buyer) for the Title VII violations of the seller. The district court ultimately declined to do so because the acquiring company had taken several post-acquisition steps to cure any discrimination or harassment at the restaurant, including terminating those supervisors who had been accused of improper behavior. But the outcome easily could have been the opposite because every test for successor liability—whether the issue arises under the FLSA, the FMLA, or Title VII—involves the balancing of various competing interests, which limits the predictability of outcomes.

Finally, the role of human resources professionals in mergers and acquisitions does not end at the due diligence stage. On the contrary, the expertise of human resources departments should be used to help align the cultures of the acquiring company and the target company. And the human resources professionals at the target company often have the institutional memory that supplies the context for why the target company acted (or did not act) in a certain way. The bottom line is that human resources professionals should be considered an essential part of any contemplated merger or acquisition.

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HR Executive Breakfast Briefing

Workforce Management: Compliance Trends and Strategies

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With the recent changes in regulations, and more coming, keeping the focus on your organization's Human Capital Management strategies can be a challenge. The panel of subject matter experts led the discussion at the Breakfast Briefing on key employment-related legal trends, and how organizations are building resiliency and agility into their workforce management processes. Topics discussed included pay equity, recent executive orders, Agency updates, the latest on healthcare reform, immigration reform, and retention.

1 The panel of subject matter experts included Dr. Susan Hanold, Vice President Strategic Advisory Services, ADP, LLC; John W. Simmons, Shareholder, Litter Mendelson; Jennifer S. Kiesewetter, Kiesewetter Law Firm, PLLC. **2** Cynthia Thompson, MBA, SHRM-SCP, SPHR, was the panel moderator. **3** Jeff Jenks, District Sales Manager - Human Capital Management Consultant at ADP; Jeff Phelps, Regional Sales Director – Global Enterprise Solutions at ADP, and Kelly Mills, Associate District Sales Manager – Global Enterprise Solutions at ADP.

The DoI's 2016 Proposed Overtime Rule Under The Trump Administration: **Reading The Tea Leaves**

By NEIL E. DUKE

The Department of Labor's Fair Labor Standard Act (FLSA) Overtime Rule was slated to take effect on December 1, 2016. The new regulations would have extended the rights to overtime compensation to millions of additional employees in the workforce by redefining exempt-level employment under the Act. However, the rule has yet to actually take effect because it is presently bogged down in litigation. Before offering a theory as to what may happen in the immediate future, a brief digression regarding the FLSA itself will provide context for a discussion of the rule.

Since roughly 1940, DOL regulations have afforded overtime compensation to employees who work in excess of 40 hours per week. However, as with most things, there are exceptions to the general rule. The exceptions, in this instance, come in the form of a three-part test: (a) salary basis test; (b) salary level test; and (c) job duties test. The proposed rule's change would affect the salary basis and salary level test. The job duties test remains unchanged. Under the "old" and still existent standard, (assuming the job duties test is satisfied), an employee could be exempt from overtime compensation if he/she minimally earned $23,660 per year (salary level), at least $455 per week (salary basis) and performed exempt level functions (job duties). Under the proposed rule's change to the salary basis and salary level test, those amounts are increased, respectively, to $47,476 and $913.

As one would imagine, the announced rule's change caused a considerable uproar, which led to a number of states, primarily under Republican leadership, and corporate interests filing suit against the DOL. That particular lawsuit is still pending in the Fifth Circuit Court of Appeals. Speculation has been rampant regarding what may ultimately happen with the proposed overtime rules change given the inauguration of a new White House Administration, principally due to the fact that the revisions came in the waning days of the Obama Administration. For its part, the current Trump Administration has signaled a clear preference toward deregulation, further fueling predictions of the demise of the proposed overtime regulations. While no definitive statement has been made, or even suggested by the White House, the recent Senate confirmation hearing of the Trump Administration's nominee for the position of U.S. Secretary of Labor, Alexander Acosta, may offer a glimpse of what to expect. During that hearing, which took place on March 22, 2017, the topic of the proposed rule's change was a featured point of conversation. In response to both friendly, and occasionally more hostile questions, during his confirmation hearing, Mr. Acosta offered the following three important insights.

First, while acknowledging the fact that the overtime rules have not been updated since 2004 to reflect cost of living increases, Mr. Acosta expressed concerns that doubling the salary level test would "stress" the economy and may have unintended harmful consequences for non-profits and geographic areas where lower wages are prominent. Second, Mr. Acosta opined that he was unsure if elevating the salary level threshold was even within his authority. Third, in a response to Senator Tim Scott's (R-SC) question regarding the issue of cost of living adjustments, Mr. Acosta agreed that if a straight inflation adjustment were applied, the salary level test would rise to roughly $33,000. Despite that particular observation, he was extremely hesitant in his responses to Sen. Scott and other members of the Health, Education, Labor and Pensions Committee to adopt a position in favor of any increase, repeatedly noting his need to further research the issue and consult officials within the Justice Department and DOL. One final observation regarding Mr. Acosta's testimony is that at no point did he hint of a rooting interest in the litigation being favorably adjudicated for the DOL.

So what happens next? There are several possibilities that come to mind all predicated on what takes place in the pending Fifth Circuit lawsuit. For instance, if the DOL prevails and the salary basis and level tests are increased as a result, the current administration could do nothing, thereby permitting the new regulations to take effect. That seems to be the most unlikely reaction. The more probable outcome of a DOL victory in the Fifth Circuit would be that the current administration, under Mr. Acosta's leadership, would reissue a new set of regulations, rolling back the increases. Perhaps it would come by way of compromise regulations seeking either a gradual or a single step increase of the salary level threshold to $33,000 per year ($634/wk), which would take cost of living adjustments since 2004 into consideration. Mr. Acosta seemed to express some ease with this option during his confirmation hearing. Alternately, if there is an unfavorable ruling for the DOL in the current the lawsuit, it's quite possible that there will be no renewed effort by the present administration to resuscitate the issue at all. That outcome would certainly incur the wrath of Senate Democrats, but is not entirely inconceivable given present Capitol Hill partisan tensions.

Needless to say, it will be very interesting to see how both the litigation and the reaction by the new administration to those results play out in the coming months.

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TAKE TWO: The AHCA Passes the House by a Narrow Margin Now What?

By JENNIFER S. KIESEWETTER

On May 4, 2017, the U.S. House of Representatives went to the floor for a second time for a vote on the American Health Care Act (AHCA) – just six weeks after House Speaker Paul Ryan pulled the AHCA for not having enough Republican support and conceding that "[w]e're going to be living with Obamacare for the foreseeable future." Since March, the AHCA has undergone some revisions to cure the Republican divide in the House. To pass the House, the Republicans needed 216 votes. The revisions worked, narrowly, and the bill passed the House, achieving a party-line vote of 217-213. The bill is now off to the Senate, where a simple majority will be needed, before the bill goes to the President's desk for signature.

Does the AHCA achieve the Republicans seven-year promise of "Repeal and Replace?" Not quite. Essentially, the Republicans are unable to repeal and replace *the entire Affordable Care Act (ACA)* because they chose the path of budget resolution. Back in early January, to avoid a filibuster from the Democrats, the House approved a budget resolution allowing Congress to repeal certain key provisions of the ACA. This same resolution passed the U.S. Senate on January 12, 2017. Because the Republicans are utilizing the budget resolution process for repeal, only certain provisions of the ACA can repealed, including provisions with respect to the insurance marketplaces, Medicaid-expansion, and the employer and individual mandates, among others. The provisions that may be repealed under budget resolution must be fiscally relevant and reduce the deficit, i.e., tied to budget issues -- such as federal spending and taxation. We'll be hearing quite a bit about this process as this bill moves to the Senate, and then back to the House for approval after the Senate more than likely makes its own revisions to the AHCA. *However, until this process is complete, and the final bill makes it to the President's desk, the ACA is still the law of the land.*

What Does the AHCA **Not** Repeal and Replace?

In its present form, at the time this article went to press, the AHCA only repeals and replaces *about 10 percent of the ACA.* The AHCA does not amend several of the ACA's titles, including:

- Medicare and Delivery System Reform
- Prevention and Wellness
- Workforce Initiatives
- Fraud, Abuse and Transparency
- Biological Similars

Additionally, the AHCA does not target many of the ACA's market reforms, such as:

- Cost-sharing limits on essential health benefits for non-grandfathered plans (see MacArthur Amendments below)
- Coverage for adult children up to age 26
- Prohibition on lifetime and annual limits for essential health benefits (see MacArthur Amendments below)
- Prohibition on health status underwriting (see MacArthur Amendments below)
- Nondiscrimination rules based on race, nationality, disability, sex or age
- Guaranteed availability and renewability of coverage
- Pre-existing conditions (see MacArthur Amendments below)

What Does the AHCA Repeal and Replace (or simply amend)?

The AHCA primarily targets Article I of the ACA -- Affordable and Available Coverage – which includes the individual mandate, the employer mandate, the premium and cost sharing subsidies, and the insurance exchanges. The AHCA also targets Article II of the ACA – Medicaid, and Article IX of the ACA – the revenue or tax provisions.

So what are some of the key provisions that have changed? Here are some of the highlights:

- Retroactively effective to 2016, the AHCA repealed the penalties under both the individual and employer mandates.
- Beginning with open enrollment for 2019, for any individual who has had a lapse of coverage of more than 63 days in the previous 12 months, the *insurer* may impose a 30 percent surcharge to the premium cost for that individual for the next 12-month period.
- Individual and small group market plans no longer will have to fit into the actuarial tiers of bronze, silver, gold, and platinum.
- The AHCA created a Patient and State Stability Fund where over the next eight years, $40 million will be appropriated to help fund high-risk pools, reinsurance, maternity, mental health, and substance abuse care.
- Beginning in 2020, age-based tax credits will become available to individuals who are not eligible for insurance through their employer or a government program. These credits

are refundable and advanceable. Additionally, these credits will be phased out for those individuals with incomes above $75,000, or joint filers with incomes above $150,000.

- Age restrictions would continue to apply. However, the age ratio limit would be increased from 3:1, as it is now established, to 5:1.
- The AHCA rescinded any remaining funds in the Prevention and Public Health Fund.
- The AHCA barred for one year any funding to Planned Parenthood.
- The AHCA added liberal rules for both health flexible spending accounts and health savings accounts.
- The Cadillac tax is delayed from a 2020 effective date to taxable periods beginning after December 31, 2025.
- The 3.8 percent tax on investment income for those individuals making over $200,000 yearly (or couples making $250,000 yearly) has been eliminated.
- The 0.9 percent payroll tax for individuals making over $200,000 yearly (or couples making $250,000 yearly) will be eliminated after 2023.
- States may opt for a block grant rather than a per capita grant with respect to Medicaid funds.

The MacArthur Amendments

On April 23, 2017, after the AHCA was put to rest after a disappointing March showing, Tom MacArthur (R-NJ) breathed new life into the bill with what are now known as the MacArthur amendments. The MacArthur amendments address the ability for states to waive certain provisions of the AHCA to lower premiums and to expand the number of the insured within their state. States may apply for waivers from the AHCA's essential health benefits requirements. Under the essential health benefits, insurers are required to cover ten categories of benefits, including – for example – prescription drugs, maternity and newborn care, emergency services and laboratory services. By applying for these waivers, states may establish less generous minimum essential benefits than the federal law requires. This will not only affect the benefits offered, but also could affect the dollar limits tied to these benefits.

Additionally, states may request waivers for the community rating rules, which only apply to those individuals who do not maintain continuous coverage. However, states are not allowed to rate based on the following:

- Gender
- Age (except for reductions in the 5:1 ratio, which is the new ratio established by the AHCA)
- Health status (unless the state has established a high-risk pool or is participating in a federally-established high-risk pool)

Thus, for states who are granted a waiver for community rating, insurers in those states may underwrite based upon health status for one year for individuals *who have not maintained continuous coverage,* but only if that state has established a high-risk pool or participates in a federally-sponsored high-risk pool. Insurers cannot *exclude* those with pre-existing conditions, *but they can charge much higher premiums* that could essentially exclude these individuals, based on high-risk underwriting.

To receive waivers, states must establish that such a waiver will allow them to reduce premium costs, increase coverage and participation, or advance another public interest in their state (such as guaranteed coverage for those with a pre-existing condition exclusion).

The Upton-Long Amendment

On May 3, 2017, two Republican Representatives -- who had previously been against the bill -- added another amendment strengthening the bill's support for sick Americans. Fred Upton (R-MI) and Bill Long (R-MO) drafted the Upton-Long Amendment, garnering support from the House and the White House. This amendment creates an $8 million fund over the next five years for community rating waiver states. This fund will be used to offset the higher premium costs for those individuals with pre-existing conditions who have had a lapse in coverage and who may be charged higher premiums based on health status underwriting. The state may use this money to fund the high-risk pools, or to pass savings directly on to individuals through reduced premiums or other cost-sharing methods. Whether this amount is sufficient to bridge the gap for high-risk individuals, that remains to be seen.

The McSally Bill

In the MacArthur Amendments, Congress was exempted from the state waivers which weaken the pre-existing conditions and essential health benefits protections. Claims from the Hill are that this provision inclusion, or exclusion as it may, was not intentional, but instead was simply credited to legislative maneuvering to get the bill through the House. Nonetheless, this did not sit right with the American people, and invoked outrage. On April 26, Representative Martha E. McSally (R-AZ) introduced a bill eliminating any non-applicability of state waivers to members of Congress or Congressional staff. Now, with respect to watering down these specific protections through state waivers, Congress must practice what they preach.

We have an unknown road ahead of us. The Senate must pass this bill with a simple majority. Thus, only two Republicans may vote "no." We can expect amendments to be made in the Senate, at which time, if passed in the Senate, those amendments will go back to the House for consideration and debate. In a recent Kaiser Family Foundation study, 74 percent of Americans polled stated that they would like to see President Trump and his Administration make the current law work. Sometimes it is easier to fix what is broken rather than start over. We can incorporate good proposals into the existing law, and start working on bipartisan solutions for what does not work. However, that is not the road we are on. Get ready to hear a lot about governmental process. Civics. Federal budgets. Fiscal impact. Legislative intent. Budget resolution. We need to pay attention to what's going on in Washington, but we also need to pay attention to what's going on in our workplaces. And until the law changes, the ACA is still the law.

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The World Is Shrinking!

International Background Screening Tips HR Pros Must Know

By JULIE HENDERSON

Gone are the days when people grew up, went to school, found a job, and spent their entire lives within an hour's drive of their parent's house. For HR professionals and hiring managers, it may seem that every other resume includes a work history or education claim from a country outside the U.S.

Today's workforce has more people who have lived, worked, or studied abroad than at any other time, and this is only expected to increase in the years ahead. The embracement of global living poses a unique challenge to HR professionals during the background screening process. How can you thoroughly review an applicant's background if they have spent time in other countries, and still maintain the compliance and integrity of your background screening process?

The good news is that background screening reports are, in some cases, available from a wide variety of foreign countries. You just have to know how to find the information, and what you need to gain access to it. It's time to update your background check policy by understanding and executing international background screening.

Here are five tips HR pros must know before embarking on an international background screening process.

#1: Expect longer turn times

While checking the criminal history, verifying education and employment, and completing reference checks usually take a few days in the United States, it can take much longer in other countries. Issues with privacy laws and rules vary by country, making it more complex to navigate. Some countries offer the same information as the U.S. while others won't give out any information at all. And, depending on the country, the government may not keep accurate or thorough records, so some information could return as incomplete.

#2: Allow for extra documentation

Foreign countries may require identification and additional documentation in addition to what the U.S requires. With varying privacy laws and information gathering standards, employers may need to have access to more of the applicant's information and documentation if they want to screen them internationally. It's a smart practice to have as much information on the candidate as possible on the front end, from their date of birth to the dates he or she resided in the foreign country, to their address, to ensure an accurate international background check.

#3: Identify country rules in advance

A key mistake we see with employers who order background checks on applicants who have lived in other countries is they don't ask questions up front. Requesting information on a particular country, its laws, and the type of information their companies, schools, and courts will and won't divulge is key to keeping your pre-employment screening process moving forward productively. Be sure to talk with your background screening provider before you order an international screen, so you know what to expect. This helps to proactively plan your hiring strategy.

#4: Maintain consistent procedures when possible

Seasoned HR professionals understand that a uniform, consistent hiring process protects their company against discrimination claims and negligent hiring lawsuits. When it comes to international screening, don't give up on screening your applicants in the same manner, even if it takes a little more effort. When possible, it's a smart best practice to compare the same information on everyone. So, if you are verifying a job seeker's education within the United States, you should make every effort to verify education if an applicant attended school abroad. While it may not always be possible to receive the same in-depth information that U.S. based schools provide (such as dates of attendance, major, grades, etc.) keep documentation showing that you made a valid effort to compare apples to apples when screening applicants for the same position.

#5: Rely on a trusted third-party screener

In an international environment, working with a professional, experienced background screening company is vital. Companies that don't have tenured screeners on staff, or take the time to keep up with each country's privacy laws and information gathering standards can guide employers down the wrong road. They may report information that is inaccurate and may miss important information that you need to make the best decision. HR pros need to ask questions about their background screening company's practices regarding international screening, from the documents they require, to the level of experience of the people doing the screening, to expected turn-around times and pricing. The company should be able to give you direct, educated answers. If they don't seem to know the difference between national and international screening or offer broad, vague answers, it may be time to find another screening partner.

The hiring world is getting smaller every year, with a greater number of people spending portions of their lives outside the United States. Getting the whole picture on an applicant is eventually going to require HR professionals to delve, if they haven't already, into international background screening. By being aware of the differences presented by each individual country, committing to a consistent screening policy, and working with a background screening company that is experienced and adept at international screening procedures, you will proactively adapt to the international climate and continue to hire the right people for your open positions.

Julie Henderson, Director of Sales
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Public Sector Employers' Massive Employee Benefit Challenge: Four Letters... OPEB

By QUINTIN ROBINSON

The level of unfunded retiree healthcare and life insurance debt amassed by public sector entities across Tennessee and other states has created a financial bubble that can no longer be ignored.

The Governmental Accounting Standards Board fully implemented **GASB Statement 45** in 2017. This accounting change now requires public entities to elevate Unfunded Actuarial Accrued Liability for other (than pension) post-employment benefits (OPEB) in their financial reporting documents. No longer will they be allowed to simply include OPEB liabilities as a foot note in their Comprehensive Annual Financial Reports (CAFR).

In Memphis, Shelby County Schools' Unfunded Actuarial Accrued OPEB liabilities stood at $1.25B as of July 1, 2016. To address this issue, Shelby County Schools district implemented Retiree Life Insurance changes in 2016 and is weighing additional changes to its retiree medical coverage to reduce the District's liabilities.

The state of Tennessee is reporting approximately $1.3B in Actuarial Accrued Liability in its most recent OPEB report. This includes liabilities associated with its three plans, State, Teachers and Medicare Supplemental. The state has been proactive in making benefits changes and implementing funding mechanism to ensure its OPEB liabilities remain in check.

Tennessee is not alone. In 2013, U.S. states reported a combined $627B for OPEB liabilities, according to a 2016 report by the Pew Charitable Trusts and the John D. and Catherine T. MacArthur Foundation.

This year, **GASB 45** will force all cities, counties, school districts and public utilities across Tennessee to seriously consider strategies to reduce benefits or increase funding for retiree benefits they offer. Their ability to pay for efficient and effective delivery of core services to communities they serve without raising taxes or laying off employees will require the adoption thoughtful benefits changes to reduce OPEB debt.

To be sure, this is not only a complex math problem for public officials and legislative bodies. It is a herculean task to win support for changes that reduce benefits to public sector retirees. And any discussion of retiree healthcare benefits changes will face opposition and the raw emotions of retirees as they fight to protect their benefits, including public safety retirees who risked their lives in service to their communities.

For decades, Tennessee's public sector employers have rewarded retirees with rich healthcare benefits for the remainder of their lives in recognition of the services they rendered as public employees.

However, the financial impact of the recession on public sector health plans exposed the unsustainability of funding retiree benefits on a "pay-go basis" and shed light on the huge costs to taxpayers of sustaining rich benefits plans for retirees.

However, the financial impact of the recession on public sector health plans exposed the unsustainability of funding retiree benefits on a "pay-go basis" and shed light on the huge costs to taxpayers of sustaining rich benefits plans for retirees.

A Case in point is the City of Memphis, Tennessee, which offers health insurance coverage to approximately 4,000 retirees.

For decades, the Bluff City offered its retirees health insurance benefits for the remainder of their lives after retirement. City Administrations budgeted annually to pay for these benefits on a current basis, without fully acknowledging taxpayers' costs associated with those benefits over a 25 to 30-year period during which many of these retirees would continue to receive healthcare benefits.

Prior to 2015, approximately 70% of the cost of providing retiree medical coverage to most City of Memphis retirees was taxpayer funded Not only were the retirees offered lifetime benefits, but so were their spouses and disabled adult children.

In late 2010, the City took note of the fact that its Unfunded Actuarial Accrued OPEB retiree health insurance liabilities had exceeded $1B. At that same time, the trust that the city had established to cover the cost of these benefits in the out years held less than one-tenth of that amount.

Memphis leaders understood the ramifications of not addressing this huge financial obligation, including a potential downgraded bond rating, which would increase its borrowing costs. As well, its unfunded OPEB liabilities coupled with a huge funding hole in its pension plan, seriously threatened the financial health city government and its ability to fund core services without a significant tax increase or massive layoffs.

Over the next five years, the Administration of Mayor AC Wharton Jr. began devising a strategy to reduce the city's unfunded retiree health insurance liabilities.

These efforts came together in 2015, when Mayor Wharton's Administration proposed and a majority of the Memphis City Council approved sweeping retiree benefits plan changes that ultimately reduced the city's unfunded retiree health insurance liabilities from $1.3B to approximately $700M.

The changes made by the city were far-reaching and included:

- Disallowed Post-65 retirees with Medicare to participate in its base Medical plans with active employees. Instead, the City offered group issued Medicare Supplemental coverage and Medicare Prescription Drug plans to those retirees and paid 25 percent of the premiums for the retirees and eligible spouses.
- Eliminated city subsidies for Pre-65 Retirees other than those who retired under disability status. Instead, pre-65 retirees could participate in the city's plan if they paid 100 percent of the monthly insurance premiums. Many pre-65 retirees instead enrolled in coverage through their current employers, their spouse's employer or a marketplace place.
- Disallowed coverage for retirees' spouses if the spouse has access to coverage through their employer or Medicare.

In the wake of the 2015 reforms, the city of Memphis cut its OPEB liabilities in half and reduced its annual retiree healthcare costs by approximately $26M. These savings were available to assist the city in meeting its full annual pension obligations.

In 2016, the City set up a Private Healthcare Exchange and restored subsidies for Pre-65 retirees' medical insurance coverage. Post-65 retirees without Medicare were also offered subsidies to participate in the Private Healthcare exchange.

Disabled retirees and the eligible spouses and children of employees who died in the line of duty were allow to remain in the city's base medical plans with employees. The financial impact of those changes as well as additional OPEB reductions are forthcoming.

These changes took place as the full impact of **GASB 45** was being measured.

For its part, The National Accounting Standards Board used a phase-in approach of **GASB 45** to get the attention of public sector employees, beginning with transparency measures in 2008.

However, the full impact of **GASB 45** is being felt this year as government employers are now required for the first time to measure and report the liabilities associated with OPEB. Reported OPEBs may include government-funded post-retirement medical, pharmacy, dental, vision, life, long-term disability and long-term care benefits that are not associated with a pension plan.

This financial reporting change impacts all states, towns, education boards, water districts, mosquito districts, public schools and all other government entities that offer OPEB and report under GASB. **GASB 45** requires that government employers:

- Recognize the cost of OPEB benefits in the period when services are received.
- Provide information about the actuarial liabilities for the promised benefits.
- Provide information useful in assessing potential demands on future cash flows.

Public officials across the state and the nation will be tasked with developing and implementing retiree benefits strategies that continue to offer meaningful and sustainable health care coverage to retirees. They also will have to ensure adequate financial resources are available to fund core services and capital projects that taxpayers pay for and expect to receive.

As you make changes, consider the active and retiree populations in your design and communications and plan for active enrollments in both groups. You will need to partner with carriers, consultants, and enrollment companies that understand OPEB and public sector business.

Just as the City of Memphis had to confront its OPEB issues in 2015 by making unprecedented changes to its retiree health insurance programs, other public entities with huge unfunded OPEB liabilities will have to follow suit.

Quintin Robinson was Human Resources Director for City of Memphis from 2010-2015 during the AC Wharton Administration. He currently is President and Chief Executive Officer of Memphis-based IGS Consulting Group, LLC, a private consulting firm which advises public sector clients on Benefits and Human Capital strategies. IGS partners with firms such as HRO Partners for enrollment fulfillment and healthcare strategy support.
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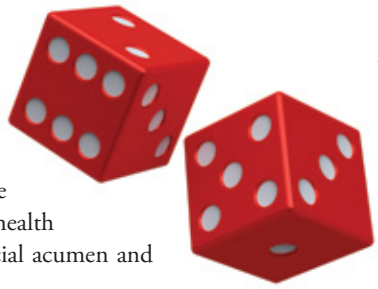
Rolling the Dice...Let's Hope No One Gets Sick!

High Deductible Plans Can Be the Worst Option for Hourly Employees

By KERSTIN NEMEC and TIM NORWOOD



Are you ready to have your employee's roll the dice with your employee's health and better yet do your employees even understand what is at stake?

The new trend in healthcare - cost shifting or rather High deductible health insurance plans (HDHP), also known as consumer directed health plans are inherently risky and require thorough education, financial acumen and full understanding of coverage policies.

Exactly what is an HDHP?

HDHPs were created to lower health insurance premiums and encourage consumers to be responsible for medical costs upfront. Once the deductible is met, the plan pays a percentage of expenses (generally 80%) up to the out of pocket maximum. By law the minimum deductible to be considered a HDHP is $1,300 per individual with a maximum annual out of pocket of $6,550 and for a family $2,600 with maximum annual out of pocket of $13,100 but we are seeing plans with deductibles much higher, typically starting at $2,000 and as high as $10,000. While conceptually a good idea, to come out ahead you better have a healthy cushion in your bank account and be certain you won't be in an accident or get sick.

To help mitigate the risk and help reduce front end costs, HDHPs are being paired with paired with a **Health Savings Account (HSA),** which is a tax-preferred medical savings account that can be used to pay for qualified medical expenses. They can also be paired with supplemental coverage such as accident and critical illness coverage that will cover the deductible should one of those qualifying events happen.

So really all one must do to make this work is:

- Fully understand you and your family's potential health issues and risks for the year
- Understand your tax position, have enough extra cash to set aside ($3,350 - $6,750) in an HSA
- Acquire a full understanding of which of your potential medical expenses would qualify for HSA expenses
- Gain understanding of what services are covered by the HDHP and what counts towards the deductible and what does not.
- Back into how much of your deductible could be left and make sure that is covered by supplementing insurance and if not make sure you have another $7,000 - $10,000 in the bank on top of what you have set aside for the HSA
- Hope that nothing happens that is not covered under one the three plans.

Now marry the left with the fact that:

- There are over 77 million hourly workers in the United States. Of which the majority (77%) work full time, are between 20-45 years old, have children and are in average health compared to good or very good health and most concerning has less than $750 in liquid assets.
- Most large employers (81%) offer a HDHP, some (32%) offer it as an only option.
- Roughly only 10% of those large employers also offer supplemental accident and critical illness coverage.

HDHPs are conceptually a good idea and who doesn't love a lower premium, but with the complexity of making it truly work and the reality of the limited financial assets of many Americans, primary hourly workers, these plans are a massive gamble for the employee. Are employers serving up their employees for financial ruin or even best case causing them to not even get care due to cost concerns. Yes, these plans save employers significant money but at what ultimate cost and what is the employers responsibility in offering these plans in such a way that they can ensure the employee is fully educated and understands how to go about making the right decision in the ever increasingly complicated world of health insurance.

Over 62% of Americans are living paycheck to paycheck. Hourly employees in these circumstances are wasting their hard-earned money on HDHPs. Even if they can swing the premium, it will be impossible to pay the deductible let alone co-pays make them highly unlikely to obtain appropriate medical care even if they have insurance. There needs to be significantly increased education on how these plans work in addition to exposure to other non-employer based options such as State Health Insurance Plans (SHIP). SHIP can provide individuals and families meeting household size and income criteria coverage with no deductibles, very little or no premiums and no co-pays. Dental and vision is also included in many states.

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Don't Write Off Obamacare Yet

By TOM HAYES

So it looks like the 51st time is the charm when it comes to the House of Representatives' vote on repealing the Affordable Care Act (ACA). If you include various measures to update or change it, it's actually somewhere around the 54th time since the law passed in October 2009. While Republicans may be doing victory laps today, I wouldn't be so quick to write the final epitaph on Obamacare. A law once reviled by a majority of voters is today a coveted entitlement program for more than 20 million Americans.

It appears healthcare is complicated after all. For many of us – industry professionals, employers and HR professionals – our routine grapple with the complex intricacies of a fragmented healthcare delivery system extends beyond federal legislation designed to fix it.

And, let's face it, while the ACA has expanded coverage to millions of Americans who were excluded from or unable to afford health insurance in the past, the law itself has done little to streamline the system or improve cost and quality. But in all fairness, the legislation wasn't really crafted to do that. Sure, it included some provisions designed to improve cost and quality such as pay-for-performance (P4P), the creation of Accountable Care Organizations, the Patient Centered Outcomes Research Institute (PCORI) and the promotion of electronic health records. However, aside from preventative services being covered at 100%, these initiatives have arguably had minimal impact on affordability and improved outcomes.

Expanding access to health insurance seems like a no-brainer, but it hasn't necessarily translated into improved access to care. Or better care. Many policies sold on the federal exchanges have witnessed higher deductibles and co-payments, benefit exclusions and a limited network of covered physicians and hospitals. Even with Medicaid expansion, on average, only 35% of physicians are willing to accept new ACA patients.

However, even in the face of double digit premium hikes and insurers exiting the federal marketplace en masse, new hospitals, diagnostic facilities, urgent care centers and free-standing emergency rooms are popping up across the country. Pharmacy costs, once 15% to 20% of an employer's annual health spend, are now pushing 50% in some programs due to a rapid influx of newer, costlier, specialty drugs. In many cases, these drugs cost upwards of $50,000 per month, per prescription. At the individual level, it's pretty simple math. If a person spends $7,000 per year in health insurance premiums and incurs $200,000 in medical claims, someone loses money. Replicate that scenario across millions of insured Americans nationwide and you are rapidly moving down a path that is unsustainable.

Now it's Republicans' turn to take a crack at fixing a problem that may be slightly more complicated than cost shifting from subsidies to tax credits and promoting competition from insurance carriers. The House bill that passed by a narrow 217-215 margin now faces a steeper uphill climb in the Senate, which operates under different rules and procedures, and where Republicans hold a slimmer majority.

Whether or not the House bill is dead on arrival in the Senate is yet to be seen, but early indications are that there will be major modifications to the proposed American Health Care Act (AHCA). Or, the Senate may scrap it altogether and start from scratch. The House version repeals or replaces many major portions of Obamacare through the budget reconciliation process. These include the repeal of the net investment income tax, the annual provider fee, prescription drug tax and medical device tax in 2017. The House measure also replaces the federal subsidy program with a refundable tax credit that starts at $2,000 per year for individuals under the age of 30, and up to $4,000 per year for individuals 60 and older. The employee mandate is gone and replaced with a 12-month, 30% surcharge on premiums for individuals who go more than 63 days without continuous coverage.

Two key amendments had to be added to get the bill through the second time around. The MacArthur Amendment permits states to request waivers that would set a higher ratio for age-based premium rating in the individual and small group markets beginning on or after January 1, 2018. It also allows states on or after January 1, 2020, to establish their own essential health benefit requirements, versus those imposed by the ACA, for coverage in the individual and small group markets. By default, all waivers are approved by the U.S. Department of Health and Human services, unless they don't comply with submission requirements.

For states with a high-risk pool, it allows them to engage in health status underwriting for individuals in the program who cannot demonstrate they had continuous coverage over the prior 12 months, beginning with enrollments in 2019. Additionally, the amendment clarifies that insurance companies may not discriminate based on gender or limit access to coverage for pre-existing conditions. The Upton amendment appropriates another $8 billion over five years to assist with premium stabilization.

Aside from tweaking how healthcare is financed with a dose of cost shifting, this feels a lot like fixing your home's heat and air system by giving the exterior a fresh coat of paint. Either on its own accord or through legislation, the healthcare industry must strive for greater accountability and transparency. Otherwise we may be headed for more of the same under a different name.

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Medical Marijuana:
A Fast Approaching Reality for Arkansas Employers

By STUART JACKSON

Now that the Arkansas General Assembly has passed and the Governor has signed into law House Bill 1460 (now known as Act 593), employers in Arkansas have some clarity in what they can and can't do when it comes to medical marijuana. But, that clarity only goes so far and, in my mind, all sorts of "landmines" still exist for employers.

Employee Protections in the Original Amendment

From an employment perspective, the Amendment allows "qualifying patients" who have "qualifying medical conditions" certain protections in the workplace. For instance, employers:

1. Cannot "discriminate" against an individual (which includes not hiring, disciplining, failing to promote or terminating one's employment) or otherwise penalize an individual based upon the individual's past or present status as a "qualifying patient" or "designated caregiver";

2. Cannot discipline a "qualifying patient" for the medical use (which includes actual use or mere possession) of marijuana in accordance with the Amendment if he or she possesses not more than 2 ½ ounces. Under the Amendment, a rebuttable presumption exists that a "qualifying patient" is lawfully engaged in the medical use of marijuana if he or she a) is in actual possession of a registry identification card issued by the Department of Health and b) possesses an amount of usable marijuana that does not exceed 2 ½ ounces;

3. Cannot discipline a "qualifying patient" for giving a permitted amount of usable marijuana to another "qualifying patient" for medical use if nothing is transferred in return;

4. Cannot discipline a "qualifying patient" for possessing marijuana paraphernalia to facilitate the use of medical marijuana; and

5. Cannot discipline anyone for giving a "qualified patient" marijuana paraphernalia to facilitate the use of medical marijuana.

"Qualifying medical conditions" presently include cancer, glaucoma, HIV/AIDS, amyotrophic lateral sclerosis, severe arthritis, posttraumatic stress disorder (PTSD), Tourette's syndrome, hepatitis C, Crohn's disease, fibromyalgia, Alzheimer's disease, ulcerative colitis and any "chronic or debilitating disease or medical condition" with symptoms such as peripheral neuropathy, "intractable pain," seizures, "severe" nausea or "severe and persistent" muscle spasms.

Employer Rights Under the Terms of the Amendment and Act 593

The Amendment and Act 593, when combined, provide significant protections for Arkansas Employers. First, the Amendment does not require an employer to "accommodate the ingestion of marijuana" in the workplace. So, unlike the normal use of prescription drugs, Arkansas employers do not have to allow their employees to "light up" or otherwise use medical marijuana on their property. Further, the Amendment states that nothing in its text permits a person to possess, smoke or use marijuana in a variety of locations, including schools of any type, school busses, alcohol or drug treatment facilities, community or recreation centers, public transportation or any "public places."

Second, the Amendment does not require an employer to allow an employee to work "while under the influence of marijuana" and states that nothing in its text permits a person to undertake any task under the influence of marijuana "when doing so would constitute negligence or professional malpractice."

Finally, the Amendment does not permit a person to operate, navigate or control any type of "motor vehicle, aircraft, motorized watercraft, or any other vehicle drawn by power other than muscle power" while under the influence of marijuana.

Act 593 adds other protections for Arkansas employers, which it defines as only those employers with nine or more employees.

Those protections include:

1. Allowing employers to have and enforce drug-free and substance-abuse testing policies that apply to both applicants and employees (which in some situations could be problematic under the original terms of the Amendment);

2. Permitting the discipline of an employee if there is a good faith belief that he or she used *or just possessed* (which seems to conflict with the original terms of the Amendment in certain situations) medical marijuana on site or during work hours;

3. Permitting the discipline of an employee if there is a good faith belief that he or she was under the influence of medical marijuana on site or during work hours; and

4. Allowing employers to exclude a person (employees and applicants) from a safety-sensitive position if there is a good faith belief that person is a current user of medical marijuana.

These protections allow employers a wide variety of latitude when it comes to applicants or employees with a medical marijuana card. Employers are allowed (in certain situations) to refuse to hire an applicant, monitor and assess the job performance of an employee, reassign an employee to different job duties or positions, place an employee on paid or unpaid leave, suspend or terminate an employee, and even require successful completion of a substance abuse program.

But, a word of caution -- just because one has the right to do something under the protections added by Act 593 doesn't necessarily mean that one should. With the mix of state and federal employment-related issues swirling around medical marijuana, employers need to be very careful how they treat employees with a medical marijuana card. Knee-jerk reactions will not serve employers well, especially when they lead to the first lawsuits to be filed by employees with medical marijuana cards.

Start Planning Now

Even though medical marijuana won't be available in Arkansas until late 2017 or early 2018, start planning now for this eventual reality. An important threshold question to answer now – are you willing to allow medical marijuana in your workplace? Here is our list of other things to do:

1. Take a hard look at your written job descriptions, especially the ones you consider to be safety-sensitive. Update them as needed and be sure to indicate in writing which ones are in fact safety-sensitive. But, don't go overboard by claiming all of your jobs are safety-sensitive. If the greatest risk inherent in a given job is a paper cut, it is not going to be safety-sensitive. Don't lose your common sense.

2. For truly safety-sensitive positions, make it a requirement that an employee disclose to your HR Manager that he or she is using medical marijuana or any other "regular" prescription drug that may impact the employee's ability to safely perform the essential elements of the job.

3. Make sure your handbook is up-to-date and include in it prohibitions against the use and possession of medical marijuana at work or during work hours and being under the influence of medical marijuana at work or during work hours.

4. Consider adding a drug-free workplace or substance abuse-testing policy to your employee handbook.

Arkansas employers will be faced with all sorts of scenarios in the coming months and years – from the medical marijuana user that is caught under the influence at work to the long-time employee who is legitimately in need of medical marijuana to the employee who posts a video on Facebook of himself or herself smoking/using medical marijuana at home. Think through the various scenarios, make sure you understand the law, and be ready to make a reasoned decision on how to react.

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Cynthia Y. Thompson is Principal and Founder of The Thompson HR Firm, LLC, a human resources consulting company in Memphis, TN. She is a senior human resources executive with more than twenty years of human resources experience concentrated in publicly traded companies. She is also the Publisher | Editor of *HR Professionals Magazine,* an HR trade publication distributed to HR professionals in Tennessee, Alabama, Georgia, Kentucky, Mississippi, and Arkansas. The mission of the publication is to inform and educate HR professionals. Cynthia has an MBA and is certified as a Senior Professional in Human Resources by SHRM and HRCI. Cynthia is a faculty member at Christian Brothers University in Memphis teaching Human Resource Management. Cynthia also teaches online HR Certification Exam Prep Courses for HRCI and SHRM. She is a sought-after speaker on HR Strategic Leadership.

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MEMPHIS

Thomas L. Henderson is the Managing Shareholder of the Memphis office. He has represented management in employment and labor relations matters for over 30 years. He has served as lead counsel in numerous jury trials in state and federal courts across the nation. His trial experience includes defending state and federal discrimination and harassment lawsuits, class actions, FMLA claims, ERISA and benefit claims, trade secret and unfair competition matters, and related state law claims. He also handles NLRB elections and unfair labor practice proceedings.

JACKSON

Timothy W. Lindsay routinely sought by clients to provide legal advice and offer guidance in avoiding potential problems and costly litigation in the labor and employment arena. In litigation, Tim has defended employers against claims involving state and federal employment laws with a high success rate for over 30 years. To Tim, representing management in labor and employment disputes is more than a professional career choice, it is a personal passion to which his practice has been dedicated for years.

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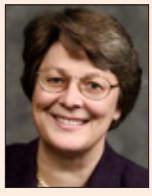


Margaret H. Campbell is a shareholder in the Atlanta office and has practiced employment, litigation, and labor law at Ogletree since 1981. An all-around labor and employment lawyer, Meg is particularly recognized for her expertise and experience in complex class and collective action litigation, whistleblower investigations and litigation including Sarbanes-Oxley and Dodd-Frank cases, appellate practice, and restrictive covenant law. Meg has litigated single plaintiff, multi-plaintiff, and class and collective action jury and non-jury cases in federal and state courts around the country.

A. Craig Cleland defends employers in litigation—including class and collective actions—and counsels them in risk management and compliance. He is the former Chair and Co-Chair of the Firm's Class Action Practice Group. He is also an Adjunct Professor of Law at Georgia State University College of Law, where he teaches Complex Litigation. He has been recognized as a BTI Client Service All-Star twice—one of a small number of employment lawyers in the U.S. who "combine exceptional legal expertise with practical advice, business savvy and creative, effective solutions."

Homer L. Deakins, Jr. was Managing Shareholder of Ogletree from 1985-2000. He has extensive experience in all aspects of labor relations law and has handled some of the largest and most highly publicized union elections in the United States on behalf of employers. This includes representing management in two major union elections in foreign-owned automobile assembly plants in the United States, where the company won those elections by large margins. He also has created and participated in highly sophisticated labor relations training programs for management personnel and has a wealth of experience in guiding employers through challenging labor-related issues.

Gregory J. Hare is Managing Shareholder of the Ogletree Deakins Atlanta office and has been an employment lawyer at Ogletree his entire career, ever since 1991. He assists companies with human resources and employment-related litigation matters, including wrongful termination claims, sexual harassment, employment discrimination, employment contracts, trade secrets, and non-compete agreements. He advises clients on a wide range of human resources topics, such as employee discipline and discharge, severance planning, independent contractor classifications, wage payment, family and medical leave, disability law, military leave, joint employment issues, affirmative action and reductions in force.

OGLETREE DEAKINS ATLANTA CONT.

William P. Steinhaus recently completed a nine-year term in the role of Managing Shareholder of Ogletree's Atlanta office. For over 30 years, he has focused his practice solely on representing employers in the full spectrum of employment and labor matters. His in depth knowledge of the law and network within the legal community have resulted in requests for consultation from his peers and others to assist in identifying lawyers outside of his area of expertise and subject matter experts in various cases. Bill administers the firm's EPLI program, and is the primary contact with the firm's insurance carriers.

BIRMINGHAM

Gordon L. Blair devotes a substantial portion of his practice to general litigation, regularly representing colleges and universities, contractors, healthcare providers, manufacturers and retailers in personal injury, construction, tort, and contract litigation. However, the majority of Gordon's practice is focused on the representation of employers in workplace-related matters, ranging from administrative proceedings to federal litigation. He routinely counsels employers on day-to-day employment decisions, conducts training seminars, and works to develop effective workplace policies and procedures. Gordon lectures to human resources personnel and related groups on topics such as the Family and Medical Leave Act and the Alabama Workmen's Compensation Act.

Brian R. Bostick has practiced exclusively in the area of labor and employment law in the Birmingham area since 1997, and has been with Ogletree Deakins since 2000. He has considerable experience representing employers in employment-related litigation in federal and state courts. He has defended employment lawsuits pending before each of the federal districts in Alabama, the Alabama Supreme Court, the Eleventh Circuit Court of Appeals and the United States Supreme Court. He has also successfully represented employers before numerous administrative agencies such as the Equal Employment Opportunity Commission, the Department of Labor, and the Mine Safety and Health Administration.

John Richard Carrigan is an enthusiastic litigator in state and federal courts, as well as before administrative agencies. He tries jury and bench trials in federal districts throughout Alabama, and in the Northern District of Florida, as well as state courts. Richard has tried matters before administrative law judges of the NLRB and the US Department of Labor, and has argued federal appeals to the Fifth Circuit and the Eleventh Circuit. Matters defended include simple misunderstandings, sharply contradictory versions of an event, disparate impact or "pattern and practice" claims affecting thousands of employees, and malicious and fraudulent attacks.

Christopher W. Deering has extensive experience representing employers in successfully avoiding and defending a broad range of employment-related claims. His focus areas include employment discrimination, wrongful discharge, retaliation and harassment, whistleblower issues, restrictive covenants, wage-hour matters (including class and collective actions) and workplace safety. Mr. Deering has litigated such matters throughout Alabama, Florida, Georgia, Mississippi, Tennessee and Texas. In addition, Mr. Deering regularly provides counseling to employers on matters of employee discipline and termination, enforcement and implementation of employment policies, workplace investigations and reductions in force.

T. Scott Kelly provides practical solutions for federal contractors and subcontractors across the United States to comply with the ever-changing affirmative action obligations imposed by doing business with the federal government. He advocates on behalf of his clients in compliance evaluations and administrative enforcement actions triggered by the United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Kelly assists manufacturing, transportation, construction, food processing, hospitality, healthcare, and financial institutions with creative solutions for preparing, managing, and defending their affirmative action programs and related matters, including jurisdictional analyses and preventative strategies.

Peyton Lacy, Jr. has forty-four years experience in labor and employment law. He graduated with a J.D. degree from the University of Alabama in 1965, where he served as editor-in-chief of the Alabama Law Review and a member of the Farrah Order of Jurisprudence. In addition to a traditional labor law practice, Mr. Lacy defends individual and class employment litigation cases in both federal and state court, handles traditional labor law matters for employers including negotiation and arbitration, and counsels employers on preventive measures in both areas.

James A. Patton, Jr. has advised companies for the past 20 years on a variety of workplace issues including preparing and enforcing non-competition agreements, dealing with complex employee leave issues, defending employment discrimination lawsuits, and providing advice on difficult workplace issues. Jay has written extensively on Alabama's newly amended restrictive covenant law and has enforced and defended restrictive covenant cases in state and federal courts. Jay provides ongoing support to clients who are managing long-term, complicated leave and accommodation issues by helping them to comply with legal directives while ensuring that leaves are efficiently managed.

James C. Pennington is the Managing Shareholder and a founding member of the Birmingham Office of Ogletree Deakins. For more than two decades, he has represented employers in a wide range of labor and employment law matters, including administrative agency charges, federal and state court litigation, union campaigns and collective bargaining. He helps employers avoid workplace disputes by providing management training and developing defensive documentation such as effective employee handbooks, dispute avoidance and resolution policies, and drug and alcohol testing policies and procedures. He is known for helping employers navigate through the intersections of disabilities and leave laws.

David L. Warren, Jr., founding member of the Birmingham office, has represented employers in employment and labor law since 1993. Warren's litigation prevention counseling includes training on employment law issues; assisting employers with implementing adverse employment actions; maintaining policies, handbooks, employment contracts and agreements; and managing leave issues under the Americans With Disabilities Act, Family and Medical Leave Act and workers' compensation laws. His litigation experience encompasses discrimination; equal pay, wage and hour, and leave laws; workers' compensation retaliation; class and collective actions; non-competition and non-solicitation agreements; employment contracts; and compliance with Title III of the Americans With Disabilities Act.

FordHarrison is a U.S. labor & employment law firm with more than 200 attorneys in 29 offices, including four affiliate firms. The firm is committed to adhering to the FH Promise, a set of principles that guides how the firm delivers legal services and works with its clients. FordHarrison attorneys represent employers in labor, employment, immigration and employee benefits matters, including litigation. Through its global practice group and membership in the global employment law firm alliance, Ius Laboris, FordHarrison provides clients that have multinational operations with a broad range of services related to labor and employment law in 49 countries throughout the world. For more information on FordHarrison, visit fordharrison.com. To learn more about Ius Laboris, visit iuslaboris.com.

Louis P. Britt, III – Partner, Memphis
Louis Britt is the Regional Managing Partner for FordHarrison's Memphis, Nashville and Dallas offices. He concentrates his practice on employment litigation and advice, representing private and public employers in a broad range of employment matters. Louis handles employment discrimination and harassment cases (Title VII, ADA, ADEA and FMLA), wage/hour matters, enforcement and defense of restrictive covenants contained in employment agreements, and employment-related torts. He is experienced in complex and class action litigation, and has tried cases in state and federal courts across the country. Louis has extensive experience in public sector representation in both litigation and collective bargaining.

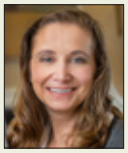
Charles "Bud" V. Holmes – Partner, Memphis
Bud Holmes has over 30 years of experience representing employers in employment related matters. Upon graduation from law school, Bud served as a Judicial Clerk to the Honorable Charles E. Nearn in the Tennessee Court of Appeals, Western Section. Subsequently, he served as Senior Assistant City Attorney for the City of Memphis where his primary responsibilities focused on advising and representing the City in employment-related matters. After entering private practice in 1989, Bud has exclusively represented private and public sector management in a wide variety of employment-related matters.

Herbert E. Gerson – Partner, Memphis
Herb Gerson focuses his practice on managing all areas related to traditional labor and employment issues both local and international. He devotes much of his practice to counseling clients on avoiding employment discrimination claims and developing a positive work environment. Herb has written numerous articles on labor and employment matters, is a frequent speaker on labor and employment matters and co-chaired the Labor and Employment Committee of the Litigation Section of the American Bar Association. Herb is a graduate of Leadership Memphis and a member of the Advisory Board to the Memphis Area Chamber of Commerce.

J. Gregory Grisham – Partner, Nashville
Greg Grisham has over 25 years of successful experience counseling and representing employers in all aspects of workplace law in Tennessee and across the United States. He has helped employers avoid claims, charges and lawsuits with a focus on preventative practices. Preventative practices include counseling in situations involving discipline, termination, demotion, promotion and other workplace changes in the terms and conditions of employment, harassment investigations, wage and hour compliance, FMLA Compliance, Reasonable Accommodation assessment, supervisor training and the review of employment policies and procedures.

Burch, Porter & Johnson provides comprehensive legal services across a wide range of litigation, business and transactional practice. The firm's clients span a broad spectrum: from multi-million dollar corporations seeking counsel to negotiate complex transactions to individuals dealing with the most sensitive personal issues. From its inception, the firm's focus has been on client service – providing specialized expertise, value, responsiveness and practical solutions to address our clients' needs. Clients have counted on the firm's experience, its commitment to service, and its tradition as a leader in business and community affairs for more than a century.

Jennifer Hagerman – As a member at Burch, Porter & Johnson, Jennifer Hagerman has represented clients in cases involving employment discrimination, wage and hour class actions, restrictive covenants, civil rights, healthcare, education and numerous areas of commercial law. Her recognition as a leading labor and employment attorney stems from her focus on employment litigation and experience advising clients on a variety of employment matters including non-solicitation and non-competition agreements, employee handbooks, and employee classification under the FLSA. In addition to her active involvement in the legal community, she has served on the Boards for organizations including Downtown Memphis Commission and New Memphis Institute.



Lisa Krupicka – Since joining Burch, Porter & Johnson in 1987, Lisa Krupicka has built her reputation as one of the top labor and employment attorneys in the Mid-South. Primarily, she focuses on advising and representing employers on employment-related matters, including employee handbooks, training, wage and hour issues, labor relations, and employee discipline and termination. She also advises businesses on compliance with the accessibility requirements of Title III of the ADA. Her litigation experience includes claims for race, sex, age, disability, religious and age discrimination; constitutional claims under 42 U.S.C. § 1983, Title III ADA litigation, ERISA discrimination and benefits claims, as well as wage and hour class actions.

Tannera Gibson is a native Memphian whose practice focuses on employment law and general civil litigation, including personal injury and medical malpractice. Prior to graduating from the University Of Memphis Cecil C. Humphreys School Of Law, she received a B.S. in Computer Science from the University of Memphis, and worked as a software analyst. Ms. Gibson is an active member of the community who maintains a solid pro bono practice.

Gary Peeples' practice focuses on civil litigation, including labor and employment law. A graduate of Vanderbilt University Law School, he has experience in all phases of litigation and defends companies large and small in state and federal court and in administrative matters. A significant component of his practice involves advising employers on how to comply with federal and state law.

Fisher Phillips is one of the largest labor and employment law firms in the country with more than 350 attorneys in 32 offices nationwide, including Tennessee, Florida, Georgia, Kentucky and Mississippi. Some of the most talented and experienced attorneys come to the firm to handle challenging cases involving workplace issues faced by employers and HR professionals. Fisher Phillips attorneys specialize in all areas of labor and employment law and have the experience and resolve to achieve your desired results in court, with employees and unions, and with competitors.

MEMPHIS

Jay Kiesewetter is senior counsel in the Fisher Phillips Memphis office. He counsels employers in all aspects of union-free management and advises non-union companies facing union organizing activity. Additionally, he represents employers in unfair labor practice and representational proceedings before the National Labor Relations Board and the United States Courts of Appeal.

Jeff Weintraub is the managing partner of the Fisher Phillips Memphis office. He has represented employers in more than 59 jury and bench trials in employment-harassment/discrimination and retaliatory discharge lawsuits. Jeff handles EEOC charges, wage and hour cases, non-compete cases, and labor cases in all courts and agencies, various Courts of Appeals and the U.S. Supreme Court.

LOUISVILLE

Tom Birchfield is the managing partner of the Louisville office, which he helped open for the firm in 2009. Prior to 2009, he was the chairperson of the labor and employment practice group of a large regional law firm. Tom has represented employers exclusively for over 25 years in federal and state courts and before various administrative agencies throughout the nation. Tom assists employers with their employment practices liability prevention efforts by conducting training, counseling, reviewing and revising policies and preparing severance agreements. Tom also represents companies in collective bargaining, arbitrations and proceedings before the National Labor Relations Board. Named Super Lawyer – Kentucky since 2007.

Ray Haley III is a partner in the Louisville office and has practiced labor & employment law for more than 35 years. He represents employers in a variety of industries including healthcare, manufacturing, transportation and rehabilitative services. Ray's representation of clients involves defense of all forms of civil rights and wrongful discharge claims in state and federal courts, as well as arbitration of labor disputes. He regularly advises clients concerning compliance with virtually all employment-based state and federal mandates, union related matters and state and federal wage and hour advice and litigation. Named Super Lawyer – Kentucky since 2007.

Jeff Savarise is a partner in the Louisville office and chair of the firm's automotive manufacturing practice group. Jeff has served as Toyota manufacturing's national outside labor and employment counsel for over 20 years. Jeff practices exclusively in the areas of labor and employment law on behalf of employers, where he handles cases in a number of state and federal jurisdictions. He also provides a variety of preventative maintenance and employment training programs especially geared to the automotive industry. Jeff received the "Distinguished Alumni Award" given to alumni of the University of Akron Law School who have demonstrated significant achievement in the field of law and have made significant contributions to their community. Named Super Lawyer – Kentucky since 2007.

Craig Siegenthaler is a partner in the Louisville office. He has appeared in federal and state courts defending clients in class action litigation involving wage and hour matters, as well as other employment law based claims. Craig represents corporate entities and management in employment litigation in federal and state courts and in administrative proceedings before the Equal Employment Opportunity Commission (EEOC) and state agencies. He has counseled companies regarding employment issues, including legal compliance, policies and procedures, restructuring, job accommodations, leaves, non-compete agreements, employment contracts, and layoffs and related severance programs. Named Super Lawyer – Kentucky since 2007.

George Adams is a partner in the Louisville office. For nearly two decades, his practice has been devoted exclusively to advising and representing employers in many states and industries regarding labor and employment matters. This includes managing compliance with local, state, and federal laws, and defending employers against alleged violations. George also provides day-to-day advice regarding harassment, discrimination, FMLA and ADA issues, wage and hour issues, collective bargaining and labor relations, and many other topics. He has helped many employers reduce the risk of litigation and liability through sound policy development and training. Named Super Lawyer - Kentucky in 2007, 2010-2017.

Cynthia Blevins Doll is a partner in the Louisville office. She has 25 years of labor and employment experience. She represents employers in employment litigations of all sorts in the federal and state courts, and she counsels them on compliance with the law in such areas as Family and Medical Leave Act, employment discrimination, Americans with Disabilities Act, Title VII, wrongful termination, wage and hour issues, reductions in force, non-competition agreements and sexual and racial harassment. Cynthia also assists clients in their prevention efforts by conducting employee training and preparing handbooks and policies for the workplace. Named Super Lawyer – Kentucky since 2007.

Todd Logsdon is a partner in the Louisville office. His practice is devoted to advising and representing employers regarding labor and employment law matters. He represents employers in a variety of forums, including state and federal courts and before administrative agencies. Todd accrued many years of practical experience prior to his legal career working in manufacturing with responsibilities for Human Resources and Safety. He has a particular emphasis on OSHA issues including contesting and litigating OSHA citations, representing employers during OSHA inspections/investigations, OSHA compliance audits and defending whistleblower/retaliation claims, as well as handling discrimination, FMLA, wage and hour and covenants not to compete issues. Named Super Lawyer – Kentucky since 2014.

Wright Lindsey Jennings' Labor and Employment team has management-oriented practices addressing all aspects of the employee/employer relationship. The team has extensive experience litigating and arbitrating employment and civil rights claims, in addition to state law claims. Our attorneys defend clients in multi-plaintiff, collective action and class action lawsuits, as well as Department of Labor and EEOC investigations. WLJ's team provides advice and counsel to clients regarding a variety of day-to-day matters, such as employment agreements and disciplinary issues, and represents clients in labor arbitrations, union elections and contract negotiations. Despite our collective litigation and arbitration experience, we place a premium on preventing employee claims that could lead to administrative investigations and litigation. We do this in part by offering employee and manager training on a variety of issues and by providing free educational resources to our clients through quarterly newsletters, employment law luncheons and website articles.

WRIGHT LINDSEY JENNINGS

Stuart Jackson heads up Wright Lindsey Jennings' Labor and Employment Team. He advises employers on compliance with civil rights laws and developing personnel policies, employment agreements and covenants not to compete. Jackson also defends employers in federal and state court litigation and appeals involving claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act and the Arkansas Civil Rights Act. Jackson is listed among *The Best Lawyers in America, Chambers USA* "Leaders in Their Field" and *Mid-South Super Lawyers,* and has an AV® Preeminent™ Peer Review Rating through Martindale-Hubbell.

Jane A. Kim's practice centers on defending employers in state and federal court litigation involving claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act and the Age Discrimination in Employment Act. Kim also advises and provides training to employers on compliance with civil rights law. Kim is recognized by *Chambers USA* as a "Leader in Their Field" and has been listed in *Mid-South Super Lawyers* since 2013. Kim chairs Wright Lindsey Jennings' Committee on Associates, and was named to the inaugural *Arkansas Business* list of "Women to Watch" in Central Arkansas.

John D. Davis concentrates his Little Rock practice in the areas of labor and employment law and workers' compensation. He spends a considerable amount of his time advising clients in connection with a variety of employment-related matters, including terminations, severance agreements, wage and hour issues, union avoidance, union negotiations, arbitrations, personnel policies and compliance with federal, state and local employment laws. Davis has received an AV® Preeminent™ 5.0 out of 5 Peer Review Rating through Martindale-Hubbell, and is listed among *The Best Lawyers in America, Chambers USA* and *Mid-South Super Lawyers.*

Lee J. Muldrow has been engaged in general litigation and workers' compensation defense in Little Rock for more than thirty years. His litigation practice primarily involves a wide variety of insurance defense cases, including copyright, trademark and trade dress litigation. His workers' compensation practice entails representing employers, self-insured companies and insurance carriers. Muldrow is listed in *The Best Lawyers in America* in the areas of "Worker's Compensation Law" and "Health Law," *Chambers USA* and *Mid-South Super Lawyers.* He has also received an AV® Preeminent™ 5.0 out of 5 Peer Review Rating through Martindale-Hubbell.

Michelle M. Kaemmerling's practice focuses on employment and commercial litigation in state and federal court, including appeals. She has also represented a number of defendants in employment and consumer class action lawsuits. In addition to her litigation practice, Kaemmerling regularly advises employers regarding compliance with state and federal employment laws and develops personnel policies, employment agreements, covenants not to compete and other employment-related contracts. Kaemmerling has been recognized by *Mid-South Super Lawyers* since 2009, is listed among *The Best Lawyers in America* and is named a "Leader in the Field" by *Chambers USA.*

Regina Young's practice centers on litigation and trial work, including employment law defense. Young defends employers in federal and state court litigation and appeals, including claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, 42 U.S.C. Sections 1981 and 1983 and state law claims involving trade secrets, non-compete agreements, arbitration agreements, wrongful discharge, the Arkansas Civil Rights Act and the Arkansas Minimum Wage Act. She has been recognized by *Mid-South Super Lawyers* for her work in Litigation Defense and was also recognized by *Soiree Magazine* in 2016 as a "Best Lawyer" in Little Rock in the category of litigation.

Littler is the largest global employment and labor law practice with more than 1,300 attorneys in over 75 offices worldwide. Littler represents management in all aspects of employment and labor law and serves as a single source solution provider to the global employer community. Consistently recognized in the industry as a leading and innovative law practice, Littler has been litigating, mediating and negotiating some of the most influential employment law cases and labor contracts on record for over 70 years.

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MEMPHIS

Lisa A. Lichterman represents management clients in both state and federal employment litigation as well as administrative proceedings before state and federal agencies. Lisa regularly works with employers to determine the legal, as well as the practical, impact of employment decisions and to develop proactive policies and procedures to improve employee morale, strengthen relationships between management and employees, and ensure compliance with employment and labor laws. Lisa also regularly conducts employee and supervisory training programs in various employment law areas. Lisa served as general counsel for a multi-state sales company, with a significant portion of her role being devoted to training supervisors and human resources professionals on employment law issues.

Paul E. Prather represents management exclusively in all areas of employment and labor relations, including state and federal employment litigation and in administrative proceedings before the National Labor Relations Board, the Equal Employment Opportunity Commission and the United States Department of Labor.

Tanja L. Thompson is Office Managing Shareholder and represents companies in the area of traditional labor law. Fortune 500 companies as well as local employers across various industries, such as manufacturing and healthcare, seek her expertise in remaining union-free and in managing their union-represented workplaces. Union-free efforts include campaigns, comprehensive union vulnerability assessments, human relations audits, communication strategies, and union avoidance and positive employee relations training. She has successfully represented companies throughout the country in union organizing campaigns. Tanja's NLRB litigation practice includes unfair labor practice charges, as well as pre- and post-election litigation. For unionized clients, Tanja takes a proactive and assertive approach in representing clients' interests at the bargaining table, in labor arbitrations, and in developing training and communication programs to ensure effective management under collective bargaining agreements.

John W. Simmons represents management clients in employment litigation, advises clients on employment law and labor relations matters and represents clients in administrative proceedings such as those before the National Labor Relations Board and the U. S. Equal Employment Opportunity Commission.

Steven W. Likens represents management in labor and employment litigation in state and federal courts and in administrative proceedings before the National Labor Relations Board, the Equal Employment Opportunity Commission and the Department of Labor. His litigation experience includes class actions, discrimination and harassment, unfair competition and trade secrets, and wage and hour.

ATLANTA

Leslie A. Dent, is an experienced trial lawyer who has successfully tried cases ranging from individual discrimination matters to complex wage and hour class actions. She represents employers in class and collective actions involving off-the-clock claims, challenges to exempt status and other wage-related claims, as well as Rule 23 class actions alleging discrimination claims. Leslie counsels and represents employers on a broad range of employment law issues, including discrimination, harassment, retaliation, and leave laws. She has extensive experience conducting and supervising internal investigations and defending whistleblower and retaliation claims, including Dodd Frank and False Claims Act claims.

L. Traywick Duffie, is Office Managing Shareholder and represents corporate clients in a broad range of employment and labor law, including employment litigation, union organizing, wage and hour and Employee Retirement Income Security Act matters. He has successfully defended numerous class and collective matters and countered union organizing campaigns in more than 40 states. He has successfully defended single plaintiff, multiple plaintiff and class action litigation involving, race, age, sex, pregnancy, disability, retaliation, ERISA, whistleblowing, covenants not to compete and state law contract claims.

Marcia A. Ganz, focuses her practice on representing management in federal and state employment and traditional labor matters, with an emphasis on The Fair Labor Standards Act, Title VII, wage and hour laws, employment discrimination, retaliation, workplace harassment and wrongful discharge. Marcia also has extensive experience defending manufacturing and healthcare clients against complex class and collective action claims involving overtime, misclassification, and other wage-related issues. Additionally, Marcia regularly counsels and defends employers under investigation by the Equal Employment Opportunity Commission and state civil rights agencies.

ATLANTA CONT.

Anne M. Mellen, represents and counsels employers in a broad range of employment matters arising under federal and state law. Her practice primarily focuses on wage and hour actions arising under the Fair Labor Standards Act and various state laws, including complex class and collective actions involving overtime, misclassifications and other wage-related claims.

Jeffrey M. Mintz, dedicates his practice to providing employment and labor law counsel and strategic advice to employers with an emphasis in labor management relations and positive human resource practices. Jeff is an experienced practitioner before the National Labor Relations Board and has defended employer positions before the Equal Employment Opportunity Commission and other state and federal administrative agencies and courts. Over the past three decades, he has represented management in over 100 counter-organizing drives and has abundant knowledge with respect to representation elections, related NLRB proceedings and preventive labor relations. He also has extensive experience advising employers facing non-traditional organizing including "corporate campaign" tactics designed to enhance union leverage so as to achieve labor's objectives.

Amy M. Palesch, represents and counsels employers in a broad range of employment matters arising under federal and state law. Amy concentrates her practice in employment litigation, defending employers against claims of workplace discrimination, harassment and retaliation and alleged wage and hour violations. Amy also offers clients litigation avoidance strategies and training on a range of employment issues.

Benson E. Pope, represents and counsels employers in a broad range of employment matters arising under state and federal laws. His practice primarily focuses on issues involving, the Fair Labor Standards Act, the Sarbanes-Oxley Act, the Dodd-Frank Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Occupational Safety and Health Act and contingent workers and independent contractors. For over ten years, Ben has successfully defended lawsuits alleging single plaintiff and class claims, including alleged class-wide wage hour violations, systemic discrimination and retaliation for purported violations of securities laws.

Daniel Turner, counsels and represents employers in all aspects of litigation in employment law issues, including discrimination, harassment, retaliation, wage and hour, and leaves of absence. Serving as lead counsel in more than 50 class and collective actions throughout the country, he has litigated cases under the Title VII and Section 1981 of the Civil Rights Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act and various wage and hour laws. Dan's extensive litigation practice also includes state law tort, contract, restrictive covenant claims, and various types of civil rights litigation.

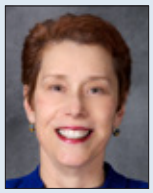
LEXINGTON

Leila Ghabrial O'Carra focuses her practice in the areas of employment discrimination, leave laws and education. Her extensive litigation experience includes state and federal court and agency proceedings. She has obtained favorable trial verdicts, summary judgments, dismissals and settlements on claims including: discrimination, wrongful discharge, tortious interference with a business relationship, defamation, non-compete agreements, and unemployment benefits. Leila has significant experience guiding employers through employee terminations, helping them to avoid costly litigation by drafting severance agreements and negotiating terms favorable to them. Her significant experience and excellent client service has yielded tangible value to her clients.

Jay Inman represents employers in a full range of labor and employment law matters arising under federal, state, and local laws. He regularly provides advice, counsel, and training for employers of all sizes, and he has assisted clients with administrative agency investigations and charges, as well as represented clients at various stages of litigation, including trial and, if necessary, appeal. Jay's industries of emphasis include education, healthcare, hospitality, and manufacturing. Jay has obtained favorable results for clients in federal and state courts and before the Equal Employment Opportunity Commission (EEOC), Kentucky Commission on Human Rights, and Kentucky Labor Cabinet.

Cross, Gunter, Witherspoon & Galchus, P.C. (CGWG) is a leading Labor and Employment law firm in the state of Arkansas. CGWG's team of attorneys provides innovative and unique solutions for today's fast-paced and evolving legal environment. We offer customized training programs to help employers and HR professionals minimize legal exposure and navigate workplace challenges. We are a female majority owned law firm and we have been repeatedly recognized for our family friendly and work life balance initiatives. Respect for employees and an emphasis on work-life balance are the hallmarks of our business and we are able to use our experience to help our clients meet their own diversity goals and mandates.

M. Stephen Bingham's practice includes products liability defense, commercial litigation, airport law, insurance defense, and construction law. Steve, who is also a Certified Public Accountant, has an emphasis in business contract work. He focuses a great deal of his time in defending municipal and government entities. Steve served as a Member of the House of Delegates for the Arkansas Bar Association from 1996 to 2013, and also was a member of the Board of Governors. He is past president of the Arkansas Association of Defense Counsel, and former Commissioner of the Arkansas Commission on Child Abuse, Rape and Domestic Violence.

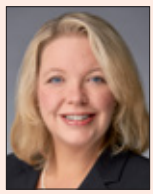


Carolyn B. Witherspoon practices in the areas of labor and employment defense, transportation law and government law in Little Rock. Carolyn is active in the Arkansas and American Bar Associations; is a member of the prestigious Union Internationale des Avocats, an international society of legal professionals recognized before the United Nations; and also serves and arbitrator for the Court of Arbitration for Sport. She has been named one of the top 50 Arkansas Super Lawyers and Top 50 Women Mid-South Super Lawyers and is also a Fellow of the College of Labor and Employment Lawyers.

J. Bruce Cross practices in the areas of labor and employment defense law. He was named Lawyer of the Year in Little Rock in Labor Law – Management in 2014 and is listed as a Leading Lawyer in Labor and Employment in *Chambers USA; Best Lawyers in America* in Labor and Employment Law; US News and World Report Listing of Best Labor and Employment Lawyers; and the *Top 50 Arkansas Mid-South Super Lawyers.* He is a Fellow in the College of Labor and Employment Lawyers of the American Bar Association.

Baker Donelson gives clients access to a team of more than 800 attorneys and public policy advisors representing more than 30 practice areas to serve a wide range of legal needs. Clients receive knowledgeable guidance from experienced, multi-disciplined industry and client service teams, all seamlessly connected across 24 offices in Alabama, Florida, Georgia, Louisiana, Maryland, Mississippi, Tennessee, Texas, Virginia and Washington, D.C. Ranked as the 60th largest law firm in the U.S., Baker Donelson is recognized by FORTUNE magazine as one of the "100 Best Companies to Work For."

Jenna Bedsole is a shareholder in the Birmingham office and leads the Firm's Labor & Employment Group. With the recent increase of wage and hour law cases, she has defended employers successfully in both single plaintiff cases and collective actions. She advises U.S. companies with U.S. workers in foreign jurisdictions about the effect of U.S. law on those workers, and advises foreign companies in the U.S. on compliance with U.S. labor and employment laws. Ms. Bedsole conducts management and employee training relating to employment issues, drafts handbooks and employment agreements, provides policy review and regularly counsels employers to ensure compliance.



Leigh M. Chiles concentrates her practice in complex business and health care litigation, including antitrust litigation, fiduciary duty litigation, class action litigation, ERISA litigation qui tam actions, litigation involving managed care organizations, and payer-provider disputes. Ms. Chiles also advises health care clients concerning compliance with EMTALA, HIPAA, and Section 501(r) of the Internal Revenue Code. Ms. Chiles practices out of the Firm's Memphis office. She regularly represents clients in state courts in Arkansas, Mississippi and Tennessee, and in federal courts throughout the Fifth, Sixth, Seventh and Eighth Circuits.

As a shareholder in the Labor & Employment Group at Baker Donelson, **Martha Boyd** advises nonprofits, for-profits and public companies on all types of employment issues. She assists managers in running the company by creating legalese-free employee handbooks and employment policies that employees can actually understand and follow. She also advises businesses on their obligations regarding employee leaves of absence, such as absences under the FMLA and military leave laws. She counsels clients on responding to harassment claims, and investigates those claims when an outside investigator is desirable.

Angie Davis partners with clients on all aspects of employment issues. Her practice includes high level investigations of claims involving discrimination and/or harassment under Title VII, the Tennessee Human Rights Act or the ADEA and the drafting of clients' responses to subpoenas, attorney demand letters, and state and federal agencies such as the EEOC or the NLRB. She provides daily counsel to executives, human resources managers and various other clients regarding employment issues such as leaves; terminations; reasonable accommodations under the ADA; wage and hour issues under the FLSA; reorganizations; reductions in force; policies and procedures; non-compete agreements and severance agreements.

BAKER DONELSON CONT.

Brooks Eason, a shareholder in the Jackson office, has served for more than 25 years as lead outside counsel in employment litigation for a naval shipyard in Pascagoula, the largest employer in Mississippi. Mr. Eason has also represented shipyards in Gulfport, Mississippi, and New Orleans, Louisiana. He has successfully defended employers in class and collective actions and individual suits asserting claims for discrimination on the basis of race, gender, age, religion and disability, for sexual and racial harassment, and for violations of the Fair Labor Standards Act.

Lawrence S. Eastwood Jr. is an employment and labor law attorney in the Nashville office, where he counsels and defends clients on a full spectrum of employment, training and executive compensation matters. Mr. Eastwood has extensive experience litigating labor and employment law cases on behalf of management, including cases under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), ERISA, and applicable state employment statutes.

David Gevertz is a shareholder in the Firm's Labor and Employment Group. He is also the managing director of the Firm's Advocacy Department. David Gevertz is a trial lawyer. He tries employment discrimination, wage and hour, noncompete, whistleblowing, and trade secrets cases to juries throughout the country. When he is not litigating cases, Mr. Gevertz directs companies through sensitive internal and government investigations, and mass layoffs. Additionally, Mr. Gevertz represents financial, housing, testing, and hospitality companies sued for violating public accommodations, fair housing, fair testing and fair lending laws.

Steve Goodwin is a civil litigation and labor relations lawyer in the Firm's Memphis office. His experience includes employment discrimination litigation, unfair labor practices, employer policies, arbitration and negotiations, tort and commercial litigation, tax litigation and appellate practice. He has extensive experience in all aspects of labor and employment law and has negotiated union contracts, represented management in labor arbitrations and unfair labor practice charges and EEOC charges. He has litigated cases under the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the WARN Act and the Family and Medical Leave Act.

Charles K. Grant is a veteran litigator who has tried more than 45 jury trials to verdict in both federal and state courts, and represented numerous clients in mediation and arbitration proceedings across more than a dozen states. Mr. Grant represents clients in complex employment litigation, including collective actions under the Fair Labor Standards Act, as well as business litigation matters. He is a shareholder in the Firm's Nashville office and a member of the Firm's Board of Directors. Mr. Grant's clients also include licensed professionals, such as lawyers, physicians and dentists, whom he has represented before licensing boards.

Rusty Gray represents local, regional and national clients on a full range of labor and employment matters, including wage and hour, drug testing, policy manuals, covenants not to compete, response to union activity, various employment forms, compliance advice and employment litigation. He also has more than 15 years of experience in commercial and business litigation, including litigation involving contractual matters, trade secrets, stock valuation and real property. He has litigated matters before courts or government agencies in approximately 20 states. Mr. Gray is the managing shareholder in the Chattanooga office, and he also serves on Baker Donelson's Board of Directors.

Jonathan C. Hancock represents employers and management clients regarding all aspects of employment law, including employee counseling and termination, proactive employee training, and the handling of employee complaints and claims, whether made informally to the employer or filed as part of a lawsuit in state or federal courts across the country. Mr. Hancock has extensive experience creating proactive training programs for all employees, including focused "front line" training for managers, supervisors and executives, and has successfully assisted numerous employers with the implementation of risk avoidance programs producing measurable results.

Jennifer P. Keller is president and chief operating officer of the Firm. Ms. Keller is a former member of the Firm's board of directors and former chair of the Firm's nationally-recognized Labor & Employment Department. As an employment litigator, she advises clients on a wide variety of issues, including discipline and terminations, benefits issues, leave, disability accommodation, policy formulation and enforcement and similar matters. A substantial part of her practice is providing training for employers in the areas of harassment and discrimination prevention, drug-free workplace, union avoidance and other employment law issues.

BAKER DONELSON

BAKER DONELSON CONT.

Timothy B. McConnell, a shareholder in the Knoxville office, practices employment litigation and co-chairs the Labor & Employment Practice Group. Mr. McConnell counsels and defends clients in cases filed in both federal and state courts in matters arising under Title VII, the ADA, ADEA, FMLA, FLSA, OSHA and state-specific employment laws. Mr. McConnell regularly represents clients in matters pending before the EEOC and the Tennessee Human Rights Commission.

J. Randall Patterson represents employers before the EEOC and other state and federal agencies, and advises employers on many topics including policies and procedures, reductions in force, wage and hour issues, employee handbooks, drug testing and employment contracts. In employment litigation, Mr. Patterson has experience in a full range of employment related claims including: sexual harassment; age, race and disability discrimination, FLSA collective actions; retaliatory discharge and employment related defamation claims. Mr. Patterson has litigation experience in ERISA litigation cases involving the denial of employee benefits, breach of fiduciary duties and related claims, and in antitrust and white collar criminal defense.

William G. Somerville concentrates his practice in business litigation, including health care litigation, employment law and gaming law. In addition to defending employers in matters ranging from class action discrimination cases to wage and hour investigations, Mr. Somerville has successfully handled a wide variety of complex and commercial cases on behalf of corporate litigants. His successful representations include prosecuting insurance coverage cases, breach of contract claims, and computer software disputes on behalf of major financial institutions; prosecuting and defending trade secret and intentional interference claims involving corporate plaintiffs and defendants; and defending manufacturers in products liability litigation.

Steven H. Trent, the managing shareholder in Baker Donelson's Johnson City/Tri-Cities office, has counseled and defended clients in employment matters for more than twenty years. Mr. Trent focuses his practice on labor and employment law. He represents employers before the NLRB and other state and federal agencies and advises employers on many topics including union avoidance, FMLA administration, reductions in force, wage and hour issues, employee handbooks, drug testing and employment contracts. Mr. Trent also represents the interests of management during the collective bargaining process.

Kim Vance has more than 25 years of experience representing management in every aspect of labor and employment law. Ms. Vance is a shareholder in the Labor & Employment Group at Baker Donelson's Nashville office. She has represented management clients in State and Federal Courts and in defense of administrative proceedings before the Equal Employment Opportunity Commission, State Human Rights Commissions, State Unemployment Commissions, Arbitrators, the National Labor Relations Board and the Department of Labor.

Ken Weber has devoted his legal career to helping employers manage their workplace liabilities. For more than 20 years, he has defended employers of all sizes in disputes ranging from wage and hour, unfair competition and trade secret protection, to discrimination and harassment charges, retaliation and whistleblower suits, and employment contract disputes. He has participated in over 50 trials and injunction hearings, including numerous jury trials as first chair. Mr. Weber also regularly counsels employers on litigation avoidance and compliance strategies, provides general employment law advice and training, drafts employment contracts and policies, and represents employers in Department of Labor and EEOC investigations.

Maurice Wexler, senior counsel in the Memphis office, offers clients decades of experience in labor and employment and general corporate law. Mr. Wexler has counseling and litigation experience in the areas of employment discrimination, Title VII, ADA, ADEA, FMLA; statistical cases; class actions; employment policies; wage/hour cases; drugs, alcohol and AIDS-related issues; unemployment compensation; arbitration; labor negotiations; federal executive order 11246; compliance reviews; charge handling; develop affirmative action plans; NLRB and DFR cases; mediation and arbitration. He also serves as a diversity and inclusion trainer for the Firm.

Edward R. Young is engaged in a unique nationwide practice limited exclusively to the representation of management in all phases of labor relations and employment law. Mr. Young began his practice with Newell Fowler, who was known as one of the first labor relations attorneys in the nation. For more than thirty years he has assisted clients in labor and employment litigation in state and federal courts in issues dealing with the EEOC and NLRB. He has litigated in federal courts opposite the EEOC, tried cases before the NLRB, as well as handled union elections before that agency.

The Kullman Firm has exclusively represented management in labor and employment matters since 1946, including matters relating to Title VII, the ADA, ADEA, FMLA, FLSA, OSHA, ERISA, COBRA, OFCCP, NLRA, WARN and other federal and state employment laws. The Firm represents clients in a wide range of industries, which provides it with a sound understanding of the general business practices of a vast array companies. With this experience, the Firm is able to provide proactive legal advice to help clients achieve their business goals while complying with applicable law.

THE KULLMAN FIRM

COLUMBUS, MS

Peyton S. Irby, Jr.

Mr. Irby has more than 35 years of experience assisting private and public employers in litigation and advising employers regarding compliance with regulatory requirements. Prior to entering private practice, he served as a trial and supervisory attorney with the NLRB.

Taylor B. Smith

Mr. Smith has more than 50 years of experience representing employers and is listed in *America's Leading Business Lawyers* and *The Best Lawyers in America* as one of the outstanding lawyers in the labor and employment field.

MOBILE, AL

Elizabeth "Beth" Darby Rehm

For over 23 years, Ms. Rehm has represented employers in all aspects of labor and employment law, including counseling employers on day-to-day decisions and litigating and advising employers on a variety of federal and state laws. She has been recognized as a Super Lawyer in Employment and Labor Law and Best Lawyers in America for several years.

Paul D. Myrick

Paul D. Myrick has represented employers in all areas of labor and employment law for over 30 years, including counseling, litigation in state and federal court, arbitration and administrative proceedings. Paul is an elected Fellow of the College of Labor and Employment Attorneys.

NEW ORLEANS

Ernest R. Malone, Jr.

Mr. Malone has represented management exclusively for 40 years in labor and employment law. He advises management in the employment dimensions of strategic planning, the development and administration of employment practices, policies, mergers, acquisitions, and divestitures, compliance with employment and anti-discrimination laws, union organizing and NLRB elections.

At **Bass, Berry & Sims,** positive human relationships and interactions drive business success. Our Labor and Employment team works with public and private companies across a variety of industries, ranging from Fortune 500 companies to small locally owned businesses. As experienced litigators, the team defends employment cases and works with employers to avoid litigation on the front end through day-to-day counseling and HR training. Our attorneys are regularly involved in matters involving discrimination, retaliation, wrongful discharge, non-competes, FMLA, wage and hour, defamation, employee misclassification and a myriad of other traditional labor issues.

BASS BERRY SIMS

Tim Garrett of Bass, Berry & Sims helps employers solve complex issues related to all aspects of labor and employment law, providing in depth counseling and developing creative solutions to underlying business issues. He is an experienced trial lawyer, defending employers of all sizes in employment litigation claims across the country. Tim has been recognized by *Mid-South Super Lawyers* for the past ten years (2006-2016), along with *Best Lawyers in America*® and *Chambers USA* for many consecutive years. This recognition paired with his experience has earned him a national reputation for counseling employers through the maze of complex employee issues.

Bill Ozier of Bass, Berry & Sims has practiced for more than 40 years as a labor and employment attorney. Bill has been recognized by *Mid-South Super Lawyers* for the past ten years (2006-2016) and earned national praise including 30 consecutive years of recognition in *Best Lawyers in America*® and top-tier rankings in *Chambers USA* for his "well documented and focused process" on labor and employment matters (from *Chambers USA* 2013). Bill's ability to provide practical employment advice while remaining mindful of the cost/benefit considerations for the business has resulted in numerous long-term client relationships.

Guns in the Workplace:
Crafting a State-Compliant Policy

By JENNIFER S. P. CHANG
and GREGORY J. NORTHEN

The debate over guns in the workplace has been a common fixture in the media for many years, and for good reason. In 2010, shootings accounted for 78 percent of all workplace homicides, or 405 fatal injuries, according to the U.S. Bureau of Labor Statistics. The vast majority of these shooting (83 percent) occurred in the private sector, while only 17 percent of the shootings occurred in the government. The Crime Prevention Research Center estimates that there are more than 12.8 million concealed handgun permits in the U.S. All 50 states and the District of Columbia have enacted various forms of concealed-carry licenses, and approximately half have passed laws permitting employees to bring guns into workplace parking lots.

This article analyzes whether employers in Alabama, Arkansas, Georgia, and Tennessee may prohibit guns on company property and/or company property. Employers researching their state's concealed carry laws should pay attention to notice requirements, storage requirements for possession in cars, restrictions on searches and inquiries, and liability to employees or third parties. A full understanding of the nuances of an employer's concealed carry laws will enable the employer to draft a compliant workplace violence policy that addresses the possession of firearms in the workplace.

Alabama

In Alabama, employers may prohibit employees from bringing firearms onto the premises by posting a visible notice at public entrances of premises or buildings to alert all persons entering the facility that firearms are prohibited.

However, an employee with a valid concealed carry handgun license may transport and store a gun in his or her vehicle while in a public or private parking lot so long as: (1) the weapon is any firearm legal for use for hunting in Alabama other than a pistol, (2) the employee is parked where he or she is permitted to be, (3) the gun is kept out of plain sight, and (3) when the employee is not in the car, the gun is stored inside a locked compartment or container or in the interior of the car.

A public or private employer may inquire about an employee's possession of a firearm in his or her motor vehicle if the employer believes that the employee presents a risk of harm. The employer may also verify that the employee is complying with the requirements for possessing a firearm in a parking lot.

Employers may be liable for wrongfully taking an adverse employment action against an employee properly possessing a firearm. Employers are generally immune from liability for damages resulting from compliance with the parking lot law except where the employer's affirmative, wrongful acts caused the harm.

The presence of firearms in accordance with the statute does not, by itself, constitute a failure to provide a safe workplace.

Arkansas

In Arkansas, employers may prohibit the possession of handguns in the workplace if they provide proper notice of the prohibition. Employers must place at each entrance

to the premises a written notice that is clearly readable at a distance of not less than ten feet that "carrying a handgun is prohibited." If the premises lack a roadway entrance, employers must post at least one written notice within every three acres of the premises.

However, even if the employer posts the proper written notice, an employee with a valid concealed carry handgun license may transport and store a gun in his or her car while in a public or private parking lot. If the employee works for a private employer, the employee must ensure that: (1) the employee is parked where he or she is permitted to be, (2) the gun is stored out of sight inside a locked car, (3) when the employee is not in the car, the gun is stored inside a locked personal handgun storage container, and (4) the employee possesses the key to the storage container.

Notably, public employers that are public universities, colleges, or other higher educational entities may not restrict the carrying of lawful handguns by persons who obtain a new special "active shooter" endorsement from the Arkansas State Police.

Employers may be liable for wrongfully taking an adverse employment action against an employee properly possessing a firearm. Employers are generally immune from liability for damages resulting from compliance with the parking lot law except where the employer intentionally solicited or procured the harm.

The presence of a handgun in a parking lot does not, by itself, constitute a failure to provide a safe workplace. Similarly, the decision to not ban concealed weapons in the workplace does not, by itself, constitute a failure to provide a safe workplace.

Georgia

In Georgia, an employee with a valid weapons carry license may transport and store a gun in his or her car while in a public or private parking lot if the gun is locked out of sight within the trunk, glove box, or other enclosed compartment or area in the vehicle.

Public and private employers are prohibited from conditioning employment of prospective employees by prohibiting the prospective employees from entering or parking a locked vehicle with a concealed firearm so long as the employee stores the gun in compliance with the Georgia statute and has a valid weapons carry license.

Public and private employers are prohibited from searching locked, privately owned vehicles of employees in the employer's parking lot. However, this does not apply to searches by law enforcement pursuant to a valid search warrant; vehicles owned or leased by an employer; or situations in which a reasonable person believes that accessing the locked vehicle is necessary to prevent an immediate threat to human health, life, or safety.

However, these restrictions do not apply if the employer provides a secure, restricted parking lot for employees, and if searches are uniformly applied. There are also exceptions for certain sensitive areas such as electric generation, defense facilities, and as provided under federal law.

Employers are generally immune from liability for damages resulting from compliance with the parking lot law except where the employer knew that the person using the firearm would commit a criminal act on the employer's premises.

Tennessee

In Tennessee, private employers may prohibit employees from possessing weapons on the premises provided the employer conspicuously

posts specific signage in prominent locations, including all entrances used by individuals entering the property.

A handgun carry permit holder may transport and store a firearm or ammunition in his or her motor vehicle on any public or private parking area so long as the firearm or ammunition is (1) kept from ordinary observation or (2) if the permit holder is outside the car, locked in the trunk, glove box, or interior of the vehicle. Employer owned or leased vehicles are exempt, provided the employer has a written policy prohibiting firearms or ammunition in the employer's motor vehicles.

Employers may be liable for wrongfully taking an adverse employment action against an employee properly possessing a firearm or ammunition. Employers are generally immune from liability for damages resulting from compliance with the parking lot law except where the employer engages in conduct that causes the damages. Employers are not responsible for the theft of a firearm or ammunition stored in motor vehicles.

The presence of a handgun in a parking lot does not, by itself, constitute a failure to provide a safe workplace.

Drafting a Compliant Firearm Policy

Variations in state law require employers to understand their state's law and to periodically monitor the law for updates. A firearm policy should clearly identify the following: (1) the proscribed behavior and restricted locations, (2) which employees are covered by the policy, and (3) the consequences for violating the policy. While the majority of the policy will be dictated by the laws in each employer's state, employers are also advised to gauge the company's attitudes toward firearms in the workplace and their business environment. For example, some employers may choose to require employees to disclose possession of a firearm in the parking lots. Others may designate separate parking areas for employees who choose to bring firearms. Still others may require that ammunition be stored separately from firearms.

Employers are advised to consult with experienced counsel to determine the legality of their policies. The decision to ban or permit weapons on company property, even as allowed by law, will have consequences should a tragedy occur. Private, domestic and other disputes can occur in the workplace, and employee safety is obviously a paramount concern. Understanding the liability of certain actions may save your company from blame in a resulting lawsuit.

To be sure, workplace cultures can vary significantly by region and/or demographics. Understanding the interests of the company and employees' preferences is an essential first step in crafting a successful weapons policy. Once the policy is in place, employers should ensure that all employees, especially management, understand and receive training. Communicating the purpose of the policy (e.g., safety) and the efforts of the company's desire to not interfere with individual rights can also help employees "buy in" to the policy and help reach the goal of protecting all persons from harm.

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Littler Mendelson Shareholder, LaToi Mayo and Special Counsel, Leila O'Carra co-authored the article ***"Legislative Action and Inaction May Both Be Beneficial For Kentucky Employers"*** *with Littler lawyer, Jay Inman but were inadvertently omitted. Here is the corrected version.*

Legislative Action And Inaction May Both Be Beneficial For Kentucky Employers

By LATOI D. MAYO, LEILA G. O'CARRA, and JAY INMAN

Kentucky's legislature has been busy, and working with new laws can be both exciting and daunting for HR professionals. At the same time, tracking areas of legislative inaction can ensure that your business gets the benefit of the most favorable applicable law. This article sets out legislative action and inaction of note for Kentucky employers to consider.

I. Legislative Action

As one of its first acts of the 2017 Legislative Session, Kentucky lawmakers passed a right-to-work bill. The new law took immediate effect on January 7, 2017, making Kentucky the 27th state in the nation and the last state in the South to adopt such a measure.

Kentucky's right to work law states that no employee may be automatically enrolled in a union, unless that individual has affirmatively requested union membership. The new law also prohibits deductions from any employee's earnings for union dues or fees without the employee's written or electronic consent. Further, the law protects employees who exercise their rights under the Act. Employers are prohibited from requiring an employee to join, remain a member of, or financially support a union as a condition of employment or taking any adverse action because of an employee's union election. For example, an employee cannot be denied employment, other terms and conditions of employment, or discharged from employment because he or she signed, or refused to sign, union membership authorization, or consented to, or refused to consent to, union dues deduction authorizations. Moreover, an employee cannot waive—and importantly, cannot be asked to waive—the authorization requirements.

The right-to-work law applies to collective bargaining agreements that are entered into, renewed, or extended after January 7, 2017. These agreements, therefore, may not provide for mandatory membership and union dues deductions. Collective bargaining agreements in effect before January 7, 2017, however, can still provide for mandatory membership and union dues deductions as a union member or fees as a nonmember until that contract expires or is renewed or extended. But, non-union members have the right to object to a portion of those fees and pay reduced fees until the contract expires or is renewed or extended.

Proponents of the law argue that the Act restores employees' freedom of choice and promotes economic growth in Kentucky. Opponents argue that the Act is an attack on unions and will result in employees receiving lesser wages. One thing is certain; all Kentucky southern bordering states have enacted similar laws making Kentucky part of the norm rather than the exception on this matter.

On the other hand, Kentucky joined a minority of states that lack "prevailing wage laws" when the legislature repealed such laws on January 7, 2017. Prevailing wage laws establish minimum wages and fringe benefits that must be paid and provided to workers performing work on public work projects. The federal government has a prevailing wage statute, the Davis-Bacon Act, with similar wage provisions and many states do as well. But, Kentucky is no longer one of them.

The repeal of prevailing wage requirements applies to public work projects awarded as of the effective date of the Act, January 7, 2017. Accordingly, projects that were subject to the prevailing wage and had been awarded before January 7, 2017 must continue to pay prevailing wage rates. Thus, bids for public work projects will no longer have to include prevailing wage rates, which supporters of the new law believe will revive the state's construction industry.

II. Legislative Inaction

Amidst these new laws, it is also important to remember that sometimes legislative inaction may have value. One relevant example is that, when the federal Americans with Disabilities Act, or ADA, Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009, Kentucky did not take any parallel action regarding the Kentucky Civil Rights Act (KCRA).

While Kentucky employers must still comply with both the ADAAA and the KCRA, the inaction by the Kentucky legislature can be advantageous in litigation, when an employer's actions as to an alleged disability are put to the test. Because KCRA claims have a longer statute of limitations – five years – and do not require exhaustion of administrative remedies, plaintiffs often choose only to rely on the KCRA for their claims. In such a case, the inaction by the Kentucky legislature arguably left in place a higher standard for plaintiffs to meet, affording employers more protection.

When the ADAAA was enacted, Congress expressly stated that it was, in relevant part, to lower the standard for determining whether a medical condition constitutes a "disability" and, thus, afford more protection. Congress reacted to several United States Supreme Court decisions that had restricted what qualifies as a "disability." Three cases, commonly referenced as the *"Sutton* trilogy," held that mitigation measures must be taken into account in determining whether a "disability" had been established. In particular, *Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999), addressed a factual posture where two sisters with myopia applied to be commercial airline pilots, but were rejected because they did not have 20/20 vision. The Supreme Court affirmed the District Court's dismissal of the case, holding that the sisters did not have a disability in the first place because their vision was correctable by lenses.

In Kentucky courts, we and our colleagues in the labor and employment defense bar have successfully argued that the pre-ADAAA standard, including the Supreme Court cases restricting what qualifies as a "disability," remains applicable for KCRA claims. Indeed, as early as September 23, 2011, Kentucky federal courts noted that the KCRA was not amended and applied the pre-ADAAA standard. In that matter, *White v. Humana Ins. Co.,* No. 10-570-C, 2011 WL 3715046 (W.D. Ky. Aug. 23, 2011), then Chief Judge Jennifer B. Coffman wrote, "While the ADA, as amended by the ADA Amendments Act of 2008 . . . now provides that 'an impairment that is episodic or in remission is a disability if it would substantially limit major life activity when active,' . . . the amendments to the ADA do not apply to this case because Kentucky has not adopted a similar amendment to the KCRA, and because White's claims arose before the effective date of the ADAAA." The Court held that intermittent migraine headaches, blank spots in vision, and blackouts did not constitute a "disability" under the KCRA.

More recently, Kentucky's legislative inaction impacted local government minimum wage laws. Proponents of local wage laws say they boost the economy and promote a living wage, particularly in cities where the high cost of living seems grossly disproportionate to the federal minimum wage. On the other side, some business organizations argue that increased minimum wages require layoffs and stunt expansion while employers struggle under increased labor costs. In Kentucky, at least for now, the debate became moot when the state Supreme Court ruled that localities in Kentucky lack the authority to raise the minimum wage. *Ky. Restaurant Assoc, et al. v. Louisville/ Jefferson County Metro Gov't.,* 501 S.W.3d 425 (Ky. 2016).

Kentucky's statutory minimum wage tracks the federal rate, currently $7.25 per hour. Local lawmakers, first in Louisville, and then in Lexington, enacted ordinances to increase the local minimum wage rate for workers within those areas. Two business organizations (Kentucky Restaurant Association and Kentucky Retail Federation) and a Kentucky-based employer (Packaging Unlimited, LLC) sued the Louisville/Jefferson Metro County Government ("Louisville Metro"), claiming that Louisville Metro acted without authority in adopting a minimum wage rate higher than state law required. Louisville Metro prevailed in the lower courts, but Kentucky's Supreme Court found that the local ordinance was invalid and unenforceable as it was in conflict with the state minimum wage statute. The Court found that the ordinance prohibited conduct that the state statute expressly permitted – payment of a wage rate equal to $7.25 per hour. Further, the Court found that Kentucky has a comprehensive statutory scheme covering wages, and that local laws on the same subject were essentially pre-empted.

Although the only minimum wage ordinance before the Court was Louisville Metro's, the Court's holding will apply to all Kentucky local government action, and it had the effect of striking down Lexington's ordinance.

After the ruling, some employers maintained their employees' new rates while others reverted to the state minimum wage. Kentucky employers may change an employee's rate of pay prospectively, so long as the employee is informed of the change prior to performing any work at the new rate. Employers generally may not change an employee's rate of pay retroactively, so Kentucky businesses were not permitted to require the return of any portion of wages paid while the local minimum wage laws were in effect – even though some employers may have increased their employees' wages solely to conform to the invalid local law.

Unless and until Kentucky's legislature acts to change the current state statutory scheme addressing wages, Kentucky businesses that employ workers only in Kentucky can be assured that the same minimum wage applies to all of their employees, no matter where they are located within the state. So, once again, legislative inaction on this point benefits employers.

All told, when evaluating the impact of changes in the law in your organization, remember to think about both legislative action and inaction. Sometimes they both have great value.

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Recent Developments in Immigration

By BRUCE E. BUCHANAN

USCIS Issues Redesigned Green Cards and EADs

USCIS announced a redesign to the Permanent Resident card (also known as a Green Card) and the Employment Authorization Document (EAD) as part of the Next Generation Secure Identification Document Project. USCIS began issuing the new cards on May 1, 2017.

The redesigns use enhanced graphics and fraud-resistant security features to create cards that are more tamper-resistant. The new Permanent Resident cards and EADs have these new features: (1) Display the individual's photos on both sides; (2) Show a unique graphic image and color palette; (3) Have embedded holographic images; and (4) No longer display the individual's signature. Also, Permanent Resident cards will no longer have an optical stripe on the back.

Additionally, Green Cards will have an image of the Statue of Liberty and a predominately green palette while EAD cards will have an image of a bald eagle and a predominately red palette. Some Permanent Resident cards and EADs issued after May 1, 2017, may still display the existing design format as USCIS will continue using existing card stock until current supplies are depleted.

New Immigration Compliance Initiatives

The Department of Labor and Department of Homeland Security announced H-1B compliance initiatives and greater interagency coordination on enforcement efforts against H-1B violators. The DOL will increase audits and investigations of H-1B employers to ensure compliance and is also considering changes to the Labor Condition Application process to provide "greater transparency" to U.S. workers and to the general public. The USCIS fraud unit of DHS will focus site visits on H-1B dependent employers and employers who place H-1B workers at third-party worksites, such as IT firms.

USCIS Issues New I-9 Handbook for Employers

On February 14, 2017, the USCIS finally released the new "Handbook for Employers – Guidance for Completing Form I-9" (also referred to as M-274). In a comical note (at least for immigration compliance gurus), the USCIS backdated the handbook with the date of January 22, 2017.

As you probably know, the M-274 Handbook for Employers is the USCIS's guidance on how to complete and retain the I-9 form. Additionally, this M-274 handbook captures policy and regulatory changes since 2013, explains guidance regarding automatic extensions for certain Employment Authorization Documents and features more current sample documents. Additionally, it provides an overview of unlawful discrimination due to citizenship status or national origin, document abuse, and retaliation. (These prohibited practices are not enforced by the USCIS; rather, they are enforced by the Immigrant and Employee Rights (IER) of the Department of Justice's Civil Rights Division, which was formerly entitled Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)).

A new M-274 handbook was necessary due to USCIS's introduction of the new I-9 form (eff. date 11/14/2016), which became mandatory for use for new hires on January 22, 2017. (This date explains the USCIS's interest in backdating the M-274). As previously discussed, the new I-9 form added a number of new features, including: modifying Section 1 to request certain employees to enter either their I-94 number or foreign passport information, rather than both; replacing the "Other Names Used" field in Section 1 with "Other Last Names Used"; requiring "N/A" be entered instead of blanks in certain fields in Section 1; providing a box for employees to check if they did or did not use a preparer or translator; modifying the I-9 form by adding a supplemental third page if using multiple preparers and/or translators; and adding an area in Section 2 to enter additional necessary information, such as for TPS extensions, OPT STEM extensions and H-1B portability. The new M-274 handbook offers guidance on how to utilize the new features of the I-9 form.

The 64-page handbook is an important tool for Human Resource employees, who handle I-9 compliance, as well as immigrant attorneys, who want the latest guidance from the USCIS. Many of its explanations are repetitive from the instructions that accompany the I-9 form or information available on I-9 Central – an Internet-based website that answers many I-9 related questions. However, the M-274 handbook is a convenient go-to document that answers many questions. I recommend all individuals involved in I-9 compliance read the new handbook. For non-immigration compliance gurus, the reading of the handbook may be the answer for insomnia.

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1 2017 WTSHRM Board of Directors (L-R) Debbie Harris, Lindsey Pullen, Amy West, Jane Mansfield, John Carbonell, Jennifer Howell, Janice Shipman, Anna Higgs. **2** Latosha Dexter, Deputy Counsel for University of Memphis, Geoffrey Lindley, Dale Conder, Jennifer Ivy, Dale Thomas, Michael Mansfield. **3** Amy West, 2017 Past President WTSHRM, welcomed attendees and exhibitors.


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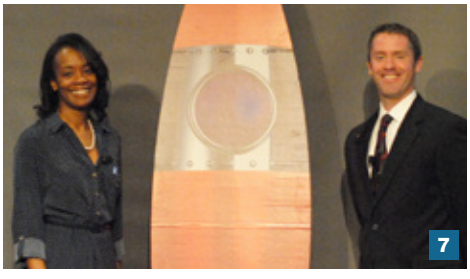
4 John Burleson and Matthew Courtner presented "Managing Terminations – how to efficiently manage terminations with as little legal risk as possible." **5** James Thompson and Rob Binkley discussed "FLSA Landmines – legal landmines buried in the federal wage and hour statute that are not widely discussed and can lead to explosive situations for HR professionals." **6** Michael Mansfield and Dale Conder spoke on "Top 10 Pitfalls for Employers."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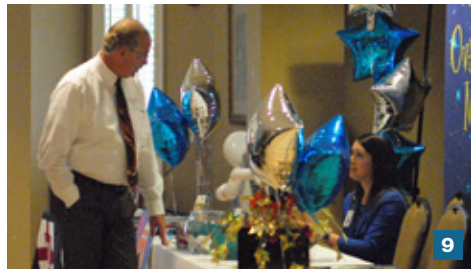
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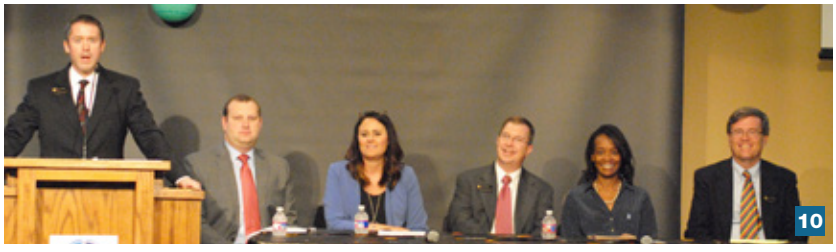
7 Latosha Dexter and Geoffrey Lindley presented an interactive discussion of recent employment law cases and the application of relevant concepts and HR strategies. **8** Manpower was the lunch sponsor for the Conference. **9** Many of the exhibitors had booths decorated in the Conference theme, "Blast Off to Effective HR Solutions!" WTSHRM presented a prize to the best booth.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10 Attorneys engaged attendees in a survey of HR issues depicted in film and television incorporating strategies that are applicable to real-world workplace challenges. (L-R) Geoffrey Lindley, Matthew Courtner, Jennifer Ivy, James Thompson, Latosha Dexter, Rob Binkley.

The Working Families Flexibility Act of 2017

Will Congressional Lawmakers Finally Be Able to Pass Legislation Bringing "Comp Time" Flexibility For Private Employees?

By JAVIER JALICE

On May 2, 2017, the U.S. House of Representatives passed a bill – the Working Families Flexibility Act of 2017 (H.R. 1180) – to amend the Fair Labor Standards Act of 1938 (the "FLSA"). The bill would change how private employers are currently required to compensate nonexempt employees for overtime – any hours worked over forty (40) in a single workweek. In its current form, the bill would amend the FLSA to allow private sector employees the same flexibility currently afforded to public sector employees – the ability to choose to accrue paid time off or compensatory time ("comp time") for future use in lieu of receiving overtime compensation. Congressional lawmakers have, on numerous occasions, sought to pass similar legislation to correct the dichotomy that the flexibility of accruing "comp time" for future use has long been available to public employees but not those employed in the private sector. Thus, and because the proposed changes have been previously unsuccessful, one key question remains: Will there be sufficient support for passage of the bill this time?

Congressional proponents of the bill argue that the bill would provide choice and flexibility to millions of families by allowing working parents to spend more time at home with their children, while providing employers with immediate savings and greater flexibility by lessening the impact of overtime payments by way of spreading out those costs over time. On the other hand, critics of the bill argue that the bill would essentially allow employees to provide their employers with a twelve (12) month interest free loan via their earned wages. Based on these obvious contradictions, it is significant for both lawmakers and the public to fully consider and understand the bill's provisions and their respective impact in the workplace should it ultimately become law.

Currently, employees of private employers may not work more than forty (40) hours in a single workweek without their employers being required to compensate them with overtime pay. As written, the bill would allow nonunionized private employers to offer their nonexempt employees who qualify the option to accrue up to 160 hours, or four weeks, of "comp time" for any hours worked over forty (40) in a single workweek. Unionized employees may also qualify for a "comp time" policy sought to be implemented by their employers, but only if their respective union has agreed to allow such a practice under the terms of their collective bargaining agreement.

To qualify for a "comp time" arrangement, a private employee must have first worked for their employer for, at least, 1,000 continuous hours of employment in the twelve (12) month period preceding the implementation of such an arrangement. Employees who agree to enter into a "comp time" arrangement with their employers may opt out of said agreement at any later time by simply giving notice of their wish to do so to their employer. Likewise, employers that have adopted a "comp time" policy may also later discontinue such a policy by giving employees thirty (30) days' notice. Thus, and as indicated by its name, the proposed legislation seeks to change the rigid rules currently in place for private employers and align them to those applicable to public employers. That said, and although the proposed legislation could potentially lower overtime costs for employers while at the same time offering employees the flexibility of additional time off to spend with their families, it may also create a number of new administrative and legal hurdles and potentially expand employers' current exposure to FLSA claims.

The last legislative attempt at passing similar legislation occurred in 2015 – the Working Families Flexibility Act of 2015, H.R. 465, and like the current bill, the 2015 version was also sponsored by U.S. Representative Martha Roby (R-Ala.). That bill, however, never made it out of committee. The last legislative attempt – the Working Families Flexibility Act of 2012, H.R. 1406 – that successfully passed the House occurred in May, 2013, almost exactly four years prior to the instant bill's passage. The 2013 bill, which was also sponsored by Representative Roby, passed by a majority party-line vote with 223 votes in favor and 204 in opposition. The legislation, however, died in the Senate.

The current bill, as its 2013 counterpart, was again passed along party lines with 229 votes in its favor and 197 in opposition. The likelihood that it will pass in the Senate, however, seems uncertain based on the small majority Republicans currently hold coupled with the fact that the bill could face bipartisan opposition. Even if a vote along party lines, like the one that took place in the House, would occur, the Senate's legislative filibuster would still present a burdensome hurdle for proponents of the bill to overcome. Based on the flurry of public statements made by lawmakers on the subject, it seems proponents have an uphill battle if they want to secure filibuster-proof support for the bill. Thus, while proponents have expressed optimism, whether there would be sixty (60) votes in the Senate to overcome a legislative filibuster is unknown and a seeming uphill battle under the current political climate in Washington. Notwithstanding the bill's tough road in the Senate, however, it is important to note that the current bill's odds at becoming law are undoubtedly better than those of its 2013 counterpart. This is primarily because in addition to congressional opposition, the 2013 version had been publicly opposed by the Obama Administration; whereas President Trump's Administration has publicly voiced support for the current bill as written. Therefore, should the most recent version of the Working Families Flexibility Act make it through the Senate, the bill is highly likely to become law.

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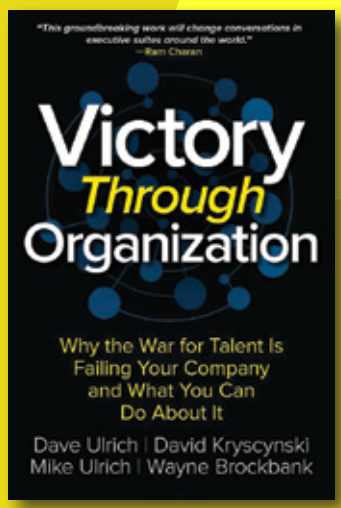
BOOK LOOK

Victory *Through* Organization



By WILLIAM CARMICHAEL

"HR is not about HR. HR begins and ends with the business." This honest, simple opening speaks volumes yet more importantly it sets a needed tone for HR professionals today. *Victory Through Organization: Why the War for Talent is Failing Your Company and What You Can Do About It"* by Dave Ulrich, Mike Ulrich, David Kryscynski and Wayne Brockbank, clarifies why HR is no longer addressing the real problems business is encountering. The fact is, as businesses evolve, HR must as well. Now true enough, HR provides the needed human talent needed to support an organization but as companies grow increasingly and aggressively competitive in hiring and nurturing individual employees this book offers a refreshing, revolutionary alternative. Here, our co-authors explore why creating dynamic systems that leverage talent throughout the organization can create a unified whole that is greater than the sum of its parts. In other words, HR has expanded from a nearly exclusive focus on people and how individuals think, behave, and act to an additional emphasis on organization.

Why This Is a Must-Read

Long ago . . . in a galaxy far, far away . . . (for all us Star Wars fans out there), I conducted return on investment strategies for training departments and much of the data needed came from HR. Statistical as well as empirical data for sure but realistic all the same. So can be said for *Victory Through Organization* except that our authors have collected data from over 32,000 people in 1,200 businesses that reveals that an organization has four times the impact on business performance compared to just individual talent. Businesses of all sizes and regardless of structure will learn how to build organization capabilities, strengthen systems, and empower human capital. This book offers HR professionals tools to better respond to emerging opportunities. It also offers guidance for how to build more effective HR departments needed to deliver real value. Perhaps what intrigued me most were the co-author's unique view of themselves as "observers, advocates, provocateurs, researchers, and agitators for the HR profession." How refreshingly honest! Worth noting is that the co-author's "envision the ideas in this book being used by multiple audiences who shape the HR profession." Worth a look I'd say!

Structure, Layout, and Content

Victory Through Organization's basis and context centers on six assumptions made in the book's preface:

That:

- HR matters
- HR research is imperative
- HR professionals are changing
- HR departments and practices are becoming more important
- HR colleagues are incredibly gifted
- HR is a dynamic and innovative discipline

To the untrained eye these six assumptions may at first appear to be too one-sided but readers can be assured they are not as further supported by the co-author's research:

- Only 61 of the original Fortune 500 firms still exist as independent firms
- Successful chief executive officers have the same skills set as successful chief human resource officers
- Approximately 30 to 40 percent of board of director time is spent on organization and people issues
- Investors are increasingly aware of leadership capital as part of their investment decision making

These facts are alarming!

From a structure and layout perspective, what readers will find is that the book has a textbook feel and appearance. It is theoretical in its approach yet very applicable for HR field use. As an example, the co-authors have gone to a great effort in their data accuracy by partnering with 22 international HR organizations in validating their data. It must be noted however that those new to HR might find it at first a bit intimidating as the data and charts presented throughout are designed to inform and educate HR professionals ready to implement changes.

As just mentioned, *Victory Through Organization* has a textbook look and feel to it but what I also found is that the information is solidly grounded in HR theory yet extremely applicable within organizations large and small. It is, after all, an excellent desk and field resource guide that the co-authors intend as one an organization can grow with. But unlike a textbook where data/flow charts and tables are referenced as stand-alone documents which can be quickly located, this data is only found in the chapters. If there is any room for improvement for future editions, this would be it.

The book's 11 chapters have a logical flow to them and each stands on its own merit. In my opinion though, Experienced HR professionals will likely locate the information needed based on the chapter or in the topic index they are looking for. In my opinion though, *Victory Through Organization* is best appreciated through a linear approach. Begin with chapter 1 and keep going!

I am always intrigued when a book ends with "now what?" and typically I will peruse it first. What I found did not disappoint. The co-authors drove their point home that 'HR is no longer HR- it is about the business' and after a most engaging read, I agree. I know you will too!

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STRATEGIC MANAGEMENT

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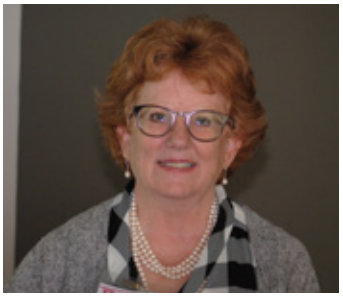
at The Crescent Club Memphis



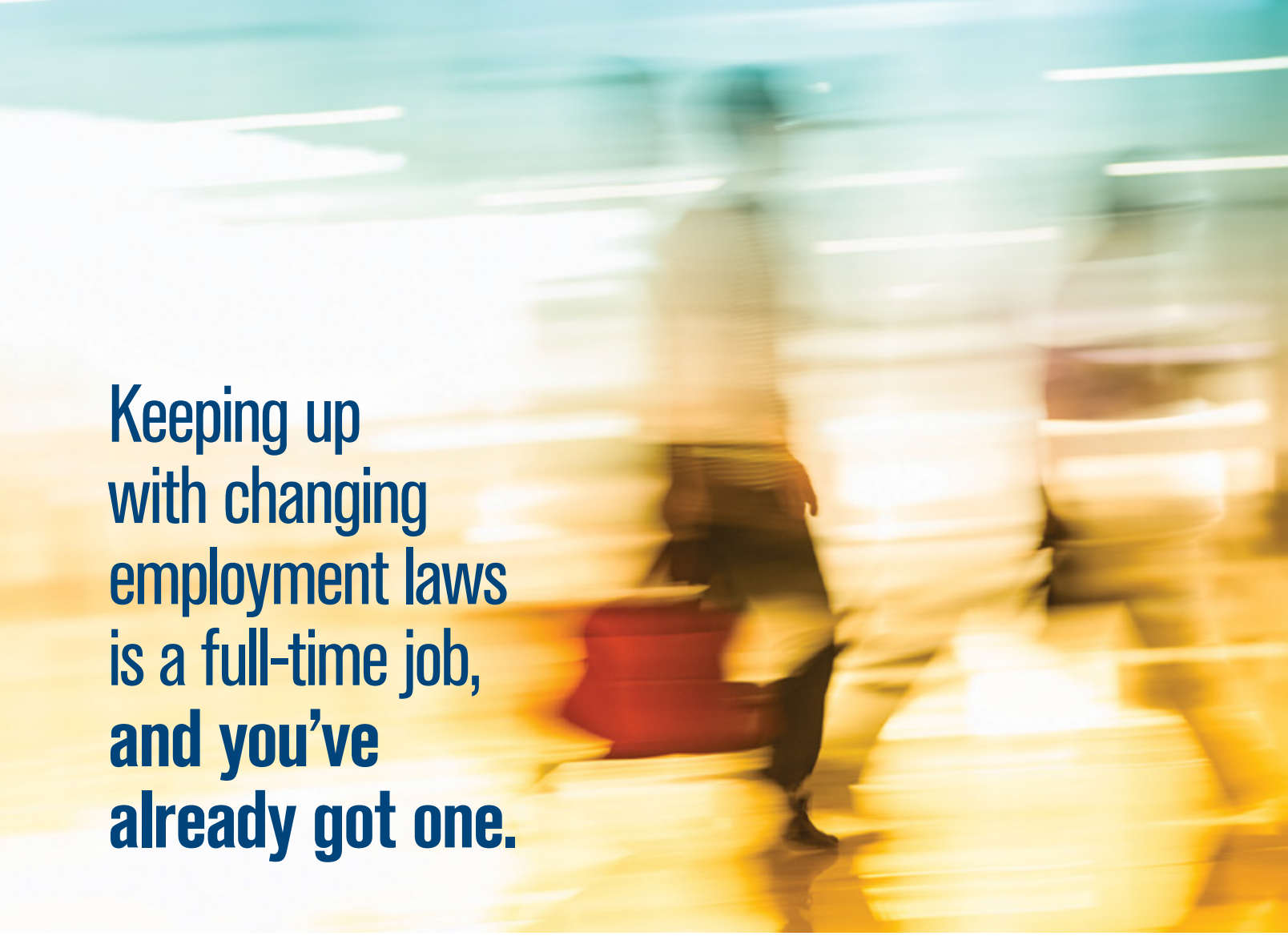
Tisch McDaniel, SHRM-Memphis President, welcomed attendees.

Jeff Weintraub, Regional Managing Partner with Fisher Phillips, spoke on "The Trump Outlook" and "Effective Discipline."

Judy Bell, SHRM-CP, PHR, Judy Bell Consulting, presented "Emotional Intelligence – The Predictor of Success," and "Effective Leadership."

Cynthia Thompson, MBA, SHRM-SCP, SPHR, discussed "Building Your Team – How to Hire A Players," and "Reinventing the Performance Appraisal."

Courtney Leyes, Attorney with Fisher Phillips, was the luncheon keynote speaker. Her topic was "Handling LGBTQ Issues."



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