# EMPLOYMENT LAW UPDATE

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## LEGISLATIVE AND ADMINISTRATIVE ACTION

***DOL Proposes FMLA Rule to Cover Same-Sex Marriage***. The DOL has announced a proposed rule to require family leave coverage for same-sex spouses in all states, as long as the marriage occurred in a state where it was legal. Currently the FMLA does not cover that spousal leave in states which do not recognize same-sex marriage. The law depends on the particular state's definition of marriage. This has created a hodge-podge of coverage, significant confusion and disparity for corporations operating in multiple states.

## LITIGATION

### Theme of the Month – Harrassment by Customers

Organizations have a duty to protect employees from third parties, customers, vendors, independent contractors or the public. The laws on harassment, safe place, etc. give employers a duty to act to address known harassing or dangerous issues affecting their staff. Far too often an organization does not want to do so, especially with "important customers." In the long run, loss of a customer's business can be a small price compared with the liability for not protecting the employees.

***Yes! The Customer is a Pig, But He Doesn't Mean Anything By It.*** This is not the best management response to an employee's complaint about ongoing sexual and racial harassment. Over three years a White male customer made sex and race comments to a female African American employee, plus engaged in other overtly crude behavior (i.e. grabbing the phone from her hand and passing gas into the mouthpiece). Not only did she complain, but her supervisor witnessed some of the incidents, and merely shook her head or said "He's a pig, but he doesn't mean anything by it." (The standard "just joking" response.) The employee finally complained to Human Resources, and the

customer was banned from the premises. In the ensuing harassment case the court found this action was too late to prevent liability. The supervisor had knowledge of the behaviors and had a duty to act and then to stop the harassment. Given the clear complaints and direct observations, there was no excuse for the supervisor's inaction. That inaction bound the employer to liability. *Freeman v. Dal-Tile Corp. (4th Cir., 2014).*

***Supermarket Settles Case of Harassing Customer for Half a Million – Déjà Vu***. *EEOC v. Fred Meyer Stores* (D. Ore., 2014) involved a male supermarket customer who made lewd sexual remarks and groped seven different female store employees repeatedly over a prolonged period. Store management seemed to discount the complaints made by the women. The women were told that nothing could be done unless store security actually witnessed the groping or was close enough to hear the comments. The EEOC charged that the employer "failed to respond effectively in a manner likely to end the harassment." ***Déjà Vu***. In 2008 Fred Meyer Stores settled a previous harassment case, also for half a million dollars. That one involved harassment of female staff by two male managers. In the recent settlement the EEOC stated "we don't see the same claims against the same employer, in the same area very often." The current settlement also requires posting notices in all the chain's stores, compliance reviews, issuing a new anti-harassment policy, training for all managers, and special training for Human Resource staff about how to properly respond to such situations. [On balance, the larger the employer, the more incidents are likely to occur or recur in the multiple stores or facilities. A smaller company can more easily control a small number of managers and staff. When one has hundreds or more locations, it is impossible to keep a tight control on every single person. There will be "wild cards" and wrong decisions which cannot be predicted or reasonably prevented. So out of hundreds of stores, addressing a problem in one does not guarantee something will not crop up in another.]

## Supreme Court

***Supreme Court Finds NLRB Recess Appointments Unconstitutional***. In *NLRB v. Noel Canning*, the U.S. Supreme Court upheld a lower court decision, invalidating the recess appointments of NLRB Board members, and the validity of any decisions made under their authority. The Senate had engaged in *pro forma* ("mock") sessions during the usual recess period, specifically to thwart the President's ability to make any appointments. The Court ruled that political gamesmanship is within the constitutional scope (and perhaps even envisioned as part of the Separation of Powers checks and balances provided by the Constitution).

***Company Owners Can Impose Their Religious Values Regarding Health Insurance***. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that a closely-held corporation is a "person" under the Religious Freedom Restoration Act, and can assert their owner's religious beliefs against the Affordable Care Act's provision of contraception coverage. Thus, business owners can refuse to provide health insurance coverage for those parts of the Act which they find religiously objectionable, and the

company employees will have no company coverage for those particular items. RFRA provides that government action (laws and regulations) should not impose a substantial burden on a person's religious beliefs or practices unless there is a "compelling government interest," and is imposed using the "least restrictive means." The Court found the contraception coverage did not meet this test. The Court also opined that the employees could personally pay or the government (taxpayers) could pick up the tab for any coverage a company owner found objectionable – if it truly was a compelling government interest. Though the decision stated that the EEO anti-discrimination laws do create a valid compelling interest, this decision is likely to generate a series of cases in which companies attempt to seek exemption from coverage under a variety of other laws and regulations by claiming the owners have a religious objection.

## Constitutional Rights

***Captain Could Not Maintain Case for Refusal of Participation at Islamic Society's Police Appreciation Day***. The Tulsa Islamic Society held an event to show appreciation for the Police Department, FBI and other city agencies having protected the mosque and its school after a series of threats. A police captain was instructed to go and/or assign other officers to go to the event. He refused to go or assign others, stating his own religious objection. He was suspended. He sued, claiming violation of his religious rights, and that the attendance was an "official endorsement of Islam," in violation of the First Amendment's Establishment Clause. The court ruled against him. First, he was not ordered to attend; he could send others. He could not impose his own religious values on other officers by refusing to even ask them to attend. Second, he had raised no religious objection until after his suspension for refusal. Also, he provided no explanation as to exactly how his religion prevented him from going to a purely secular event at the Society. The "endorsement" argument failed because the Appreciation Event was purely secular, with no religious service – it was a buffet. The police attended literally over 100 such events a year, often at churches, church schools or religious colleges. The captain had never asserted an objection to police attendance at those events. (In fact, singling out the Islamic Society Event for a refusal to attend might be seen as an official disparagement of a particular religion by the Police Department – which could violate the Establishment Clause.) *Fields v. City of Tulsa* (10th Cir., 2014).

## Fair Labor Standards Act

***Not There Yet!*** The FLSA provides several exempt status exceptions from overtime pay. One must meet the criteria for the salaried exempt position. However, a position description is not enough. Often the new person does not actually perform the full duties until several months of orientation, training, and working into the position. *Madden et al. v. Lumber One Home Center, Inc.* (8th Cir., 2014) illustrates this. The court ruled that hourly overtime pay was due to a number of employees who had salaried-exempt position descriptions, but had not yet done the full scope of duties. The "potential to eventually do the exempt duties" was not enough. The employee had to be at the stage of

actually doing the duties to qualify. So, be careful. It may be wise to pay hourly until a new and inexperienced employee is "up to speed." Then convert to salary.

## Discrimination

### Coverage

***"Volunteer" Can File Title VII and State Employment Discrimination Laws.*** Volunteers are not "employees," and cannot make claims under the standard employment laws (FLSA, ADA, Title VII, ADEA, FMLA, etc. etc.). However, in *Finkle v. Howard County* (D. Md., 2014) the court allowed a sex discrimination suit by a person who was denied a position on a volunteer horse-mounted police patrol unit. The volunteer received no pay, but was eligible for a variety of death, disability and other benefits of significant economic value. There is a "13 factor test" for determining whether a person is a volunteer or is an employee for discrimination purposes (only a six factor test for FLSA wage and hour purposes). Receiving something of significant value is a key factor. [For more information on the 13 factor test, 6 factor test and other standards of whether you have employment liability for people you thought were volunteers request the article Liability Issues Regarding Volunteers by Boardman & Clark LLP.]

### National Origin

***University Ignored its Own Investigations - Twice*.** A court had no problem in finding sufficient evidence for a case of harassment. A Hispanic mail worker made repeated internal complaints that his supervisor was engaging in ongoing derogatory comments and slurs toward him. The supervisor was counseled, but continued the behavior. Two internal investigations of the complaints concluded that the supervisor had created a hostile environment. Nonetheless, the behavior continued, and the HR Manager allegedly pressured the employee to stop his continuing complaints about the continuing behavior. *Asebedo v. Kansas State University* (10th Cir., 2014).

### Sex

***Heterosexual Gym Employee Can File Sexual Stereotyping Case***. A heterosexual fitness instructor can maintain a Title VII sex discrimination case for sexual stereotyping. His supervisor made ongoing comments that male fitness specialists needed to fit an image of being real men – "loose, promiscuous and predatory." The plaintiff was viewed as a "more sensitive type of man" showing his "feminine side." The supervisor allegedly expected him to show a more macho image. The instructor complained and was soon fired. He sued. The court found that Title VII's sexual stereotyping coverage is not confined to gay and lesbian employees, who do not fit the "heterosexual norm," but may also be brought by heterosexuals who do not conform to the stereotypes or biases of what a "real" man or woman should be. *Rachuna v. Best Fitness Corp.* (W.D. Pa., 2014).

***Suicide Attempt Was Compelling Evidence***. A female packaging technician at a candy company filed a case claiming that she was sexually harassed by three male co-workers. She alleged ongoing comments and touching for several years. Complaints to management resulted in no corrective action. She eventually took a medical leave and did not return, claiming constructive discharge. The company defended by claiming the behavior was not severe enough to "alter the conditions of employment," to meet the constructive discharge standard. The court, however, found that the medical leave was due to the employee's suicide attempt in reaction to the ongoing harassment. This was compelling evidence of the severity of the behaviors. *Standen v. Gertrude Hawk Chocolate* (M.D. Pa., 2014).

## Disability

***Children Are Not a Disability***. A city clerical employee requested, but was denied, a permanent shift change (with another employee who was willing to trade shifts). She requested the change in order to accommodate difficulties with her pregnancy and the extra day care expenses the new child would cause if she stayed in her original shift. The city gave FMLA schedule adjustments during the pregnancy, but refused the permanent shift change. She sued under the ADA and Pregnancy Discrimination Act. She lost on both counts. She was accommodated by FMLA leave during the pregnancy. The Pregnancy Discrimination Act does not cover the period after the mother recovers from the physical condition of pregnancy. The ADA requires accommodation of physical and medical issues. It generally does not require accommodation of financial issues. In any event, children are not a medical issue. Children, and financial difficulties caused by children, is not a "disability," which the city was required to accommodate. *McCarthy v. City of Eagan* (D. Minn., 2014).

## Family and Medical Leave Act

***Timing of Fitness for Duty Evaluation is Crucial***. The FMLA allows employers to require a fitness for duty medical certification before a person returns from leave. However, that certification is limited to only the specific condition for which the employee took leave, and the employer may not request a second opinion by its own medical professional. *After* return to work, though, the rule changes. The FMLA return requirement has been fulfilled; now the ADA comes into play. If there is tangible evidence of inability to perform, the employer can now send the person to its own medical evaluator for a more comprehensive evaluation, and can get the second opinion. The issue is allowing the person to return to duty from FMLA, then starting any ADA fitness evaluation process. *White v. County of LA et al.* (Cal. Ct. App., 2014).

## National Labor Relations Act

***Arsonist Firefighter Could Be Fired***. A company fire fighter at a steel mill, and also Chief of a local volunteer Fire Department, was caught setting brush fires on his off-duty

time. He would then wait to be called and lead the Volunteer Fire Department response, and look like a hero and a leader. The company fired him. He grieved the termination, claiming that off-duty conduct could not be considered, and that he had a psychological disorder resulting in poor judgment. The arbitrator rejected both arguments. A disability creating a direct threat of harm can be grounds for termination; and there was no evidence that the poor judgment would not reoccur. Off duty conduct directly related to one's job is also a valid reason for discharge. "The company cannot be expected to retain an arsonist as a fire protection employee." *In re U.S. Steel Corp. and United Steelworkers #1938* (2014).

***Cultural Confusion Was Not Fraud***. A university fired a Hmong employee after discovering she was not married to the person she listed on her health insurance as spouse. The health plan required a legal marriage for coverage. The discharge was for health insurance fraud. The employee claimed that she had been married in a Hmong wedding ceremony, and she and her husband were fully married in the eyes of their religion and community. An arbitrator reversed the discharge. Though the employee was clearly not eligible for spousal insurance coverage (all marriages occurring in Minnesota require a license to be legal), she was not guilty of fraud. She honestly believed the Hmong ceremony was a valid wedding. Also, other university employees had mistakenly continued children, former spouses, etc. on the health insurance after eligibility ceased. None of them were fired. The employee was reinstated to her job. (The arbitrator left open the issue of repayment of any health benefits provided to the non-married "spouse.") *In re AFSME Council 5 and University of* Minnesota (2014).