ECKERT SEAMANS
ATTORNEYS AT LAW

THE LATEST WORD ON EMPLOYEE BENEFITS:
Update on Affordable Care Act and Wellness Programs

Presented by Kathryn A. English and Sandra R. Mihok
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 19, 2016

Kathryn A. English

MEMBER, BOARD OF DIRECTORS

VICE CHAIR, BUSINESS DIVISION

Kate English practices exclusively in the employee benefits area, working with global public companies and privately held companies of all sizes regarding Employee Retirement Income Security Act (ERISA), tax, and executive compensation matters. She provides advice and counseling concerning compliance with ERISA, tax, and other related laws, and provides support in litigation and collective bargaining. Kate represents clients before federal agencies responsible for regulation of employee benefits. She assists companies going through mergers and acquisitions with assessing liabilities related to employee benefits and determining how to best transition benefits in such circumstances. Kate also provides advice concerning compliance with the reporting, fiduciary responsibility, and prohibited transactions requirements of Title I of ERISA, and assists employers with matters relating to multiemployer plans, including multiemployer pension plan withdrawal liability.

Kate is a regular speaker on employee benefits topics.

REPRESENTATIVE MATTERS

- Represents employers on a variety of employee benefits matters, including the design and ongoing administration of qualified retirement plans, health and other welfare plans, deferred compensation plans, and stock option and other incentive arrangements, including the requirements of Internal Revenue Code Section 409A.
- Represents employers and other ERISA plan fiduciaries in proceedings before the U.S. Department of Labor, including submissions under the Department's Voluntary Fiduciary Correction Program and requests for prohibited transaction exemptions.
- Represents employers in proceedings before the Internal Revenue Service, including filings under the Service's Employee Plans Compliance Resolution System and requests for favorable determination letters for qualified plans.

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PRACTICE AREAS:

Employee Benefits & Executive Compensation

STATE ADMISSIONS:

New York
Pennsylvania
District of Columbia

EDUCATION:

J.D., New York University School of Law, 1994

B.A., cum laude, University of Notre Dame, 1991

- Represents employers in proceedings before the Pension Benefit Guaranty Corporation, including requests for waiver of minimum funding requirements and negotiation of liability relating to facility shutdowns.

AWARDS AND RECOGNITION

- Selected for inclusion in *The Best Lawyers in America*
- Selected for inclusion in Best Lawyers 2016 Employee Benefits (ERISA) Law "Lawyer of the Year" in Pittsburgh
- Attained an AV® Preeminent™ rating from Martindale-Hubbell

NEWS AND INSIGHTS

Speaking Engagements:

- "Health and Welfare Plan Update," co-presented with Heather Stone Fletcher, Pennsylvania Bar Institute ERISA Update, June 2015.
- "Affordable Care Act: Where Are We Now?" co-presented with Sandra Mihok, Eckert Seamans' CLE, August 2014.
- "Assessing the Health/Welfare Plan Environment," co-presented with Sandra Mihok, PBI ERISA Update, March 2013.
- "Hot Topics in Health Insurance," co-presented with Sandra Mihok, PBI 16th Annual Insurance Institute, May 2012.
- "The Clock Ticks on Health Care Reform," Eckert Seamans' CLE, August 2011.

Sandra R. Mihok
MEMBER

OVERVIEW

Sandra Mihok acts as outside benefits counsel for plan sponsors and fiduciaries, advising on special projects and day-to-day matters involving employee benefit plan administration and tax, Employee Retirement Income Security Act (ERISA), and Health Insurance Portability and Accountability Act (HIPAA). She plays a key role in her clients' fiduciary compliance management by regularly attending plan committee meetings and providing training, education, and advice.

She specializes in matters ranging from qualified retirement plans and executive compensation to health and welfare and retiree medical benefits. Sandra regularly represents clients in matters involving the Internal Revenue Service (IRS), Department of Labor (DOL), Pension Benefit Guaranty Corporation, and Department of Health and Human Services (HHS) on issues such as government audits, voluntary corrections under the IRS and DOL correction programs, and HIPAA investigations.

REPRESENTATIVE MATTERS

- Provides plan sponsors and fiduciaries with consulting, advice, and practical solutions for the design, drafting, operation, and communication of tax-qualified retirement plans, including defined pension plans; cash balance plans; 401(k) plans; profit sharing plans; employee stock ownership plans; health, disability, life, severance and other welfare benefit programs; nonqualified deferred compensation arrangements; and governmental plans of state and local governments.
- Provides fiduciary training, education, and advice to plan administration and investment committees.
- Provides plan sponsors, fiduciaries, and health care providers with counseling and advice on privacy and data security issues under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) for employers and health care providers including negotiating business associate agreements.

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PRACTICE AREAS:

Employee Benefits & Executive Compensation

Health Care

Health Insurance Portability & Accountability Act – HIPAA

Tax

Data Security & Privacy

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. Court of Appeals for the Third Circuit

EDUCATION:

J.D., magna cum laude, Duquesne University School of Law

B.A., summa cum laude, University of Pittsburgh

- Has successfully resolved IRS, DOL, and HHS audits and investigation resulting in abated or significantly reduced penalties.
- Assists the firm's litigation department in ERISA litigation matters, including matters involving federal bankruptcy court, the federal district courts, and federal courts of appeals.

PROFESSIONAL AFFILIATIONS

- Duquesne University School of Law, Adjunct Professor of Law
- Pittsburgh Business Group on Health (PBGH), Member and Speaker
- PBGH Global Benefits Task Force
- Women's Bar Association of Western Pennsylvania
- Worldwide Employee Benefits Network

AWARDS AND RECOGNITION

- Selected for inclusion in *The Best Lawyers in America*

NEWS AND INSIGHTS

Publications:

- "ERISA's impact on data breach lawsuits," HR.BLR.com, April 2016.
- "Affordable Care Act Update: Healthcare reporting for employers," *Eckert Seamans' Construction Law Update*, Fall 2015.
- "Honeywell Lawsuit Takes Aim at Biometric Screenings," *Workforce Magazine*, December 2014.
- "Defense of Marriage Act affects benefits," co-author, Allegheny County Bar Association's *Lawyers Journal*, November 2012.
- "Forum selection challenged by recent litigation and Department of Labor efforts," co-author, *Eckert Seamans' Legal Update*, Fall 2012.
- "Beyond I Do: The Defense of Marriage Act, same-sex marriage and employee benefits," co-author, *Eckert Seamans' Legal Update*, Fall 2012.
- "IRS proposal considers the meaning of 'governmental plan,'" *Eckert Seamans' Legal Update*, Spring 2012.
- "New requirements for pension plans," co-authored with Malgorzata Kosturek, *Eckert Seamans' Construction Law Update*, Spring 2011; *Eckert Seamans' Legal Update*, Summer, 2011.
- "Does your health and wellness plan violate GINA?" *Eckert Seamans' Legal Update*, Spring 2010.
- "The Most Common HIPAA Privacy Mistakes Employers Make," *Workforce Management Magazine*, July 2008.

Speaking Engagements:

- "The Affordable Care Act: Understanding Employer Shared Responsibility and Information Reporting Requirements," co-presented with Heather Stone Fletcher, 2015 Employment Law Institute, Pennsylvania Bar Institute (PBI), November 2015.
- "Beyond the Biometrics II," Eckert Seamans Human Resources Forum, May 2015.
- "Protect My Data: Protection of Confidential Employee Information Under the Health Insurance Portability and Accountability Act," co-presented with Sandy Garfinkel, Eckert Seamans Human Resources Forum, May 2014.
- "Affordable Care Act: Where Are We Now?" co-presented with Kathryn English, Eckert Seamans' Continuing Legal Education Seminar, August 2014.
- "The Affordable Care Act Revisited: What's Hot Now," co-presenter, Eckert Seamans' Human Resources Forum, November 2013.
- "Health Care Reform: What Employers Need to Know Now," Eckert Seamans' Continuing Legal Education Seminar, August 2013.
- "Update on Affordable Care Act and Wellness Programs," Pittsburgh Business Group on Health, July 2013.
- "HIPAA Revisited: New Regulations Impact Privacy Rules and Wellness Programs," Eckert Seamans Human Resources Forum, June 2013.
- "Affordable Care Act/Health Care Update: What's Next?" Eckert Seamans Human Resources Forum, April 2013.
- "Assessing the Health/Welfare Plan Environment," co-presented with Kathryn English, PBI ERISA Update, March 2013.
- "Health Care Reform: Recent Developments & Guidance," co-presenter, Pittsburgh Business Group on Health, March 2013.
- "Health Care Reform: Cost and Benefit Considerations and Implications," co-presenter, Pittsburgh Business Group on Health, February 2013.
- "Health Care Reform: What's Next," co-presented with Paul Yenerall and Elizabeth Goldberg, Pittsburgh Business Group on Health, July 2012.
- "Hot Topics in Health Insurance," co-presented with Kathryn English, PBI 16th Annual Insurance Institute, May 2012.
- "Beyond the Biometrics," co-presenter, Eckert Seamans Human Resources Forum, November 2011.
- "Multiemployer Plans: a Legal Perspective," co-presenter, Pennsylvania Institute of Certified Public Accountants (PICPA) Construction Industry Conference, October 2011.

Latest Word on Employee Benefits: Update on Affordable Care Act and Wellness Programs

Kathryn A. English and Sandra R. Mihok

May 19, 2016

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DOL Final Fiduciary Rule

20946 **Federal Register** / Vol. 81, No. 68 / Friday, April 8, 2016 / Rules and Regulations

DEPARTMENT OF LABOR
Employee Benefits Security Administration

29 CFR Parts 2509, 2510, and 2550
RIN 1210–AB32

Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice

AGENCY: Employee Benefits Security Administration, Department of Labor
ACTION: Final rule.
SUMMARY: This document contains a final regulation defining who is a ''fiduciary'' of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) as a result of giving investment advice to a plan or its participants or beneficiaries. The final rule also applies to the definition of a ''fiduciary'' of a plan (including an individual retirement account (IRA)) under the Internal Revenue Code of 1986 (Code). The final rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships.
DATES: *Effective date:* The final rule is effective June 7, 2016.
Applicability date: April 10, 2017.

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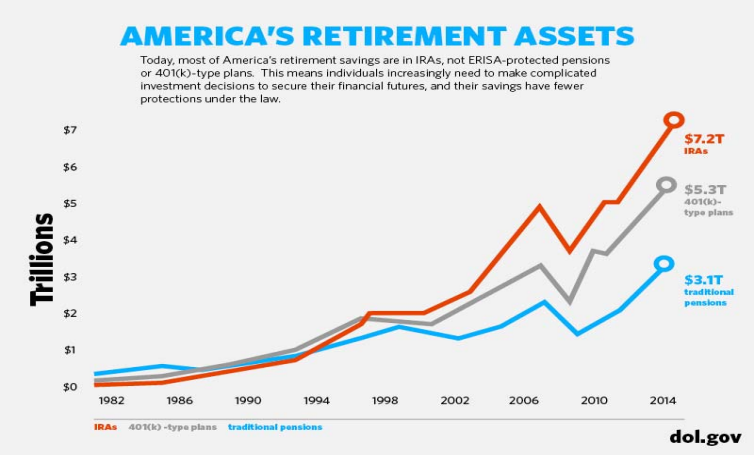
DOL Final Fiduciary Rule



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ACA Affordability of Coverage – Opt-Out Payments

Unconditional opt-out payments will be added to the employee contribution otherwise required for self-only coverage.

Example 1:

Employee is required to contribute $200 per month toward premium cost for self-only coverage. The employer offers a $100 per month unconditional opt-out payment. The employee contribution for self-only coverage is $300 ($200 + $100) per month.

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ACA Affordability of Coverage – Flex Credits

Flex credits that are only available for health benefits (called a **health flex contribution**) may be treated as lowering the employee's contribution for self-only coverage.

Example 2: Same employee $200 contribution. The employer offers flex credit of $600 for the plan year that may only be applied toward health benefits. The employee's required contribution for self-only coverage is $150 ($200 - $50) per month.

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ACA Reporting – Deadlines

IRS Form	Regular Deadline	Special Deadline for 2015 Reports
Form 1095-C Employee Statement (provided to employees)	January 31	March 31, 2016
Form 1094-C Transmittal Form (filed with IRS, along with Forms 1095-C)	Mail: February 28	Mail: May 31, 2016
	E-File: March 31	E-File: June 30, 2016

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ACA Reporting – Statutory Penalties

How Late?	Standard Penalty	Maximum Annual Penalty
Within 30 days	**$50 per report**	**$500,000**
By August 1*	**$100 per report**	**$1,500,000**
After August 1, or not at all	**$250 per report**	**$3,000,000**

* For 2015 reports only, August 1 extended to October 1 for employee statements and to November 1 for filing with IRS.

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ACA Reporting – Relief from Penalties

From Form 1095-C/1094-C Instructions:

Relief from penalties. For 2015 reporting, the IRS will not impose penalties on a filer for reporting incorrect or incomplete information if the filer can show that it made good faith efforts to comply with the information reporting requirements for 2015. No relief is provided in the case of reporting entities that cannot show a good faith effort to comply with the information reporting requirements or that fail to timely file an information return or furnish a statement. However, consistent with the existing information reporting rules, reporting entities that fail to timely meet the requirements still may be eligible for penalty relief if the IRS determines that the standards for reasonable cause under section 6724 are satisfied.

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Wellness Plans – Where Do Things Stand?

- The ACA changed the incentives that could be offered under wellness plans.
- If a wellness program is "health contingent" = activity-based or outcome-based, the total financial reward/penalty that may be given to a participant is limited to 30% of the total premium cost of the employee's coverage.
- Permits family member participation with discount based on 30% of cost of family coverage, or 50% if the wellness program that includes tobacco cessation.
- There is no limit for programs that only require participation and do not require a certain outcome for the reward/penalty "participation only programs"

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Health Contingent Programs

- Annual Qualification: Must give participants ability to qualify for the reward at least once per year. Retroactive qualification may be needed for those who require reasonable alternatives.
- Reasonable Alternatives: For activity based, must provide a reasonable alternative or waive the standard for those for whom the standard is unreasonably difficult or medically inadvisable. For outcome based, must provide reasonable alternatives for all participants.
- Reasonable Design: Must be reasonably designed to promote health or prevent disease. Reasonable chance of improving health or preventing disease, not overly burdensome, not highly suspect in method chosen to promote health or prevent disease.
- Notice of Other Means to Qualify for Reward: Must describe other means to get the reward in program materials. Notice must include contact information and statement that an individual's personal physician will be accommodated.

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Wellness Plan Update - EEOC

- Wellness plans are also subject to the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).
- The ADA says that a wellness plan can only require employees to provide medical information or undergo a medical examination if the job-related and consistent with business necessity. Two exceptions:
  - Voluntary or
  - Safe harbor based on sponsoring a bona fide benefit plan for underwriting, classifying or administering risk.
- Under GINA, an employer cannot offer an inducement to obtain "family medical information".
- The Equal Employment Opportunity Commission (EEOC) has the authority to enforce the ADA and Title II of GINA.

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EEOC Rulemaking

- EEOC issued proposed rulemaking in April, 2015. Final Rule issued on May 16
- EEOC proposal on financial incentives: ADA allows employers to offer incentives up to 30 percent of the cost of employee-only coverage to employees who participate in a wellness program which asks disability related questions or requires medical exams, and/or for achieving health outcomes.
- There is no parallel provision permitting 30% of family coverage cost if family members participate, nor is there an increase to 50% for smoking cessation.
- Smoking Cessation: EEOC states that program that merely requests if smoker/non-smoker does not ask disability related questions or require medical exams.
- NEW! Final Rule makes additional changes incentive provisions

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EEOC Rulemaking

- **When is a health program considered "voluntary"?** In addition to the limit on financial incentives, for programs with medical exam or disability-related inquiries, an employer:
  - may not require employees to participate;
  - may not deny access to health coverage or benefits under its health plans for non-participation; and
  - may not take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten employees.
  - A wellness program that is part of a group health plan must also provide notice to employees that details information about what medical information will be obtained, how it will be used, who will receive it, and the restrictions on disclosure.
  - Final Rule: Plan years on and after January 1, 2017

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EEOC Rulemaking-Reasonable Design

- The EEOC Proposed Rule requires that a wellness program be reasonably designed to promote health or prevent disease.
- Conducting a biometric screening for the purpose of alerting employees to health risks is acceptable, using the aggregate data to design and offer health programs aimed at specific conditions prevalent in its workforce is also fine.
- If the employer collects medical information (i.e. health risk assessment) but does not provide any follow-up information or advice to employees or use the data to design health programs, the wellness program would not be reasonably designed.
- Using program to predict future health costs is not acceptable

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EEOC and Wellness Open Issues

- How does GINA impact spousal participation in a wellness program?
- Will Employee-only 30% rate be final regardless?
- What about the bona fide benefit plan safe harbor?

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GINA Rulemaking

- EEOC issued proposed regulations under GINA in October, 2015; Final issued on May 16
- Expands on existing GINA regulations issued in 2008
- Only provides guidance under Title II of GINA which relates to employers
- Treasury, Labor and HHS have jurisdiction over Title I of GINA which relates to group health plans

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Genetic Information

- Title II restricts employers ability to request, require or purchase genetic information
- Genetic information includes, for example:
  - Information about genetic test
  - Information about genetic tests of family members
  - Requests for and receipt of genetic services by an individual or family member
  - *Information about the manifestation of a disease or disorder in family members of an individual "family medical history" . Family members include spouse and children.*

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Voluntary Wellness Program

- Exception to GINA prohibition is for voluntary wellness programs.
- Prior to proposed regulations inducements were prohibited
- Proposed rule: inducements for family medical history of spouse BUT NOT children
- GINA does not apply to inducements made available in exchange for an employee's spouse engaging in certain activities that do not require obtaining information about current or past health status, such as attending a weight loss or nutrition program or exercising a certain amount each week.
- NEW! EEOC permits inducements for stand-alone wellness programs

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Spousal Participation

- The spousal participation may be in the form of a medical questionnaire or a medical exam (i.e. biometric test) or both
- No inducement for spouse providing his or her own genetic information, including results of genetic tests
- Spouse must provide prior, knowing, voluntary and written authorization
- Authorization form must describe GINA's confidentiality provisions

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Type of Inducement

- Inducements must be tied to a health plan
- Inducements may be financial or in-kind (i.e. time-off awards, prizes and other items of value)
- Reward or penalty

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Amount of Inducement – ADA and GINA

- 30 percent of the total cost of
- (1) self-only coverage under the group health plan in which the employee is enrolled (including both employee and employer cost), if enrollment in the plan is a condition for participation in the wellness program;
- (2) the lowest cost self-only coverage under a major medical group health plan offered by the employer (including both employee and employer cost), where the employer has more than one group health plan, but enrollment in a particular plan is not a condition for participating in the wellness program; or
- (3) the second lowest cost Silver Plan available on the Exchange in the location that the employer identifies as its principal place of business if the employer offers no group health plan. In this last instance, the maximum inducement to the employee and the spouse is equal to 30 percent of the cost of covering an individual who is a 40-year-old non-smoker.

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Amount of Inducement

- EXAMPLE:
- The total cost of employee-only coverage is $6,000 and the family coverage is $14,000.
- Total incentives may not be more than $1,800 (30% of $6,000) for the employee. Total spousal incentive may not be more than $1,800.

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Litigation

- On December 31, 2015, the federal district court in the Western District of Wisconsin ruled in EEOC v. Flambeau that an employer's wellness program that required employees to complete a Health Risk Assessment and submit to a biometric screening as a requirement to enroll in the company's health plan did not violate the Americans with Disabilities Act (ADA).
- The decision is based on Section 501(c) of ADA's "bona fide benefit plan safe harbor"

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Litigation

- The relevant statutory provision reads as follows:

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict

(2) *a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law*

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Litigation

- EEOC has appealed to Seventh Circuit
- If the Seventh Circuit affirms the Flambeau decision on appeal, state of law remains same in Seventh and Eleventh circuits: Alabama, Florida, Georgia, Illinois, Indiana and Wisconsin. (11th Circuit Seth v. Broward County)
- If the Seventh Circuit sides with the EEOC, the issue could go to the Supreme Court

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EEOC Final Rule - FAQ

- **What is the ADA's "safe harbor" provision, and does it apply to wellness programs that include disability-related inquiries or medical examinations?**
- The ADA's safe harbor provision allows insurers and plan sponsors (including employers) to use information, including actuarial data, about risks posed by certain health conditions to make decisions about insurability and about the cost of insurance. Such practices have to be consistent with laws governing insurance and cannot be a subterfuge to evade compliance with the ADA. Without the safe harbor, these practices would violate the ADA by treating some individuals with disabilities less favorably than individuals without those disabilities. Many of the insurance practices the safe harbor permitted at the time of the enactment of the ADA, such as denying health coverage for individuals with pre-existing conditions or charging some individuals in group health plans more than others because of their health conditions, are now unlawful under the Affordable Care Act.
- The safe harbor provision does not apply to employer wellness programs, since employers are not collecting or using information to determine whether employees with certain health conditions are insurable or to set insurance premiums. The final rule adds a new provision explicitly stating that the safe harbor provision does not apply to wellness programs even if they are part of an employer's health plan.

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Questions?

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THE NLRB: A THORN IN EVERYONE'S SIDE—NOT JUST UNIONIZED EMPLOYERS!

Presented by Edward R. Noonan
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 19, 2016

Edward R. Noonan
MEMBER

OVERVIEW
Ed Noonan exclusively practices labor law. He represents management as a counselor and a litigator in all areas of labor management relations. In the area of unfair labor practice litigation, Ed has years of experience defending employers before the National Labor Relations Board (NLRB) and courts and advising employers in avoiding the commission of unfair labor practices. While his principal focus has been on union/management relations, he has expanded his practice to include employment discrimination, wrongful discharge, and other species of nonunion-related employment litigation, and preventive counseling.

REPRESENTATIVE MATTERS
- Advises clients on grievance and arbitration matters arising from collective bargaining agreements.
- Handles arbitration proceedings and federal court suits alleging breaches of collective bargaining contracts.
- Advises public and private employers and acts as chief negotiator in collective bargaining negotiations.
- Represents employers in regard to employment discrimination complaints and suits.

PROFESSIONAL AFFILIATIONS
- Allegheny County Bar Association
- Pennsylvania Bar Association

NEWS AND INSIGHTS
Speaking Engagements:

- "Keep the NLRB's Target Off Your Back: Look Out for Overbroad Rules of Conduct," Eckert Seamans' Human Resources Forum, May 2015.
- "NLRB Update: Guidance for employers dealing with the new NLRB "ambush election rules" and other labor law developments," Eckert Seamans' Human Resources Forum, January 2015.

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Litigation

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COURT ADMISSIONS:
U.S. Court of Appeals for the Third Circuit

U.S. Court of Appeals for the Fourth Circuit

U.S. Court of Appeals for the Ninth Circuit

U.S. District Court for the District of Columbia

U.S. District Court for the Western District of Pennsylvania

Supreme Court of Pennsylvania

District of Columbia Court of Appeals

EDUCATION:

J.D., George Washington University Law School, 1976

A.B., Brown University, 1973

- "Confidentiality of Internal Investigations," panelist, American Conference Institute's National Advanced Forum on NLRB & Labor Law Disputes and Litigation, March 2013.
- "NLRB Update," co-presented with Mariah Klinefelter, Eckert Seamans' Human Resources Forum, November 2011.
- "It Takes Two Wrongs to Make a Right," co-presented with Mariah Klinefelter, Eckert Seamans' Human Resources Forum, June 2009.

Media Coverage:

- "Disclaimers in Social Media Policies Could Avoid Labor Law Problems, Attorneys Say," *Electronic Commerce & Law Report*, October 2010.

The NLRB:
A Thorn in Everyone's Side — not just Unionized Employers!

Presented by:
Edward R. Noonan

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May 19, 2016

NLRA Protections

- The National Labor Relations Act covers private sector employees.
- Both union and non-union!

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NLRA Protections

Section 7 of NLRA

- Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities"
- Also protects access to the NLRB and its processes

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NLRA Protections

Section 8(a) (1)

- It is an unfair labor practice to:
  - "interfere with, retrain or coerce exercise of Section 7 rights"

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Concerted Activity for Mutual Aid or Protection

TO BE CONCERTED, ACTIVITY :

- Requires 2 people

  OR

- If one person:
  - Must be engaged with or on the authority of other employees, and not solely by and on behalf of the employee him/herself.

    OR

  - Employee must seek to initiate or to induce or to prepare for group action

    OR

  - Employee must bring *"truly group"* complaints to attention of management

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NLRA Protections

- Section 7 is broadly interpreted and covers discussions between employees and actions taken re:

➢ Wages	➢ Job opportunities
➢ Benefits	➢ Job security
➢ Time off	➢ Treatment by supervisors or managers
➢ Safety	➢ Benefits of unions
➢ Job duties	➢ Job discrimination / harassment
➢ Discipline	➢ evaluations
➢ Any other term or condition of employment	

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NLRA Protections

- They also cover:
  - complaints about supervisors, management and the company
  - communications to the public or media re: working conditions, complaints, protests, etc.
  - enlisting public support
  - wearing of pro union buttons, insignia, etc.
  - strikes and other job protests

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NLRA Protections

- Employer rules which can be "reasonably construed" to chill Section 7 rights

OR

- Employer action which chills or punishes the exercise of Section 7 rights

ARE UNLAWFUL!

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NLRA Protections

- The “Obama” NLRB has been focusing on applying and extending NLRA protections to the non-union sector
- Has been striking down rules/policies which it finds could be interpreted to prohibit or restrict the exercise of NLRA rights
- Applying broad protection to employee acts committed during exercise of concerted activity

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“Overbroad” Confidentiality Restrictions

- Defining “confidential” information as information pertaining to employees and their wages, employment policies or working conditions is unlawful
  - *… all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses and email addresses*
  - Quicken Loans 359 NLRB No. 141
- Arbitration agreement requiring proceedings be confidential
  - Covenant Care California, LLC 363 NLRB No. 80
- Broad policy of prohibiting employees from discussing investigation unlawful
  - Banner Healthcare 358 NLRB 809
- NLRB will not approve settlement agreement where more than financial terms confidential

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"Overbroad" Restrictions on Right to Communicate to Third Parties

- *"Do not contact the media, and direct all media inquiries to the Home Services Communications department."*
- *"If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security …"*
  - Direct TV 359 NLRB No. 54

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Restrictions on Access to Board

- Mandatory arbitration policy covering all employment related claims, including claims under "federal, state or local statutes"
  - Supply Technologies, LLC, 359 NLRB No. 38
- Restricts right to file NLRB charge
- Same holding could apply to covenant not to sue in separation agreement

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Restrictions on Concerted Activity

- Arbitration policy barring class action claims unlawful
  - D.R. Horton, Inc., 357 NLRB No. 184
  - Murphy Oil 361 NLRB No. 72
- Prevents employees from banding together to litigate claims
- Opt out provisions do not save the agreement but are unlawful
  - One Assignment Staffing 362 NLRB 189

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Restrictions on Concerted Activity

T-Mobile USA 363 NLRB No. 71

- Rule banning tape recording or video recording in non-work areas on employees own time is unlawful
- Employees are protected by NLRA when:
  - recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment related actions.
- Rule requiring employees to:
  - "behave in professional manner" and "to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships"
- IS UNLAWFUL
  - prohibits "disagreements or conflicts, including protected discussions"

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Restrictions on Right to Criticize Employer

- "employees are prohibited from criticizing, ridiculing, disparaging, or defaming Quicken or its products, services, policies, directors, officers, shareholders, or employees"
  - Quicken Loans 359 NLRB No. 141
- Board will not approve non-disparagement clauses in settlement agreements

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Restrictions on Right to Criticize Employer

- Facebook posts criticized company tax withholding calculations
  - *(Owner) is "such a shady little man. He probably pocketed it all from our paychecks"*
  - *"I owe (taxes) too. Such an asshole"*
  - Three D, LLC, 361 NLRB No. 31

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Restrictions on Right to Criticize Employer

- Employees campaigning for paid sick leave posted signs outside sandwich shop comparing “your sandwich made by sick worker” with “your sandwich made by healthy worker”
  - Can’t tell the difference?
  - That’s too bad because Jimmy John’s workers don’t get paid sick days. Shoot, we can’t even call in sick.
  - We hope your immune system is ready because you’re about to the take the sandwich test …
  - Miklin Enterprises 361 NLRB No. 27

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Questions?

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PREGNANT WORKERS: The evolution from "not covered" to fully protected participants in the workforce

Presented by John J. Myers
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 19, 2016

John J. Myers

MEMBER
BOARD OF DIRECTORS

John Myers focuses his practice on labor and employment litigation and counseling. He has defended employers throughout the country in cases involving claims of employment discrimination, wrongful discharge, ERISA violations, breach of employment contracts, minimum wage and overtime pay violations, and a variety of employment-related torts. John is also experienced in restrictive covenant and trade secret misappropriation litigation.

REPRESENTATIVE MATTERS

- Successfully upheld age discrimination summary judgment decision in Court of Appeals. *Willis v. UPMC Children's Hospital of Pittsburgh*, 808 F. 3d 638 (3d Cir. Dec. 22, 2015).
- Award of summary judgment in ERISA case, holding that a supplemental pension plan was a "top hat" plan. *Sikora v. UPMC and Affiliates Non-qualified Supplement Benefits Plan*, (W.D. Pa. 12/22/2015).
- Summary judgment granted by U.S. District Court in an ADEA case brought by discharged Nurse Practitioner. *Willis v. UPMC Children's Hospital of Pittsburgh*, 2015 WL 539995 (W.D. Pa. 2015).
- Defense jury verdict in an FMLA retaliation case on remand from Lichtenstein v. University of Pittsburgh Medical Center, 691 F.3d 294 (3d Cir. 2012). Judgment affirmed, 2015 WL 399958 (3d Cir. 2015).
- *Bensinger v. Western Psychiatric Institute and Clinic* (Pa. Super. Aug. 2014), In a case of first impression, the Pennsylvania Superior Court affirmed a defense verdict in a Whistleblower case, holding that there is no right to a jury trial under the Pennsylvania Whistleblower Law.
- *Buller v. PPG Industries* (Feb. 2014), Defense verdict in a jury trial alleging that the plaintiff was discharged because of her disability or her age.
- *Camesi v. UPMC*, 729 F.3d 239 (3d Cir. 2013)Successfully decertified a Fair Labor Standards Act class of 3,000 opt ins and defeated plaintiffs' attempted appeal.

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U.S. Courts of Appeal for the Third Circuit

U.S. Courts of Appeal for the Fourth Circuit

U.S. Courts of Appeal for the Sixth Circuit

U.S. Courts of Appeal for the Seventh Circuit

U.S. Courts of Appeal for the Eighth Circuit

U.S. Courts of Appeal for the 11th Circuit

U.S. Supreme Court

U.S. District Court for the Middle District of Pennsylvania

U.S. District Court for the Western District of Pennsylvania

EDUCATION:

J.D., Tulane University School of Law, 1976; Editor, *Tulane Law Review*, Order of the Coif

B.A., Franklin & Marshall College, 1973

- *Henderson v. UPMC*, 640 F.3d 524 (3d Cir. 2011). This seminal case in the Courts of Appeal affirmed dismissal of a class action Complaint which alleged that the employer failed to keep accurate records of hours worked, as required by Section 209(a) of ERISA, because it did not include off-the-clock work plaintiffs allegedly performed.
- *Huston v. Procter & Gamble Paper Products Corp*. 568 F. 3d 100 (3rd 2009), decision establishing circuit precedent for level of management whose knowledge of sexual harassment may be imputed to the company.
- *Eastman Kodak Co. v. Bayer Corp.*, 576 F. Supp. 2d 548, 551 (S.D.N.Y. 2008), affirmed 2009 WL 2767021 (2d Cir. 2009), ERISA top hat plan litigation interpreting supplemental pension plan to deny executive's claim and Eastman Kodak indemnity claim.
- Have tried dozens of employment discrimination jury trials to verdict.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association
- Pennsylvania Bar Association

COMMUNITY INVOLVEMENT

- The Education Partnership, Board of Directors

AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers*
- Selected for inclusion in *The Best Lawyers in America* for Employment Law – Management, Litigation – Labor & Employment, Litigation – ERISA; Commercial Litigation
- Attained an AV® Preeminent™ rating from Martindale-Hubbell

NEWS AND INSIGHTS

Articles:

- "After the dust settles: What Ricci vs. DeStefano means to employers," *Eckert Seamans' Legal Update*, November 2009.
- "Private Sector Commentary: Bias Ruling Creates Confusion for Employers," *Pittsburgh Post-Gazette*, August 2009.
- "Supreme headache for employers? High court ruling could clear way for more employee discrimination suits," *Pittsburgh Post-Gazette*, July 2006.

Presentations:

- "State Law Bans on Discretionary Clauses in Disability Plans," ACI Litigating Disability Insurance Claims Forum, January 2016.

- "Defending claims involving remote work using Blackberry devices, home computers, I-phones and similar devices," ACI Wage and Hour Forum, Miami, Florida, January 2015.
- "The Conflicted Fiduciary – post-Glenn Developments in the Standard of Review," presented at ACI's 8th National Forum on ERISA Litigation, October 2014.
- "Considerations for Other Types of Leave," presented at the National Business Institute's Employee Leave Law from A to Z continuing legal education program, August 2014.
- "The Fluctuating Work Week," presented at the ACI National Forum on Wage & Hour Claims and Class Actions, May 2014.
- "Equitable Remedies Under Section 502 (a)(3) after *Cigna Corp. v. Amara*," presented at the ACI National Forum on ERISA Litigation in Chicago, April 2014.
- "Benefits Claims Litigation," presented at the ACI 6th National Forum on ERISA Litigation in New York City, October 2013.
- "Employee Termination Decisions: Negotiating the Minefield," presented at the Eckert Seamans Human Resources Forum, June 2013.
- "The Americans with Disabilities Act: Judicial developments in defining who is disabled and how disabled employees must be accommodated," presented at Eckert Seamans' Human Resources Forum, January 2013.
- "Affirmative Defenses under the Equal Pay Act," presented at the Pennsylvania Bar Institute Employment Law Institute West, 2012, November 2012.
- "Hot Topics in Wage and Hour Law: "Off-the-Clock" Claims, Meal and Rest Breaks, and Tipping," presented at the ACI National Forum on Wage Hour Claims & Class Actions in New York City, June 2012.
- "Arbitration of Employment Disputes – Panacea or Plague? Or Neither?" presented at Eckert Seamans' Human Resources Forum, May 2012.
- "Attorneys' Fees Under the FLSA – Are the Courts Following the Law?" presented at the American Conference Institute National Forum on Wage Hour Claims and Class Actions in Miami, Florida, January 31, 2012.
- "News You Can Use: A Review of Recent Judicial, Legislative and Regulatory Developments of Significance to Employers," co-presented with Ryan Siciliano at Eckert Seamans' Human Resources Forum, November 2011.
- Wage & Hour Symposium, Course planner and panelist, Pennsylvania Bar Institute seminar, held September 20, 2011.
- "Off-the-Clock Collective Actions under the Fair Labor Standards Act," presented at an American Conference Institute Seminar in Miami, Florida, February 2011.

- "ERISA Litigation", presented at the American Conference Institute in New York City, October 2010.
- "Don't Ask, Don't Tell, " co-presented with Mariah Klinefelter at the Eckert Seamans' Human Resources Forum, December 2009.

Quoted:

- "Workers Who Drop Claims Can't Fight Decertification: 3rd Circ." *Law360*, September 4, 2013.
- "Legal Perspectives on Video Interviewing," *InterviewStream Blog*, July 9, 2013.
- "Future of Class-Action Cases Still Unclear," *Human Resources Executive* (online), February 1, 2012
- "Hospitals Wage Battle with OFCCP," *BNA, The Daily Labor Report*, February 18, 2011.
- "Layoffs without lawsuits: Treating people well can be good business in a downturn," *Wire Rope News & Sling Technology*, October 2010.
- "Fired for Taking Vacation: When the Boss Asks You to Cancel Plans," *The Wall Street Journal*, July 16, 2010.
- "Holding Associates Accountable," *Human Resources Executive* (online), November 24, 2009.
- "Protecting the Workplace," *Human Resources Executive* (online), October 27, 2009.
- "Clarifying Supervisory Notification," *Human Resources Executive* (online), July 13, 2009.
- "Reverse Discrimination Quashed," *Human Resources Executive* (online), June 30, 2009.
- "Supreme Court: New Haven Violated Title VII by Discarding Promotion Exam Results," *SHRM Online*, June 29, 2009.
- "Firefighter Ruling May Aid Employers, Hurt Sotomayor," *Labor Law360*, May 2009.
- "Layoffs Without Lawsuits," *AQUA: The Business Magazine for Spa & Pool Professionals*, April 2009.
- "How to Play Fair," *Industry Week*, April 2009.

Pregnant Workers:

The evolution from "not covered" to fully protected participants in the workforce

Presented by:

John J. Myers

ECKERT SEAMANS
ATTORNEYS AT LAW

May 19, 2016

What Result?

- Employee takes 3 months maternity leave. Due to complications during delivery, she needs additional time off. Must the time off be given?
- Employer has 5 clerical employees doing same job. In downsizing, eliminates the job of one of the employees who is on maternity leave because she is absent. Problematic?
- Pregnant employee cannot perform lifting requirements of job and requests a light duty position. Must employer provide her with one?

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The Beginning

Title VII of the Civil Rights Act of 1964:

> "It shall be an unlawful employment practice for an employer … to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual … because of such individual's … sex."

Is discrimination because of pregnancy discrimination because of sex?

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Geduldig v. Aiello (U.S. 1974)
Gilbert v. General Electric Company (U.S. 1976)

- California by law provided disability benefits for disabled employees, but excluded disabilities resulting from pregnancy. Lawsuit claimed Equal Protection violation.
- *General Electric Company* – comprehensive disability income plan excluded disabilities related to pregnancy. Lawsuit claimed violation of Title VII.
- Supreme Court: Discrimination against pregnant employees is not gender-based discrimination, just because only women can become pregnant.

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Congress Responds: The Pregnancy Discrimination Act of 1978 42 U.S.C. § 2000e(k)

- "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to:
  - because of or on the basis of pregnancy, childbirth or related medical conditions; and
  - women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

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PDA in the Courts

- *Klancer v. GTE Products Corporation* (3d Cir. 1994)
  - Employee discharged during pregnancy leave because of policy that provided that after a certain number of absences, employees would be discharged, regardless of the reason for absences.
- *In Re Carnegie Center Associates* (3d Cir. 1997)
  - Employee's job was selected for elimination rather than another person's solely because employee was absent on maternity leave.
  - "An employer legitimately can consider an employee's absence on maternity leave in making an adverse employment decision ... the plaintiff employee seeking to recover under the PDA must show that the employer treated her differently than non-pregnant employees on disability leave."
- *Troupe v. May Dep't Stores Co*. (7th Cir.1994)
  - "The PDA does not require employers to offer maternity leave or take other steps to make it easier for pregnant women to work. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."

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Family and Medical Leave Act of 1993

- Employees who are eligible are entitled to up to 12 weeks of leave per year, with guaranteed reinstatement, for (1) incapacity resulting from serious health conditions, including pregnancy related absences and (2) post-birth child care leave.
- No-fault policies cannot count FMLA leaves.
- For eligible pregnant employees, addresses absenteeism issue.

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California Federal Savings & Loan Assoc. v. Guerra, 479 U.S. 272 (1987)

- California requires employers to provide up to 4 months of leave to employees disabled by pregnancy. Employer sued alleging that this law discriminates in favor of women, because the law did not require leave for any other disabilities.
- Supreme Court: the PDA was intended to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."
- *I.e.,* one can favor pregnancy, but cannot burden it.

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Newport News Shipbuilding Company v. EEOC, 462 U.S. 669 (1983)

- Employer's Medical Plan covered pregnancy-related medical expenses for employees, but not for spouses.
- Supreme Court: Plan violates the PDA because it discriminates against male employees by not covering pregnancy and child birth medical expenses for them.

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Schafer v. Board of Public Education of the School District of Pittsburgh, Pa., (3d Cir. 1990)

- School District's collective bargaining agreement allowed female employees to take up to four months of paid leave, whether disabled or not, for pregnancy and child rearing, but did not allow male employees child care leave.
- Held: Provision violated Title VII, because fathers were denied a benefit provided only to female employees.

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International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) – Fetal Protection Policies

- Employer's fetal protection policy required that employees in jobs entailing lead exposure certify that they were not capable of pregnancy to be eligible, because lead exposure would jeopardize health of any fetus.
- Held: "Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a bona fide occupational qualification (BFOQ) of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the PDA."

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Protective Policies and Practices

- *What if Employee is actually pregnant?*
  - *E.E.O.C. v. Catholic Healthcare West* (pregnant employees not permitted to work in areas involving radiation exposure)
- *What if the Employee's doctor has provided work restrictions? Can Employee elect to waive them?*
  - *E.E.O.C. v. Greystar Management Services* (No working around chemicals)
  - *Noecker v. Reading Hosp*. (Could not lift over 25 pounds)

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Are abortions protected activity?

- *Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008 (PDA prohibits employer from discriminating against female employee because she has exercised her right to have an abortion)
- *Turic v. Holland Hospitality*, Inc., 85 F.3d 1211, 1214 (6th Cir. 1996) (discharge of pregnant employee because she contemplated having abortion violated PDA).
- Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 app., Question 34 (1979) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion.")

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Break Time and Place for Nursing Mothers – Obamacare § 4207

- Effective March 2010, Employers must provide "reasonable break time" for breastfeeding employees to express breast milk until the child's first birthday.
- Employers must provide a private place, other than a bathroom, for this purpose.
- State laws: Most states have similar laws.

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ADA Amendments Act of 2008

- Pregnancy is not an "impairment" so it is not a disability. Complications of pregnancy are typically temporary and not substantial, so not a disability.
- ADAAA greatly expanded definition of disability to include such functions as standing and lifting and minimized importance of duration.
- Consequence – pregnancy-related complications may be protected by ADA, with its requirement of reasonable accommodation.
- Case study: *Bray v. Town of Wake Forest,* 2015 WL 1534515 (April 6, 2015 E.D.N.C.) (Police officer who alleged she could not run, jump or lift more than 20 pounds because of her pregnancy-related conditions stated a claim under the ADAAA)

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Reasonable Accommodation for Pregnancy

- If an employer accommodates other disabilities either because the ADA requires it or because the injury is job-related, must the employer also provide reasonable accommodations for disability caused by pregnancy?
  - Former EEOC Guidelines: Yes. So long as employer accommodates any employee who is unable, for example, to lift or stand, it must accommodate a pregnant employee.
  - *Serednyj v. Beverly Healthcare, LLC,* 656 F. 3d 540, 547–552 (7th Cir. 2011) and all other circuit courts: No.
  - Controversy based upon wording of second clause of PDA.

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Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (U.S. March 25, 2015)

- Plaintiff's doctor: No lifting >20 lbs for first 20 weeks of pregnancy and >10 lbs thereafter. Job required lifting up to 80 lbs. Plaintiff asked for a light duty job as an accommodation and was refused.
- Employer accommodated lifting restrictions caused by a disability under the ADA; by a job-related injury to avoid workers' compensation expenses; and where driver lost DOT certification for medical reasons. Other employees who could not driver for medical reasons were not accommodated.
- Plaintiff forced to take unpaid leave of absence until after child born.

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Competing positions as to meaning of PDA Second clause

- EEOC/Plaintiff: PDA "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work."
- Employer: PDA requires only that pregnancy be treated the same as "other similar" disabilities; i.e., not job related or ADA disabilities. Courts should compare the accommodations an employer provides to pregnant women with the accommodations it provides to others within a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII.

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Supreme Court's Decision

- *Court adopted a middle ground*: Rejected EEOC's position as creating a "most-favored nation" status for pregnancy; rejected UPS position because it did not give full effect to the second clause of the PDA.
- *Holding*: Where employer has accommodated other types of disabilities, but not pregnancy, and the employer's policies impose a significant burden on pregnant workers, the court/jury must determine whether the employer's reasons for accommodating those other disabilities and not pregnancy are sufficiently strong to justify the burden on pregnant workers; or—when considered along with the burden imposed—do those policies give rise to an inference of intentional discrimination.

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After *Young*, Must Pregnancy Disabilities be Accommodated?

- Not necessarily – *Young* decision has made the issue one that must be considered on a case-by-case, or employer-by-employer, basis.
- First, does the employer accommodate non-pregnant employees *[in similar jobs?]* who are unable to perform their duties for medical reasons.
- Second, does the employer have a legitimate non-discriminatory reason for the difference in treatment? Not merely more expensive or inconvenient.
- Third, does the employer's policies create a significant burden on pregnant workers? i.e., Most non-pregnant workers are accommodated but most pregnant workers are not.
- Finally, are the reasons for the difference in treatment strong enough to justify the burden on pregnant workers to avoid an inference of intentional discrimination.

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Post – *Young* Guidance

- Almost no guidance from the case law.
- EEOC revised Guidelines (July 2015): Do little to clarify – repeat the *Young* holding.
- Assessment: Accommodation only of ADA-disabled workers will not give rise to a duty to accommodate pregnant employees. Accommodation also of employees with on-the-job injuries probably will not give rise to a duty – but might be an issue of fact.
- Accommodation of pregnancy does not import all of the ADA requirements into Title VII. *See Salmon v. Applegate Homecare,* (D. Utah 2016)

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State Laws Requiring Reasonable Accommodation

- Several states (and NYC) have enacted laws requiring reasonable accommodation for pregnancy. E.g., California, Illinois, New Jersey, Maryland, Utah
- Reasonable accommodation includes (Cal.): any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job. In N.J., "for needs related to the pregnancy ... Based on the advise of her doctor." Reasonable accommodations include, but are not limited to an employer:
  1) modifying work practices or policies;
  2) modifying work duties;
  3) modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (e.g., to use the restroom);
  4) providing furniture (e.g., stools or chairs) or acquiring or modifying equipment or devices;

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State Laws Mandating Minimum Leave for Pregnancy

- A number of states require that employers provide a minimum period of unpaid leave for disabilities resulting from pregnancy. This leave is in addition to FMLA leave under state and federal law.
  - WA – 12 weeks
  - CA – 4 months
  - CT – 16 weeks over two-year period
- Regulations for federal contractors require that employees be granted a leave for "a reasonable time" with reinstatement for child bearing. 41 C.F.R. § 60-20.3.

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What Result?

- Employee takes 3 months maternity leave. Due to complications during delivery, she needs additional time off. Must the time off be given?
- Employer has 5 clerical employees doing same job. In downsizing, eliminates the job of one of the employees who is on maternity leave because she is absent. Problematic?
- Pregnant employee cannot perform lifting requirements of job and requests a light duty position. Must employer provide her with one?

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NEWS YOU CAN USE

Presented by Daniel B. McLane and Lindsey Conrad Kennedy
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 19, 2016

Daniel B. McLane
MEMBER

OVERVIEW
Dan McLane has extensive experience representing mid-size and large companies in complex commercial litigation, contract disputes, and business torts, energy litigation, oil and gas disputes, product liability, commercial lease disputes, professional liability, and business dissolution matters as lead counsel in numerous state and federal courts across the country and before the American Arbitration Association. His practice actively involves the counseling of businesses on a broad range of commercial matters, including the drafting and advising on commercial contracts, natural gas exploration, and related business agreements.

REPRESENTATIVE MATTERS
- Represents public and private corporations in commercial actions in numerous state and federal trial and appellate courts across the country and before the American Arbitration Association.
- Actively counsels on business disputes, restrictive covenants, insurance coverage, dissolutions, and breach of contract actions.

PROFESSIONAL AFFILIATIONS
- Allegheny County Bar Association

COMMUNITY INVOLVEMENT
- Blind and Vision Rehabilitation Services of Pittsburgh, Former Director

AWARDS AND RECOGNITION
- Selected for inclusion in *Pennsylvania Super Lawyers – Rising Star*
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U.S. Court of Appeals for the Ninth Circuit

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J.D., cum laude, Syracuse University College of Law, 1995

B.A., Roanoke College, 1992

NEWS AND INSIGHTS

Speaking Engagements:

- "Trials in the Real World: How Things are Done in the Federal Court in Western Pennsylvania," Federal Court Section of the Allegheny County Bar Association, March 3, 2011.

Media Coverage:

- "Equitable Facing $320K Fine in Blast," *Pittsburgh Tribune-Review,* March 2, 2006.
- "PUC Blames Equitable for Ross House Explosion," *Pittsburgh Post-Gazette,* March 3, 2006.

Lindsey Conrad Kennedy

ASSOCIATE

OVERVIEW

Lindsey focuses on helping clients navigate various labor and employment matters, including state and federal discrimination litigation, design and implementation of employment policies, and other sensitive personnel matters.

She has represented management in all phases of litigation before federal and state courts and administrative agencies and in arbitration and mediation proceedings. She has handled disputes involving discrimination, harassment, and retaliation, interference or retaliation under the Family Medical Leave Act, failure to provide reasonable accommodations under the Americans with Disabilities Act, and unfair labor practices. Lindsey also counsels employers on how to avoid such litigation. She advises clients on day-to-day personnel matters, such as hiring and terminating employees, drafting and negotiating agreements, and ensuring employment policies and handbooks are compliant with the ever-changing employment law landscape.

Lindsey also has experience representing clients in the financial services and banking industries in a variety of matters, including regulatory counseling, enforcement actions, and litigation.

Prior to joining Eckert Seamans, Lindsey was a litigation associate at a large New York law firm.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association, Member

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U.S. District Court for the Western District of Pennsylvania

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EDUCATION:

J.D., magna cum laude, University of Pittsburgh School of Law, 2010; *University of Pittsburgh Law Review*

B.S., summa cum laude, University of Pittsburgh, 2007

NEWS AND INSIGHTS

Speaking Engagements:

- "The Potholes, Pitfalls, and Perils of Employment Policies, and How to Avoid Them," co-presented with Clare Gallagher, Eckert Seamans' Human Resources Forum, May 2015.
- "News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers," co-presented with Clare Gallagher, Eckert Seamans' Human Resources Forum, January 2015.

Media Relations:

- "Young In BigLaw: How To Use It To Your Advantage" quoted, *Law360*. March 2016.

News You Can Use

Presented by:

Daniel B. McLane and Lindsey Conrad Kennedy

ECKERT SEAMANS
ATTORNEYS AT LAW

May 19, 2016

Defend Trade Secrets Act (DTSA)

- Trade secrets were previously a matter of state law.
- DTSA creates a private right of civil action for misappropriation of trade secrets involved in interstate or foreign commerce.
- Belief that federal courts better equipped to deal with the rapidly changing world of technology and the rise in trade secret theft.

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Defend Trade Secrets Act (DTSA) (cont.)

- Key provisions of DTSA:
  - Original jurisdiction in federal court.
  - Definition of "misappropriation" is similar to UTSA.
  - Broad remedies.
  - *Ex parte* seizure of property:
    - Government may seize property before notice to defendant.
    - Concern with abuse – only available in "extraordinary circumstances."
    - Damages available for wrongful and/or excessive seizures.
- DTSA does not enforce non-compete agreements.

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Babcock v. Butler County

- When are meal periods compensable under the FLSA?
- The facts:
  - Prison guards received an hour-long meal break, 15 minutes of which were unpaid.
  - Required to remain on premises (unless they received permission from warden), in uniform and prepared to respond to emergencies.
  - Prohibited from running errands, sleeping, smoking, or otherwise leaving building without permission for supervisor.

Babcock v. Butler Cty., 806 F.3d 153 (3d Cir. Nov. 24, 2015)

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Babcock v. Butler County (cont.)

"The employee must be completely relieved from duty for the purposes of eating regular meals … The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." Dept. of Labor Regulation, 29 C.F.R. § 785.19(a).

vs.

"Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." Supreme Court case, *Armour & Co. v. Wantock,* 323 U.S. 126 (1944).

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Babcock v. Butler County (cont.)

- "Predominant benefit test"
  - Did the meal break, with all of its restrictions, predominantly benefit the prison? In other words, was the entire meal period compensable time?
  - Under the totality of the circumstances, **no**.

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Babcock v. Butler County (cont.)

- Obvious takeaway:
  - Review any restrictions placed on employees during unpaid breaks.
- Other reminders:
  - Recall that the FLSA requires that rest periods of less than 20 minutes be counted as "hours worked" for overtime or minimum wage purposes.
  - Revise break policies to specifically state that employees will not be paid for missed breaks (*Braun v. Wal-Mart Stores, Inc.*).

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FLSA Overtime Regulations

- Timing: mid-June – early July?
- "Exemption" depends on:
  - How an employee is paid – salary basis
  - How much an employee is paid – salary level/threshold
  - What kind of work does the employee do – job duties test
- New regulations would increase the salary level
  - $23,660 ⇨ $47,476
  - "Highly compensated employee": $100,000 ⇨ $122,148
  - Increases every three years

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FLSA Overtime Regulations (cont.)

- What can you do now to prepare?
  - Identify employees who will need to be reclassified, determine the number of hours they work, and do the math.
  - Check your time-keeping methods.
  - Craft a unified message to employees.
  - Develop a plan to ensure compliance.

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PA's Medical Marijuana Act

- General employment-related provisions:
  - Prohibits discrimination and retaliation against an employee based *solely on the basis* of an employee's status as a certified user.
  - Does not require employers to allow employees to use medical marijuana at work.
  - Does not limit an employer's ability to discipline an employee "for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for the position."

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PA's Medical Marijuana Act (cont.)

- Task-specific employment provisions (while under the influence of medical marijuana):
  - Patient prohibitions:
    - Operation or physical control of certain chemicals, high-voltage electricity, or other public utility.
    - Performance of duties at heights or in confined spaces.
  - Employers may prohibit employees from:
    - Performing tasks that are "life-threatening, to either the employee or any of the employees of the employer."
    - Performing tasks which could result in a "public health or safety risk."

Not an adverse employment decision, even if prohibition results in financial harm to employee!

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PA's Medical Marijuana Act (cont.)

- Takeaways:
  - Revise policies/trainings.
  - Do not ask whether employee or applicant is user of medical marijuana.
  - If you believe an employee is working while under the influence, record articulable symptoms.
  - Stay tuned for additional guidance.

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Socko v. Mid-Atlantic Systems of CPA, Inc.

- Restrictive covenants:
  - What consideration is sufficient when an existing employee enters into a restrictive covenant?
  - Under PA common law, need more than mere continuation of employment.
- Uniform Written Obligations Act (UWOA)
  - Magic language – "intending to be legally bound"
  - Can the magic language alone save a non-competition agreement entered into after employment has commenced?
  - **No.** "New and valuable consideration" is required.

Socko v. Mid-Atlantic Systems of CPA, Inc., 126 A.3d 1266 (PA Supreme Ct. Nov. 18, 2015)

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Socko v. Mid-Atlantic Systems of CPA, Inc.

- What is "new and valuable consideration"?
  - Salary increase
  - Other favorable change in compensation – bonuses, stock options, enhanced benefits
  - One-time payment
  - Promotion
  - Change from part-time to full-time
  - Etc.

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Questions?

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