ECKERT SEAMANS
ATTORNEYS AT LAW

NEWS YOU CAN USE

Presented by:

John J. Myers
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John J. Myers

MEMBER

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 previously chaired the firm's Labor & Employment Department for over 20 years.

John is also experienced in restrictive covenant and trade secret misappropriation litigation.

REPRESENTATIVE MATTERS

- Lead counsel on Third Circuit case affirming an award of ESI discovery costs against class action plaintiffs in the amount of $317,000, one of the highest ESI cost awards in the country to date. *Camesi v. University of Pittsburgh Medical Center*, 753 Fed. Appx. 135 (3d Cir. Nov. 9, 2018).
- Court of Appeals established the legal standard for a top hat pension plan, rejecting decisions of three other circuit appeals courts, in upholding decision in favor of clients' executive pension plan. *Sikora v. UPMC, et al.,* 876 F.3d 110 (3d Cir. 2017).
- Federal Court awards summary judgment for clients in ADA/FMLA cases. Lavorgna v. Norfolk Southern Corp., 2017 WL 5006430 (W.D. Pa. 10/31/17) and Colonna v. UPMC Hamot, 2017 WL 4235937 (W.D. Pa. 9/25/2017).
- Summary judgment in favor of employer in Age Discrimination in Employment Act case filed by discharged manager. *Pope v. Bayer MaterialScience LLC*, 2016 WL 66257 (W.D. Pa. 11/16/2016).
- Summary judgment affirmed by U.S. Court of Appeals against Nurse Practitioner alleging age discrimination. *Willis v. UPMC Children's Hospital of Pittsburgh*, 808 F. 3d 638 (3d Cir. Dec. 22, 2015).
- Defense jury verdict in ADA case filed by locomotive engineer in federal court. *Dicanio v. Norfolk Southern Ry* (WD 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).

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PRACTICE AREAS:

Labor & Employment

Litigation

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

Supreme Court of the United States

Pennsylvania Supreme Court

U.S. Courts of Appeal for the First Circuit

U.S. Courts of Appeal for the Second Circuit

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. 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

- Defense verdict in case under Pa. Whistleblower Act affirmed. In a case of first impression, the Pennsylvania Superior Court affirmed a defense verdict, holding that there is no right to a jury trial under the Pennsylvania Whistleblower Law. *Bensinger v. Western Psychiatric Institute and Clinic*, 98 A.3d 672 (Pa. Super. 2014).
- Defense jury verdict in case under ADA and ADEA alleging that the plaintiff was discharged because of her disability(cancer) or her age. *Buller v. PPG Industries* (Feb. 2014).
- Successfully decertified a Fair Labor Standards Act class of 3,000 opt-ins and defeated plaintiffs' attempted appeal. *Camesi v. UPMC*, 729 F.3d 239 (3d Cir. 2013).
- 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. *Henderson v. UPMC*, 640 F.3d 524 (3d Cir. 2011).
- Court of Appeals established circuit precedent for level of management whose knowledge of sexual harassment may be imputed to the company. *Huston v. Procter & Gamble Paper Products Corp.* 568 F. 3d 100 (3rd Cir. 2009).
- ERISA top hat plan litigation interpreting supplemental pension plan to deny executive's claim and Eastman Kodak indemnity claim. *Eastman Kodak Co. v. Bayer Corp.*, 576 F. Supp. 2d 548, 551 (S.D.N.Y. 2008), affirmed 2009 WL 2767021 (2d Cir. 2009).
- Have tried dozens of employment discrimination jury trials to verdict.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association
- Pennsylvania Bar Association

COMMUNITY INVOLVEMENT

- Urban League of Greater Pittsburgh, Board of Directors
- 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 and Special Edition Judicial Award

NEWS AND INSIGHTS

PUBLICATIONS

- "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.

MEDIA COVERAGE

- "High-profile harassment scandals could pressure human resource departments," *Pittsburgh Post-Gazette*, December 4, 2017.
- "Harassment: A problem every employer should take seriously," *Pittsburgh Post-Gazette*, April 17, 2017.
- "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.

SPEAKING ENGAGEMENTS

- "News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers," co-presented at Eckert Seamans' Human Resources Forum, April 2019.

- "Beyond the FMLA and ADA: The Other Leave and Break Laws You Also Need to Know" presented at the 2018 PBI Employment Law Institute West, November 2018.
- "Church Plans Litigation Update," ACI ERISA Litigation Conference, New York, NY November 2, 2017.
- "Taking and Defending the Deposition of HR Managers," 2017 PBI Employment Law Institute West, November 17, 2017.
- "Accommodating Pregnant Employees after *Young v. United Parcel Service,*" 2016 PBI Employment Law West program, Pittsburgh, Pennsylvania, November 2016.
- "Pregnancy — The Path from Stepdaughter of Protected Classes to Superprotection," Eckert Seamans' Human Resources Forum, May 2016.
- "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, iPhones and similar devices," ACI Wage and Hour Forum, Miami, Florida, January 2015.
- "The Conflicted Fiduciary – post-Glenn Developments in the Standard of Review," ACI's 8th National Forum on ERISA Litigation, October 2014.
- "Considerations for Other Types of Leave," National Business Institute's Employee Leave Law from A to Z continuing legal education program, August 2014.
- "The Fluctuating Work Week," ACI National Forum on Wage & Hour Claims and Class Actions, May 2014.
- "Equitable Remedies Under Section 502 (a)(3) after *Cigna Corp. v. Amara*," ACI National Forum on ERISA Litigation in Chicago, April 2014.
- "Benefits Claims Litigation," ACI 6th National Forum on ERISA Litigation in New York City, October 2013.
- "Employee Termination Decisions: Negotiating the Minefield," 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," Eckert Seamans' Human Resources Forum, January 2013.
- "Affirmative Defenses under the Equal Pay Act," Pennsylvania Bar Institute Employment Law Institute West, November 2012.
- "Hot Topics in Wage and Hour Law: "Off-the-Clock" Claims, Meal and Rest Breaks, and Tipping," ACI National Forum on Wage Hour Claims & Class Actions, New York City, June 2012.
- "Arbitration of Employment Disputes – Panacea or Plague? Or Neither?" Eckert Seamans' Human Resources Forum, May 2012.
- "Attorneys' Fees Under the FLSA – Are the Courts Following the Law?" American Conference Institute National Forum on Wage Hour Claims and Class Actions, Miami, Florida, January 2012.
- "News You Can Use: A Review of Recent Judicial, Legislative and Regulatory Developments of Significance to Employers," co-presenter, Eckert Seamans' Human Resources Forum, November 2011.

- Wage & Hour Symposium, Course planner and panelist, Pennsylvania Bar Institute seminar, held September 2011.
- "Off-the-Clock Collective Actions under the Fair Labor Standards Act," American Conference Institute Seminar, Miami, Florida, February 2011.
- "ERISA Litigation," American Conference Institute, New York City, October 2010.
- "Don't Ask, Don't Tell, " co-presenter, Eckert Seamans' Human Resources Forum, December 2009.

Taylor N. Brailey

ASSOCIATE

Taylor focuses her practice in labor and employment matters. Taylor defends employers before federal and state administrative agencies and courts against claims alleging violations of Title VII, the ADA, the ADEA, the FMLA, and related state laws, and has experience litigating restrictive covenant disputes. Taylor additionally provides advice to employers to ensure compliance with the major federal and state employment laws.

While in law school, Taylor served as a summer associate at Eckert Seamans, as well as a judicial intern for the Honorable Lisa Pupo Lenihan of the United States District Court for the Western District of Pennsylvania. She also served as a legal intern for a privately-held management company, where she gained first-hand insight into employment matters from the client perspective.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association

COMMUNITY INVOLVEMENT

- Big Brothers Big Sisters of Greater Pittsburgh
- Reading is FUNdamental Pittsburgh, elementary school reading mentor

AWARDS AND RECOGNITION

- CALI Excellence for the Future Award for Employment Discrimination
- CALI Excellence for the Future Award for Law and Human Behavior
- William H. Eckert Award for superior paper in the upper division J.D. program

NEWS AND INSIGHTS

PUBLICATIONS

- *Discrimination in the Age of Social Media: The New Dangers of Cat's Paw Liability*, 35 J.L. & Com. 271 (2017).

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PRACTICE AREAS:

Labor & Employment

Litigation

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

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

U.S. Court of Appeals for the Third Circuit

EDUCATION:

J.D., cum laude, University of Pittsburgh School of Law, 2017; Editor-in-Chief, Journal of Law and Commerce

B.A., Psychology, The Pennsylvania State University, 2014

SPEAKING ENGAGEMENTS

- "News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers," co-presented at Eckert Seamans' Human Resources Forum, April 2019.

Matthew H. Meade

MEMBER

Matt Meade concentrates his practice in the area of data security providing advice to clients regarding data breaches, information and records management, and other areas concerning data security. Matt helps clients identify business risks associated with the use and storage of sensitive information. He regularly guides clients through security incident investigations, analysis, communications, and, if necessary, responding to regulatory inquiries and litigation. He advises clients on security breach notification laws and other U.S. state and federal data security requirements (including laws regarding disposal of records). Matt drafts agreements addressing issues related to data use, privacy, and security. He also prepares document retention and management policies and develops associated training programs.

Matt speaks and writes regularly on data security matters and serves on The Sedona Conference Working Group Series Leadership Council, after previously serving on the Steering Committee for Working Group II on Data Security and Privacy, through which lawyers, judges, policy makers, security experts, technologists, and business leaders work together to identify and develop principles and best practices to constructively resolve issues surrounding data security and privacy liability. Matt has served as a Co-Chair of the ABA's First, Second, and Third Annual National Cybersecurity Institute (2016-2018).

REPRESENTATIVE MATTERS

- Advised numerous entitles, including healthcare providers, manufacturers, retailers, schools, financial services companies, county governments and collection agency on information security breach notification procedures and development of post breach corrective action plans.
- Coordinated response to multi-state security breaches, ransomware, and hacking incidents with local and federal law enforcement, and United States Attorney.
- Performed comprehensive review and subsequent revisions of all security policies for leading hospitality provider and then provided data security training to managers and executives on subjects covered in policies.

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PRACTICE AREAS:

Data Security & Privacy

Business Counseling

Artificial Intelligence, Robotics, and Autonomous Transportation Systems

STATE ADMISSIONS:

Pennsylvania

New York

New Jersey

EDUCATION:

J.D., Fordham University School of Law, 1992; Editor-in-Chief, Fordham Moot Court Board

B.A., Yale University, 1987; Casner Prize for Outstanding Achievement; Moriarty Prize; Kiphuth Scholar

- On behalf of a healthcare automation solutions provider, obtained dismissal of claims arising from the theft of an employee's laptop computer containing protected health information, on grounds that court lacked subject matter jurisdiction because plaintiff failed to adequately allege injury-in-fact.
- Conducted employee cyber training sessions in hospitality, education, healthcare, manufacturing, insurance, and financial sectors.
- Organized, ran, and oversaw tabletop mock data breach scenarios for multiple organizations including universities, energy companies, banks, insurance companies, and healthcare organizations.
- Developed cyber training for board of directors of community bank and manufacturing company.
- Conducted comprehensive review of security implications of agent agreements for provider of homeowner's insurance.
- Prepared and reviewed company security policies including Written Information Security Programs, document management, and incident response plans.
- Coordinated internal investigations of healthcare data breaches, subsequent patient notice, communication with the Department of Health & Human Services Office of Civil Rights ("OCR") and development of corrective steps. OCR closed the case taking no further action and noting the voluntary compliance efforts of the entity.
- Prepared and reviewed company policies including Written Information Security Programs, document management, social networking and incident response.
- Conducted internal investigation of processes and procedures of professional sports league, including analysis of discipline by league of teams, coaches and players, and of document management policy.
- Conducted an internal investigation of a large-scale data leak of personnel information at a Fortune 100 Corporation; interviewing relevant employees and preparing a report and recommendations for the Executive Board.
- Advised clients on proper security measures in connection with employee and customer personal information.

PROFESSIONAL AFFILIATIONS

- Pennsylvania Bar Association
- New York Bar Association
- American Bar Association National Institute on Cybersecurity, Co-Chair
- The Sedona Conference Working Group Series Leadership Council, Member
- The Sedona Conference Working Group 11 on Data Security and Privacy Liability
    - Leader of Model Data Breach Notification Law

Brainstorming Group
    - Former Steering Committee Member
- Carnegie Mellon University CISO-Executive Program, Faculty Member

COMMUNITY INVOLVEMENT

- Children's Museum of Pittsburgh, Board Member
- Chuck Cooper Foundation, Vice President and Board Member

AWARDS AND RECOGNITION

- Selected for inclusion in *The Best Lawyers in America* list for Privacy and Data Security Law (2017 – 2019) and Commercial Litigation (2015 – 2019)

NEWS AND INSIGHTS

MEDIA COVERAGE

- "Eckert Seamans Hires Buchanan Ingersoll Cybersecurity Vet," *Law360*, September 2018.
- "Lessons and Trends from FTC's 2017 Privacy and Data Security Update: Workshops and Guidance (Part Two of Two)," *The Cybersecurity Law Report*, February 2018.
- "Lessons and Trends from FTC's 2017 Privacy and Data Security Update: Enforcement Actions (Part One of Two)," *The Cybersecurity Law Report*, January 2018.

SPEAKING ENGAGEMENTS

- "News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers," co-presented at Eckert Seamans' Human Resources Forum, April 2019.
- "The Net without Neutrality: Economic, Regulatory, and Informational Access Impacts," co-presenter, University of Pittsburgh Law Review 80th Publishing Anniversary Symposium, March 2019.
- "Cybersecurity: An Analysis of the Legal Landscape and Best Practices," presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2018.
- "Interactive Breach Scenarios," presented at the NetDiligence Cyber Risk Summit, June 2018.
- "Practice Makes Perfect: A Proactive Approach to Cybersecurity in an Interconnected Hotel Industry" presented at the Hotel & Lodging Legal Summit at Georgetown University Law Center, October 2017.
- "Cybersecurity: There ARE Things Lawyers Can and Should Do," CLE presentation, October 2017.
- "You've Got Hacked: How to protect yourself against campaign data security dangers and liabilities," panel presentation at the American Association of Political Consultants' 2017 Annual Pollie Awards & Conference, March 2017.

HR FORUM
News You Can Use

Presented by:

John J. Myers, Esq., Taylor N. Brailey, Esq., and Matthew H. Meade, Esq.

ECKERT SEAMANS
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Scenario 1

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Scenario 1

- Your head of Human Resources receives an email that she believes is from the company President requesting PDF's of all employee W-2's for 2018. The head of HR sends the email but does not realize that email was a phishing attack. The W-2s were not encrypted and no separate communication was made to determine authenticity. Employees file a lawsuit alleging that the stolen data consisted of information their employer required employees to provide as a condition of their employment and that the company failed to take reasonable precautions to secure.
- Result?

3

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Scenario 2

4

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Scenario 2

- Plaintiff is a funeral director. He has cancer and was given a prescription for medical marijuana to mitigate pain under a state law permitting its prescription and use. He did not disclose this to his employer. He had an accident while driving a company vehicle and was informed he would need to take a drug test. While at the hospital being treated for injuries resulting from the accident, the physician refused to do a drug test and said that Plaintiff did not appear to be under the influence of drugs or alcohol. Employer insisted on a drug test which was, of course, positive for marijuana. Employer discharged Plaintiff. Plaintiff sued for disability discrimination, including failure to accommodate.
- Result?

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Scenario 3

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Scenario 3

- You are an attorney who has finally been able to settle a hotly contested sexual harassment lawsuit for a substantial payment. The alleged harasser was the CEO of your client and he has insisted that there be a strict confidentiality requirement in the settlement agreement.
- How should you advise your client?

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Scenario 4

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Scenario 4

- Carol lives and works in Indiana, Pennsylvania. She had been the administrative assistant for a senior female executive for ten years. Carol announced to her boss one day that she was getting married to her long-time friend, Jill. The boss was taken aback because she had no reason to believe that Carol was gay, and it made her uncomfortable to be alone with Carol in her office. She began to find fault with Carol's work and, a few months later, discharged her for poor performance.
- Carol comes to you to represent her. Take the case?

ECKERT SEAMANS ATTORNEYS AT LAW

Questions?

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Taylor N. Brailey, Esq.
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Matthew H. Meade, Esq.
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ECKERT SEAMANS ATTORNEYS AT LAW

NEWS YOU CAN USE ANSWERS

Presented By:
John J. Myers, Esq., Taylor N. Brailey, Esq., and Matthew H. Meade, Esq.

I. Scenario One

Your head of Human Resources receives an email that she believes is from the company President requesting PDF's of all employee W-2's for 2018. The head of HR sends the email but does not realize that email was a phishing attack. The W-2's were not encrypted and no separate communication was made to determine authenticity. Employees file a lawsuit alleging that the stolen data consisted of information their employer required employees to provide as a condition of their employment and that the company failed to take reasonable precautions to secure.

Result?

The result will depend on the whether the company had reasonable cybersecurity safeguards in place. What policies did the company have to address providing files with PII? For example, did they require sending PII via encryption with the password being provided out of band (*e.g.*, cellphone), did they have procedures in place to protect and secure employee PII that were ignored. Had they conducted any training on this subject?

In connection with a case involving hacking the Pennsylvania Supreme Court recently held that "an employer has a legal duty to exercise reasonable care to safeguard its employees' sensitive personal information stored by the employer on an internet-accessible computer system." At least 16 states have enacted laws that require "reasonable security" which include broad requirements to: "implement and maintain reasonable security procedures and practices appropriate to the nature of the information."

Two recent class actions highlight risks to businesses associated with W-2 incidents. One case involved an aviation company that fell victim to one of these scams and settled for $300,000. The class action complaint included claims for violation of North Carolina's Unfair and Deceptive Trade Practices Act, invasion of privacy, and negligence. A second case involved a respiratory therapy supplier that paid $875,000 to settle a data breach lawsuit involving a W-2 scam and highlighting the failure to safeguard employee PII and employee handbook references on confidentiality in connection with claims for negligence, breach of fiduciary duty, breach of implied contract, and violation of Florida Deceptive and Unfair Trade Practices Act.[1]

II. Scenario Two

Plaintiff is a funeral director. He has cancer and was given a prescription for medical marijuana to mitigate pain under a state law permitting its prescription and use. He did not disclose this to his employer. He had an accident while driving a company vehicle and was informed he would need to take a drug test. While at the hospital being treated for injuries resulting from the accident, the physician refused to do a drug test and said that Plaintiff did not appear to be under the influence of drugs or alcohol. Employer insisted on a drug test which was, of course, positive for marijuana. Employer discharged Plaintiff. Plaintiff sued for disability discrimination, including failure to accommodate.

[1] Additional information regarding this lawsuit can be found here: https://www.databreaches.net/respiratory-therapy-supplier-lincare-agrees-to-pay-875k-to-settle-data-breach-lawsuit/.

Result?

Under the facts as presented, the Employer would win. An employer cannot discriminate against an employee based on a something the employer does not know—here the employer was not informed that Plaintiff had a prescription for medical marijuana.

What if the employer was aware that Plaintiff had a prescription for, and was using, marijuana for medical reasons?

Under the Americans with Disabilities Act ("ADA"), current use of marijuana is not protected and under federal law use of marijuana is a crime. The employee would have not valid claim, unless somehow he could convince a jury that the real reason he was discharged was his cancer. That would be difficult, since the employer did not discharge the employee when he learned of his cancer—it was only after the employee had an accident and tested positive that the employer decided to discharge him. In fact, employers subject to the Drug Free Workplace Act or any of the Commerce Department drug and alcohol use and testing programs are required to report positive drug tests. The MMA expressly does not require any employer to violate federal law.

There is, however, a potential for liability against the employer in this scenario under state law, on either of two grounds.

First, The Pennsylvania Medical Marijuana Act ("MMA") prohibits employers from discharging, threatening, refusing to hire, or otherwise discriminating or retaliating against an employee "*solely* on the basis of such employee's status as an individual who is certified to use medical marijuana." 35 Pa. Stat. Ann. § 10231.2103(b)(1). In other words, taking adverse action against an employee based solely on the individual's status as a medical marijuana cardholder would likely be considered discrimination under the MMA. We have attached for your information a copy of the provisions of the MMA that directly affect employers.

The MMA does not require employers to allow the use of medical marijuana on the job or in the workplace. 35 Pa. Stat. Ann. § 10231.2103(b)(2). It also does not protect an employee who is working under the influence of medical marijuana "when the employee's conduct falls below the standard of care normally accepted for that position." *Id.* The law is silent as to whether an employer can rely solely upon a positive drug test as proof of being under the influence. The MMA seems to suggest otherwise, by conditioning discipline of an employee for working under the influence by requiring that "the employee's conduct falls below the standard of care normally accepted for that position." It may require expert testimony to show that an employee who tested positive was actually "under the influence." *See Whitmire v. Wal-Mart Stores, Inc.*, No. CV-17-018108-PCT-JAT, 2019 WL 479842 (D. Ariz. Feb. 7, 2019) (federal court interpreting Arizona MMA statute held that expert testimony was required to prove impairment).

In the hypothetical, there is an argument that the employee's behavior fell below the standard of care, since he had an accident in the car; and that he was under the influence because he had marijuana in his system. However, before drawing a conclusion, an employer should know how much marijuana was in the employee's system and whether the accident was the fault of the employee. Otherwise, it would be a risky termination.

The Funeral Director also might attempt to state a claim for disability discrimination under the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. § 951 *et seq.* It is unlikely that the plaintiff could show that his discharge was because of his cancer, for the reasons explained above in the ADA discussion. He

might argue, however, that the employer should have accommodated his disability by tolerating his off-premises use of marijuana, which allowed him to work by lessening the pain. Courts have been reluctant to provide protections to medical marijuana users beyond those explicitly provided in medical marijuana statutes. *See e.g., Garcia v. Tractor Supply Co.*, 154 F.Supp.3d 1225, 1229 (D.N.M. 2016) ("medical marijuana is not an accommodation that must be provided for by the employer"); *Ross v. Raging Wire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008) (California's statute prohibiting handicap discrimination "does not require employees to accommodate the use of illegal drugs"). There are, however, some recent cases that offer users some hope.

In *Wild v. Carriage Funeral Holdings, LLC*, No. A-3072-17T3, 2019 WL 1371206 (N.J. App. Div. Mar. 27, 2019), the court held that even though the New Jersey medical marijuana law had a provision stating that "[n]othing" in the law would "require … an employer to accommodate the medical use of marijuana in the workplace," N.J. Stat. Ann. 24:6I-14, the New Jersey law that prohibited disability discrimination, N.J. Stat. Ann. 10:5-12(a), required an accommodation for the use of medical marijuana even if the medical marijuana law did not. This case illustrates that courts are inclined to favor requiring employees to use medical marijuana outside of work as an accommodation for their disabilities.

In another case, a Massachusetts appellate court held that it was not unreasonable for an employer to allow the use of medical marijuana as an accommodation for a disability. *Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37, 46 (Mass. 2017). The Court held that the employer must engage in an interaction with the employee to see whether there was an alternative treatment that would not violate its policy. If not, then the employer had the burden to prove that the employee's use of marijuana off site to ease her pain posed an undue hardship for the employer. *Id.* at 47-48.

Employers in Pennsylvania may prohibit the use and possession of marijuana, including medical marijuana, at work. Employers may test employees before employment and randomly for drug use, as before, and test based on reasonable suspicion or after an accident. There is no change to the drug-testing laws. If an applicant or employee without a prescription card tests positive for marijuana, they may be discharged or disciplined. However, if an employee who tests positive discloses that he or she is prescribed marijuana, you will have to use caution in deciding the appropriate action. If the person is in a non-safety-sensitive job, it is not likely that you can terminate the employee. If the person is in a safety-sensitive job, then whether you can terminate the employee will depend upon whether the employee was "under the influence."

Our takeaway: Don't be the test case. Treat prescribed use of marijuana as you would any disability. If there is a safety concern, discuss another treatment alternative with the employee, and if there is one, discuss testing levels with the employee before implementing them. If the risk is sufficient, move the employee into non-safety sensitive job, if one is available, instead of terminating the employee. Address performance issues that are related to prescription marijuana the same as you would any other performance problems. You do not need to tolerate performance problems.

III. Scenario Three

You are an attorney who has finally been able to settle a hotly contested sexual harassment lawsuit for a substantial payment. The alleged harasser was the CEO of your client and he has insisted that there be a strict confidentiality requirement in the settlement agreement.

How should you advise your client?

By way of background, few lawsuits are as dreaded by employers as sexual harassment lawsuits because they impugn publically the morality of one or more of the employers' employees and also assail the responsiveness of the employer to such claims. When senior management is directly implicated in the alleged harassment, the lawsuit is especially embarrassing. Without question, the Company will want a settlement of such a suit to be kept confidential and will want to prevent the employee from repeating the allegations of sexual harassment that were made in the case. This is accomplished by including a confidentiality and non-disclosure clause in the settlement along with a non-disparagement provision.

Confidentiality clauses are commonly included in settlement agreements of all types of cases, and such clauses have traditionally been enforced by the courts. *Car Pool LLC v. Hoke*, Civ. A. No. 3:12cv511-JAG, 2012 WL 4854652 (E.D. Va. Oct. 11, 2012) (Complaint stated valid claim for rescission of settlement agreement for breach of confidentiality clause, in that it was alleged that Defendant would not have entered into settlement but for the clause).

Unless the employer can show that it was damaged by the breach of such a provision, however, it cannot sustain a claim for the breach. *Heckler & Koch, Inc. v. German Sport Guns GmbH*, 71 F. Supp. 3d 866 (S.D. Ind. Dec. 24, 2014) (Absent allegation of damages, one cannot maintain an action for breach of a confidentiality clause in a settlement agreement).

Normally, the Settlement Agreement will expressly state that confidentiality is a material term of the agreement, such that a breach of the term will entitle the employer to rescind the Agreement and recover its payments back. *See Car Pool LLC v. Hoke, supra.* Typically, if the agreement is rescinded, the lawsuit will be reinstated. However, there was a report of a case in Pennsylvania where the employee settled her case, including agreeing to confidentiality of the settlement, but promptly posted the settlement amount on her Facebook page. The Court not only ruled that the employer did not have to pay the settlement money, but also ruled that the release remained enforceable.

The #metoo movement has caused changes in our culture and in the way claims of sexual assault and harassment are viewed by the public. Some of the more public cases (Bill Cosby, Dr. Nassar, Harvey Weinstein, for example) involved victims who accepted money to keep their experiences confidential, which was said to have enabled the predators to continue to victimize women.

The fallout includes legislation to penalize or make unenforceable any provisions of settlement agreements of sexual harassment claims that prohibit disclosure of the settlement or the substance of the actions underlying the claims.

The 2017 Tax Cuts and Jobs Act, 26 U.S.C. § 162(q), was one of the first such laws. It states that

> "No deduction shall be allowed … for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment."

With this background, we can now return to the scenario. Should the employer sign the agreement?

Note that the nondisclosure agreements remain fully enforceable under the tax code provision. It sets up a straightforward financial decision for the employer who is considering a settlement. Is confidentiality worth the cost of the loss of the deductions?

- Thus, if the payment is $50,000 and the employer has incurred fees to that point of $30,000, the nondisclosure clause will increase the settlement cost by about $16,500, assuming the employer pays at the 21% corporate income tax rate.
- Where the CEO is accused, as in our scenario, it is likely that this cost will not overcome the desire to keep the matter confidential.

Issues that have not been resolved by IRS Regulations or case law include:

- What is a "payment related to sexual harassment or sexual abuse"? Is a claim of retaliation for reporting sexual harassment covered?
- Where there are multiple claims in a lawsuit, only one of which is for sexual harassment, can the payment be allocated among the claims so that only part of the payment is subject to the sanction? Most likely. The IRS now allows reasonable allocations of payments between back pay, which is subject to withholding and payroll taxes, and compensatory or punitive damages, which are not so subject.
- Does the penalty impact the plaintiff who signs a confidentiality clause? A plaintiff who is paid, for example, $50,000 and whose attorney takes $20,000 must report income of $50,000, but has an above-the-line deduction for attorney's fees. Read literally, this statute would prohibit her deduction. However, the Congressional Joint Committee on Taxation has reported that this was not intended and that a technical corrections bill may be needed to avoid this consequence.

If you are a Pennsylvania employer, your job is at an end when you decide the cost/benefit issue of whether confidentiality is worth the cost of the loss of deductions.

However, there is a fly in the ointment for employers in some other states, in that legislation has been enacted or is pending that makes confidentiality clauses in sexual harassment settlements unenforceable against the employees.[2]

New Jersey is the most recent state to enact such a law. In the New Jersey version, settlements of all types of discrimination cases are subject to the sanction of unenforceability of non-disclosure provisions.[3]

In summary, so long as the #metoo movement has vitality, there will be a likelihood of legislation aimed at prevent nondisclosure agreements in sexual harassment or sexual abuse cases. While the point of this presentation is to inform and not to comment on the wisdom of these laws, I do want to note that in my experience, confidentiality clauses are often something that the plaintiff insists on. Plaintiffs do not want

[2] California, Washington and New Jersey have passed this legislation. Other states that has recently enacted laws that in various terms affect sexual harassment settlements are Arizona, Maryland, New York, Tennessee and Vermont. At last count, bills are pending in at least 15 other states, including Pennsylvania, that would also restrict enforcement of non-disclosure provisions in sexual harassment settlements. Several versions of Bills are pending in Congress as well.

[3] The New Jersey law is broader than the tax provision: "A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a "non-disclosure provision") shall be deemed against public policy and unenforceable against a current or former employee who is a party to the contract or settlement." It clearly would apply to non-disparagement provisions as well.

to be publically portrayed as litigious and the facts of the sexual harassment claims are often embarrassing for the victims.

IV. Scenario Four

Carol lives and works in Indiana, Pennsylvania. She had been the administrative assistant for a senior female executive for ten years. Carol announced to her boss one day that she was getting married to her long-time friend, Jill. The boss was taken aback because she had no reason to believe that Carol was gay, and it made her uncomfortable to be alone with Carol in her office. She began to find fault with Carol's work and, a few months later, discharged her for poor performance.

Carol comes to you to represent her. Take the case? The result of this scenario is a dice roll.

Some Pennsylvania municipalities, such as Pittsburgh and Philadelphia, have ordinances that prohibit discrimination based on sexual orientation. *See* Section 659.02(a) of the Pittsburgh City Code and Section 9-1103(1) of the Philadelphia Fair Practices Ordinance ("FPO"). But Carol does not live in any of them, so she must rely on state or federal employment discrimination laws.

Currently, the Third Circuit holds that Title VII does not protect against discrimination based on sexual orientation unless the plaintiff alleges that his or her harassers were motivated by sexual desire, or that the he or she failed to comply with societal stereotypes of how men or women, respectively, ought to appear or behave, such that the discrimination fits into the definition of the prohibition on discrimination "because of … sex." *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001).

The Pennsylvania Courts have never explicitly addressed the issue, but have repeatedly noted that the PHRA does not prohibit sexual orientation discrimination. *Southeastern Pennsylvania Transportation Authority v. City of Philadelphia*, 159 A.3d 443, 444 n.3 (Pa. 2017) and *id.* at 459 (Wecht, J. concurring) ("The deliberation behind the General Assembly's conspicuous omission of protections for those discriminated against based upon gender identity and sexual orientation is thrown into stark and glaring relief when viewed in a national context. Numerous other states have enacted legislation that, in relevant part, differs from our own PHRA only in the particular that, like Philadelphia's FPO and markedly unlike Pennsylvania's PHRA, these states prohibit discrimination on the basis of gender identity and sexual orientation."); *Teal v. Board of Comm'rs of Haverford Tp.*, No. 556 CD 2013, 2014 WL 1422888, at *1 n.2 (Pa. Commw. Apr. 11, 2014) ("The PHRA does not grant equal opportunity protections based upon a person's actual or perceived sexual orientation, gender identity or gender expression.").

However, there are signs of change at both the state and federal level that might warrant taking Carol's case.

In August 2018, the Pennsylvania Human Relations Commission ("PHRC") released a "Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act," which indicates the PHRC's support for expanding the definition of "sex" for purposes of sex discrimination claims under the PHRA. The Guidance further explains the PHRC's willingness to accept for filing sex discrimination complaints that arise out of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression, using all legal theories available depending on the facts of a particular case. Although it is not clear whether this will change the stance of state courts interpreting the PHRA, it at least represents a step in that direction.

At the federal level, one aggressive judge on the U.S. District Court for the Western District of Pennsylvania ruled that Title VII's "because of sex" provision prohibits discrimination on the basis of sexual orientation,

agreeing with the position of the EEOC. *U.S. Equal Employment Opportunity Commission v. Scott Medical Health Center, P.C.*, 217 F. Supp. 3d 834, 839 (W.D. Pa. 2016). Moreover, the more recent trend is for other federal appellate courts to similarly extend the protections in this manner. *See, e.g., Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018) (en banc) (holding that a claim of sexual orientation discrimination was cognizable under Title VII as a subset of discrimination "because of … sex"); *Hively v. Ivy Tech. College of Ind.*, 853 F.3d 339 (7th Cir. 2017) (holding that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for purposes of Title VII).

The Third Circuit Court of Appeals will have an opportunity to revisit the issue in an appeal filed by a plaintiff whose sexual orientation discrimination claims were reluctantly dismissed pursuant to the *Bibby* decision discussed above, in an opinion in which the court simultaneously expressed its disagreement with the *Bibby* decision as outdated and incorrect. *See Guess v. Philadelphia Housing Authority*, 354 F. Supp. 3d 596 (E.D. Pa. 2019), *appeal filed, John Doe v. Philadelphia Housing Authority*, No. 19-8006 (3d Cir. Mar. 15, 2019). Moreover, the Supreme Court will have an opportunity to resolve this issue if it grants certiorari in *Altitude Express, Inc. v. Zarda*, No. 17-1623 (May 29, 2018), Petition for Certiorari pending.

Until then, employers should operate under the assumption that sexual orientation is protected, and should not discriminate against individuals on the basis of their sexual orientation—again, you do not want to be the test case.

NEWS YOU CAN USE ANSWERS
Attachment to Scenario 2

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Relevant Provisions of the Pennsylvania Medical Marijuana Act

35 Pa. Stat. Ann. § 10231.510(3): A patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

35 Pa. Stat. Ann. § 10231.510(4): A patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of marijuana. The prohibition shall not be an adverse employment decision even if the prohibition results in financial harm for the patient.

35 Pa. Stat. Ann. § 10231.2103(b): Employment –

(1) No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.

(2) Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way 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 that position.

(3) Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law.