2016 Labor and Employment Seminar

Sponsored by the ISBA's
Labor and Employment Section

Friday, October 14, 2016
Hilton Garden Inn
Johnston, Iowa

Caveat

The printed materials contained in this book and the oral presentations of the speakers are not intended to be a definitive analysis of the subjects discussed. The reader is cautioned that neither the program participants nor The Iowa State Bar Association intends that reliance be placed upon these materials in advising your clients without confirming independent research.


CLE CREDIT: 7.0 State CLE hours which includes 1 hour of Ethics CLE and 6.5 hours of Federal CLE

ACTIVITY ID # 240575

2016 Labor and Employment Seminar

Schedule

8:00 – 8:25	**Coffee and Registration**
8:25 – 8:30	**Welcome and Announcements**
8:30 – 9:00	**Identity Theft and the Employment Relationship** Speaker: Jo Ellen Whitney, Davis Brown Law Firm
9:00 – 9:30	**Know Your Revised Agency Rules, Part 1: Pay Data Reporting Requirements** Speaker: Kelsey Knowles, Belin McCormick
9:30 – 10:15	**How to Get the Deal Done: Tips and Wisdom from Employment Law Mediators** Speakers: David Goldman, Babich Goldman, P.C.; Elizabeth Kennedy, Ahlers & Cooney, P.C. and Michael Mullin, Kutak Rock, L.L.P.
10:15 - 10:30	**Break**
10:30 – 11:30	**The Federal Defend Trade Secrets Act of 2016 and Implications for Non-Compete and Confidentiality Agreements** Speakers: Thomas Foley, Whitfield & Eddy, P.L.C. and Randall Armentrout, Nyemaster Goode, P.C. and Frank Harty, Nyemaster Goode, P.C.
11:30 - 12:00	**Case Law Update** Speaker: Richard Autry, Employment Appeal Board
12:00 – 1:00	Lunch (provided with registration)
1:00 – 2:00	**Litigating Employment Claims in Federal Court** Speakers: Hon. Leonard T. Strand, United States District Judge for the Northern District of Iowa; Hon. Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa; Hon. Helen C. Adams, United States Magistrate Judge for the Southern District of Iowa and Hon. CJ Williams, United States Magistrate Judge for the Northern District of Iowa
2:00 - 3:00	**Using Social Media Ethically and Effectively** Speaker: Timothy Semelroth, RSH Legal
3:00 – 3:30	**Know Your Revised Agency Rules, Part 2: FLSA Developments** Speaker: Kendra Hanson, Fredrikson & Byron, P.A.
3:30 – 3:45	**Break**
3:45 – 4:15	**What You Didn't Learn in Law School: How to Effectively Manage a Law Practice** Speakers: Thomas Duff, Duff Law Firm, P.L.C.; Deborah Tharnish, Davis Brown Law Firm and Mark Zaiger, Shuttleworth & Ingersoll
4:15 – 5:00	**Effective Use of Demonstrative Evidence in Employment Law Trials** Speakers: Mark Sherinian, Sherinian & Hasso Law Firm and Kevin Visser, Simmons Perrine Moyer Bergman P.L.C.

IOWA STATE BAR ASSOCIATION

Friday, October 14, 2016

Identity Theft and the Employment Relationship

8:30 a.m. - 9:00 a.m.

Presented by

Jo Ellen Whitney
Davis Brown Law Firm
215 10th St, Suite 1300
Des Moines, IA 50309
Phone: 515-288-2500

Friday, October 14, 2016

When Things Go Wrong: Anticipating & Responding to Employee Identity Issues

Jo Ellen Whitney

JoEllenWhitney@davisbrownlaw.com

Davis Brown Law Firm

DAVIS BROWN LAW FIRM

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DAVIS BROWN
LAW FIRM

Jo Ellen Whitney

Jo Ellen is a senior shareholder at the Davis Brown Law Firm.

Ms. Whitney's areas of practice include:

- Employment & Labor Relations
- Health Law
- Privacy & Security (HIPAA)

The Davis Brown Law Firm

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DAVIS BROWN LAW FIRM

Types of ID Theft

- Employee isn't who he/she claimed
- Someone else pirated your employee's ID

DAVIS BROWN LAW FIRM

Personal Information Security Breach Protection Iowa Code 715C

- 715C.1 (1) Breach is any acquisition not done in good faith
- 715C.1 (2) Consumer is any resident of the state
- 715C.2 Requires notice of breach
  - Letter
  - Electronic if standard
  - Public notice including statewide media

DAVIS BROWN LAW FIRM

Mismatch Crops Up Again

2008 No Match Issues = Not legally Authorized. Employer liability due to "constructive knowledge."

DAVIS BROWN LAW FIRM

No Match

- Aramark Facility Services vs. Services Employees Int. Local Union 1877
  - 3300 employees given 3 days to resolve a no match

DAVIS BROWN LAW FIRM

DOJ Revises "No Match"

- DOJ determines "no match" is not constructive knowledge
  - Mistake
  - Skipping debt, including child support
  - Prior criminal record, debarrment
  - Not legally authorized

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Skip Ahead to 2016 & the ACA

- IRS Form 1095-C which includes SS# match-Employer has 45 days to respond to the IRS if no match occurs must show
  - Error corrected
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Immigration and Nationality Act

- August 2016 proposed regulation changes
- Broader definition of interference
- DOJ Special Counsel

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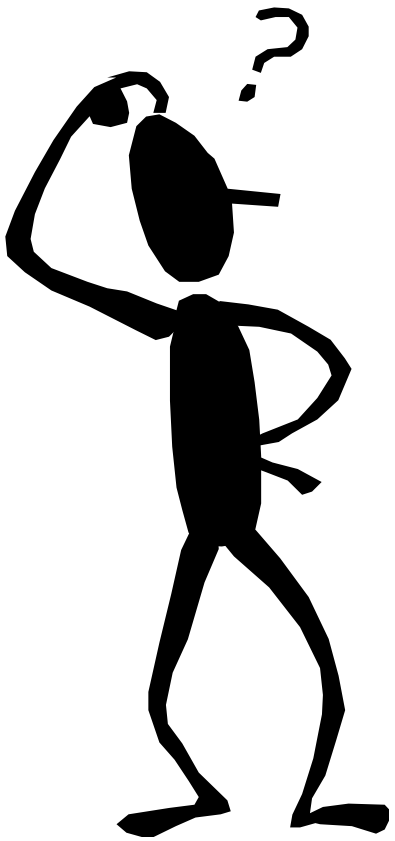
BETTY ISN'T REALLY BETTY!

- WHAT DO I DO?



DAVIS BROWN LAW FIRM

The Employer Has a Multi-Step Process

- Reasonable investigation / don't assume
- Conversation with employee
- Evaluate your process (I-9, interview, etc.)

DAVIS BROWN LAW FIRM

Are There Tax Issues?

- Submit IRS forms W-2c and W-3c to correct any wages reported in error to someone else's Social Security number.
- File amended employment tax returns such as the 941-X.
- Alert accounting department to ensure proper claims are filed.
- Advise employee that tax consequences may arise if he did not pay appropriate taxes and that the employee should seek professional advice on filing amended returns. Document this.

DAVIS BROWN LAW FIRM

SHOULD I CALL IMMIGRATION?

- Employers have no duty to report unauthorized workers (or suspected unauthorized workers to either USCIS or ICE).
- Any individual may choose to contact the government regarding a potential law violation.

DAVIS BROWN LAW FIRM

GENERAL REPORTING ISSUES

- Legal reporting (police, sheriff, DEA).
- Tax evasion or identity theft may be a criminal issue, but reporting is not always required.
- Internal reporting to administer policies.
- Medical identity theft-patient & provider reporting.

DAVIS BROWN LAW FIRM

WHAT IF I DISCOVER A FALSE ID AFTER I FIRED THE EMPLOYEE?

- Little an employer can do except file Forms W-2c and W-3C to correct the wages reported in error to Social Security.
- Letter to last known address (Certified/Regular)

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THE ID IS FAKE – DO I OWE THEM?

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2. Workers without employment authorization brought action against employer for overtime wages and minimum wage violations under the Fair Labor Standards Act ("FLSA"). The court held FLSA applies to unauthorized workers, reasoning that if the FLSA did not apply, employers would have incentive to hire such workers and pay them lower than minimum wage.

DAVIS BROWN LAW FIRM

WHAT IF THEY GOT HURT?

Yes, *Staff Management v. Jimenez*, 839 N.W.2d 640 (Iowa 2013).

- An undocumented worker is entitled to healing period benefits under the Iowa Workers' Compensation Act ("IWCA"). The court reasoned 1) undocumented workers meet the definition of employees under the IWCA, 2) a contract between an employer and an undocumented worker is not void as construing an employment agreement between an undocumented worker and an employer as void would encourage employers to hire undocumented workers, and 3) federal law does not preempt healing period benefits.

DAVIS BROWN LAW FIRM

WHAT IF THEY, LIKE DAVID COPPERFIELD, DISAPPEARED?

Because classified as an "employee" must hold on to final payroll and benefits for same amount of time as a documented employee.

- If unspecified by policy, depends on state law. For Iowa, unpaid wages, including wages represented by payroll checks or other compensation that remain unclaimed by the owner for more than one year after becoming payable are presumed abandoned. Iowa Code § 556.9(1).
- In Iowa, when property becomes abandoned, must report to the state treasurer. Iowa Code § 556.11.

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Thank you

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When Things Go Wrong: Anticipating & Responding to Employee Identity Issues

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Thank you

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JoEllenWhitney@davisbrownlaw.com
Davis Brown Law Firm

Know Your Revised Agency Rules, Part 1: Pay Data Reporting Requirements

9:00 a.m. - 9:30 a.m.

Presented by

Kelsey Knowles
Belin McCormick PC
666 Walnut St
Suite 2000
Des Moines, IA 50309
Phone: 515-283-7100

Friday, October 14, 2016

Know Your Revised Agency Rules, part 1: Pay Data Reporting Requirements

KELSEY J. KNOWLES

BELIN MCCORMICK, P.C.

Overview

- Where We have Been: EEO-1 Report
- July 14, 2016 Proposed Rule Change
  - Why?
  - Who is affected?
  - What data would be collected?
  - How does the EEOC plan to use the information?

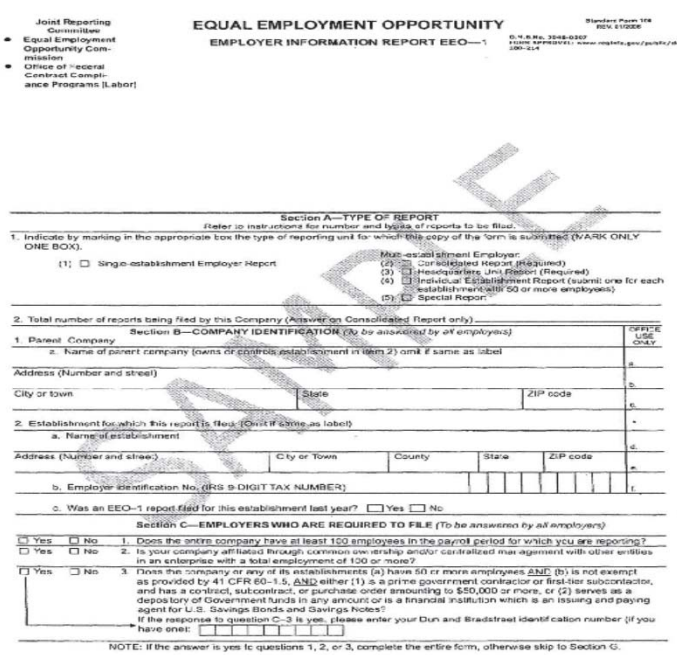
Where We have Been: the EEO-1

- What is it?
- How is it Used?
- Who Files?
- What is Reported?

Where We Have Been: The EEO-1

- Compliance survey mandated by Title VII, Civil Rights Act of 1967, as amended by the Equal Employment Opportunity Act of 1972 and their associated regulations.
  - Section 709(c) requires employers to make and keep records relevant to whether unlawful employment practices have been or are being committed, to preserve such records and to produce them as the Commission requires.
  - The EEO-1 report is prescribed at 29 CFR 1602.
- Filed on or before September 30th each year.
- Failure to file can result in an order to compel.
- False statements on the EEO-1 are punishable by fine or imprisonment.

Where We Have Been: EEO-1



Joint Reporting Committee
- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance Programs (Labor)

EQUAL EMPLOYMENT OPPORTUNITY

EMPLOYER INFORMATION REPORT EEO—1

Standard Form 100 (EEO-1)
REV. 01/2006

O.M.B. No. 3046-0007
EXPIRATION APPROVED: www.regfed.gov/public/do/PRAMain
100-214

Section A—TYPE OF REPORT
Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report (Required)
(3) ☐ Headquarters Unit Report (Required)
(4) ☐ Individual Establishment Report (submit one for each establishment with 50 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

1. Parent Company — OFFICE USE ONLY

a. Name of parent company (owns or controls establishment in item 2) omit if same as label — a.

Address (Number and street) — b.

City or town | State | ZIP code — c.

2. Establishment for which this report is filed. (Omit if same as label) — d.

a. Name of establishment

Address (Number and street) | City or Town | County | State | ZIP code — e.

b. Employer identification No. (IRS 9-DIGIT TAX NUMBER) — f.

c. Was an EEO–1 report filed for this establishment last year? ☐ Yes ☐ No

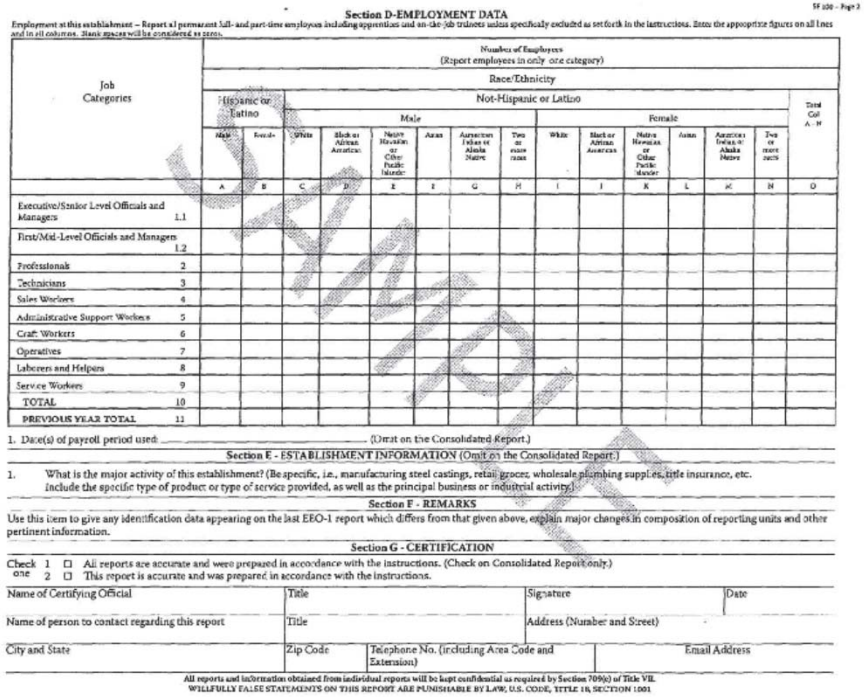
Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☐ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☐ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

☐ Yes ☐ No 3. Does the company or any of its establishments (a) have 50 or more employees AND (b) is not exempt as provided by 41 CFR 60–1.5, AND either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?
If the response to question C–3 is yes, please enter your Dun and Bradstreet identification number (if you have one): ☐☐☐☐☐☐☐☐☐

NOTE: If the answer is yes to questions 1, 2, or 3, complete the entire form, otherwise skip to Section G.



SF 100 – Page 2

Section D-EMPLOYMENT DATA

Employment at this establishment – Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories		Number of Employees (Report employees in only one category)													
		Race/Ethnicity													
		Hispanic or Latino		Not-Hispanic or Latino											
		Male		Male					Female						
		Male	Female	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	Total Col A - M
		A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Executive/Senior Level Officials and Managers	1.1															
First/Mid-Level Officials and Managers	1.2															
Professionals	2															
Technicians	3															
Sales Workers	4															
Administrative Support Workers	5															
Craft Workers	6															
Operatives	7															
Laborers and Helpers	8															
Service Workers	9															
TOTAL	10															
PREVIOUS YEAR TOTAL	11															

1. Date(s) of payroll period used: _____ (Omit on the Consolidated Report.)

Section E - ESTABLISHMENT INFORMATION (Omit on the Consolidated Report.)

1. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.)

Section F - REMARKS

Use this item to give any identification data appearing on the last EEO-1 report which differs from that given above, explain major changes in composition of reporting units and other pertinent information.

Section G - CERTIFICATION

Check one
1 ☐ All reports are accurate and were prepared in accordance with the instructions. (Check on Consolidated Report only.)
2 ☐ This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official	Title	Signature	Date
Name of person to contact regarding this report	Title	Address (Number and Street)	
City and State	Zip Code	Telephone No. (including Area Code and Extension)	Email Address

All reports and information obtained from individual reports will be kept confidential as required by Section 709(e) of Title VII.
WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE, TITLE 18, SECTION 1001

Where We Have Been: EEO-1

- Used by the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP).
- Collect data from private employers and government contractors about women and minorities in the workforce.
- EEOC analyzes employment patterns such as representation of women and minorities within companies, industries or regions.
- Used to support civil rights enforcement.

Where We Have Been: EEO-1

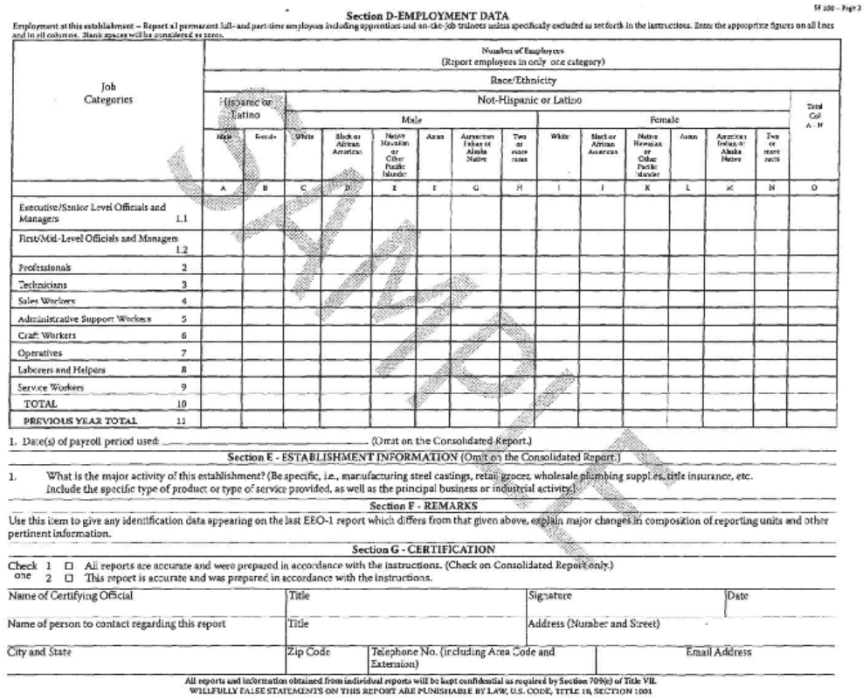
- Three types of employers required to report:
  1. Employers subject to Title VII with **100 or more employees**.
  2. Employers subject to Title VII with fewer than 100 employees if the company is owned by or corporately affiliated with another company and the **entire enterprise employs a total of 100 or more employees**.
  3. Federal government prime contractors or first-tier subcontractors subject to Executive 11246, as amended, with **50 or more employees and a prime contract or first-tier subcontract amounting to $50,000 or more.**

Where We Have Been: EEO-1

- A single-establishment company is only required to submit one EEO-1 report, a "Type 1" report.
- Multi-establishment companies must submit multiple reports:
  - Type 2 – Consolidated report – includes all company employees.
  - Type 3 – Headquarters report - includes all employees working at the main office, including those that work from home and report to the main office. This report is required even if fewer than 50 employees report to the headquarters office.
  - Type 4 – Establishment report – a separate report for each physical establishment with 50 or more employees.
  - For sites with fewer than 50 employees, either:
    - Type 8 – Establishment report like Type 4, OR
    - Type 6 – Establishment List (note with this report you must then physically enter date for the Type 2 report).

Where We Have Been: EEO-1

- Reports information about race/ethnicity, gender and job category
- 10 job categories
- 7 race/ethnicity categories
  - Hispanic or Latino
  - White
  - Black or African American
  - Native Hawaiian or other Pacific Islander
  - Asian
  - American Indian or Alaskan Native
  - Two or more races



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July 14, 2016 Proposed Rule

- What and Why?
- Who is affected?
- What data would be collected?
- How does the EEOC plan to use the information?

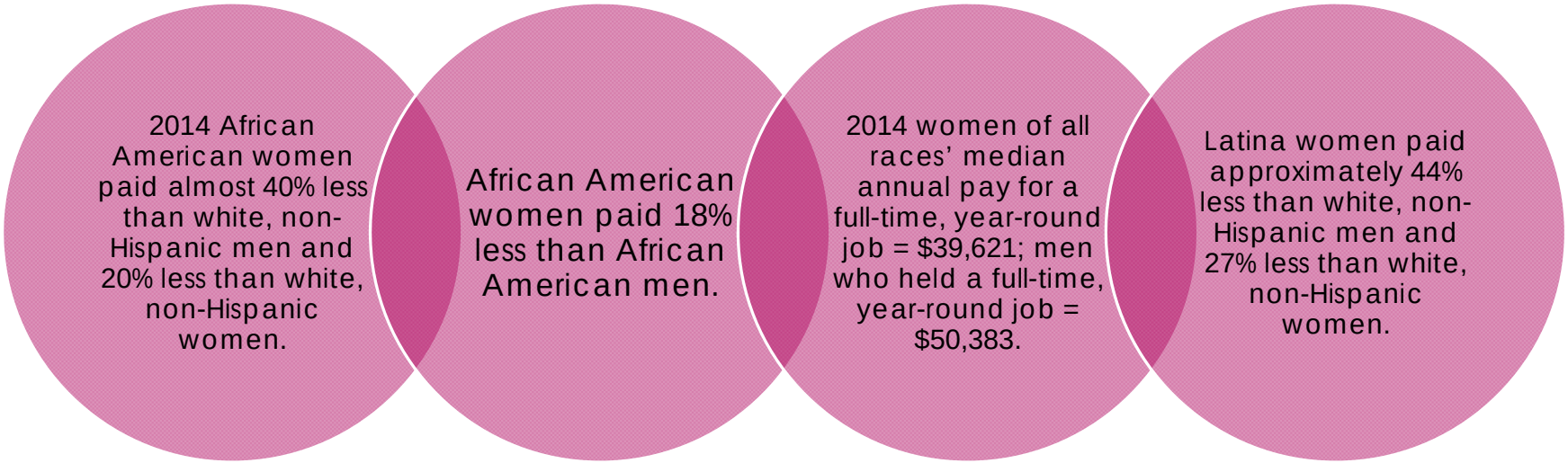
July 14, 2016 Proposed Rule: What?

- On July 14, 2016, the EEOC issued an updated proposed rule to collect pay data by race, ethnicity and sex from employers that already file the EEO-1 Report.
  - Followed an initial proposal published February 1, 2016, and public hearing March 16, 2016.
- New rule will encompass more than 63 million workers.
- Will add W-2 pay data and hours worked to the existing reporting requirements and change reporting date to March 31st to allow employers to collect year end (W-2) information.

July 14, 2016 Proposed Rule: Why?

- EEOC's increased focus on pay disparity following President's Equal Pay Task Force in 2010.
- EEOC has recovered more than $85 million for claims based on pay discrimination based on sex.
- EEOC continues to determine a significant pay disparity exists linked to sex, race and ethnicity.
  - "Even when controlling for other factors, workplace discrimination is an important contributing factor to these pay gaps."

July 14, 2016 Proposed Rule: Why?



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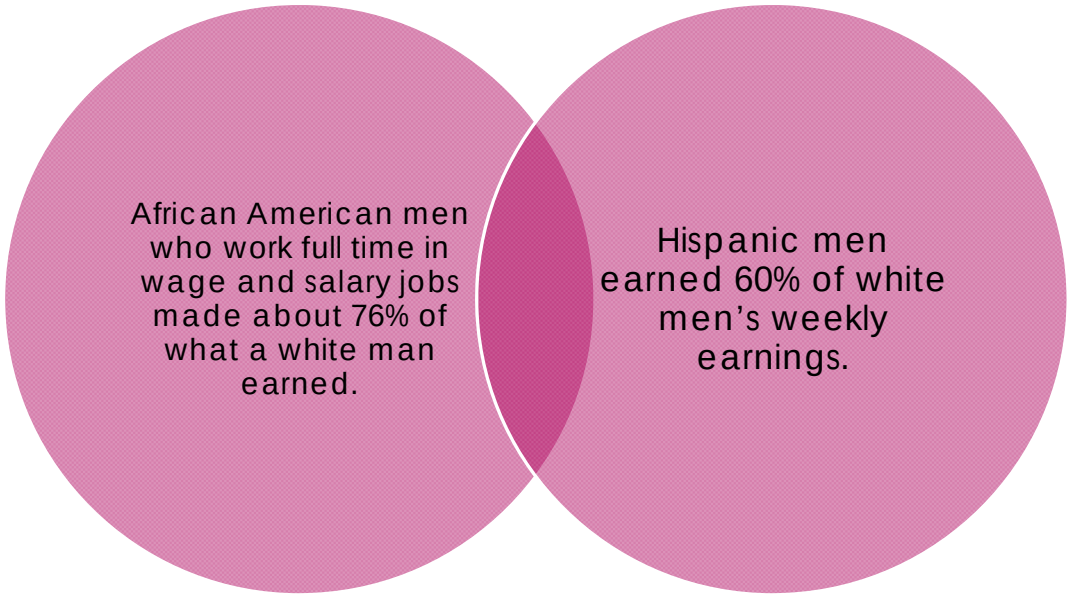

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  - Inform and strengthen EEOC's and OFCCP's enforcement efforts. Continued use of EEO-1 to identify trends, inform investigations and focus resources.
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    "It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this chapter involving such information." 42 U.S.C. § 2000e-8(e).

  - Court rejected EEOC's argument that information could only be released if the EEOC sues *that* employer.
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  - Using W-2 data, employers would tally the number of employees in 12 pay bands for each EEO-1 job category.
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- Example: an employer may report that it has 12 employees in pay band 3 for Professionals, and that four are white men, four are Asian men and four are white women.

"EEOC does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter. ... The data will be useful for identifying patterns or correlations that can inform the early stages of the investigative process...."

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- Hours Worked Reporting
  - Attempting to account for full- and part-time workers.
  - Uses FLSA definition of hours worked and exempt/non-exempt definitions.
  - For non-exempt workers, employers would report the hours worked as recorded for FLSA purposes.
  - For exempt workers, employers can either:
    - Report 40 hours for full-time and 20 hours for part-time multiplied by number of weeks employed that year, OR
    - Report actual hours worked with data they already keep (if kept).

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  - Economically burdensome on employers to report wage data. Resolution: adjust reporting procedure and allow employers to use W-2 data.
    - EEOC rejected calls to increase the minimum employer size to 200 or 300.
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  - The 2016 report would be due September 30, 2016, as usual.
  - No report due in 2017.
  - Gives employers 18 months to transition to new system.

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Know Your Revised Agency Rules, part 1: Pay Data Reporting Requirements

KELSEY J. KNOWLES
BELIN MCCORMICK, P.C.

Overview

- Where We have Been: EEO-1 Report
- July 14, 2016 Proposed Rule Change
  - Why?
  - Who is affected?
  - What data would be collected?
  - How does the EEOC plan to use the information?

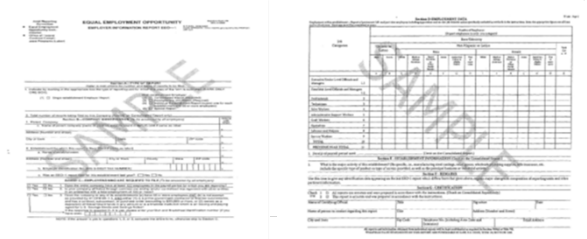
Where We have Been: the EEO-1

- What is it?
- How is it Used?
- Who Files?
- What is Reported?

Where We Have Been: The EEO-1

- Compliance survey mandated by Title VII, Civil Rights Act of 1967, as amended by the Equal Employment Opportunity Act of 1972 and their associated regulations.
  - Section 709(c) requires employers to make and keep records relevant to whether unlawful employment practices have been or are being committed, to preserve such records and to produce them as the Commission requires.
  - The EEO-1 report is prescribed at 29 CFR 1602.
- Filed on or before September 30th each year.
- Failure to file can result in an order to compel.
- False statements on the EEO-1 are punishable by fine or imprisonment.

Where We Have Been: EEO-1



Where We Have Been: EEO-1

- Used by the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP).
- Collect data from private employers and government contractors about women and minorities in the workforce.
- EEOC analyzes employment patterns such as representation of women and minorities within companies, industries or regions.
- Used to support civil rights enforcement.

Where We Have Been: EEO-1

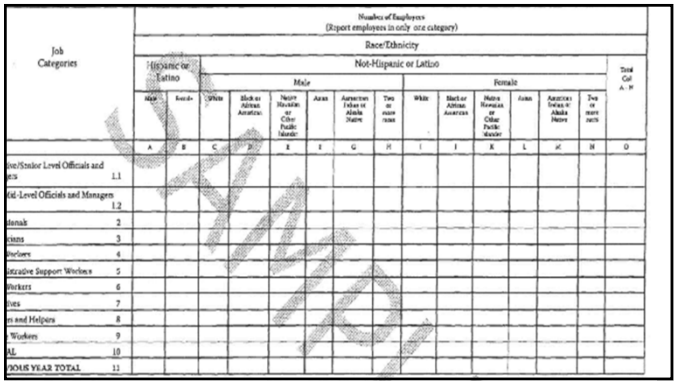
- Three types of employers required to report:
  1. Employers subject to Title VII with **100 or more employees**.
  2. Employers subject to Title VII with fewer than 100 employees if the company is owned by or corporately affiliated with another company and the **entire enterprise employs a total of 100 or more employees**.
  3. Federal government prime contractors or first-tier subcontractors subject to Executive 11246, as amended, with **50 or more employees and a prime contract or first-tier subcontract amounting to $50,000 or more.**

Where We Have Been: EEO-1

- A single-establishment company is only required to submit one EEO-1 report, a "Type 1" report.
- Multi-establishment companies must submit multiple reports:
  - Type 2 – Consolidated report – includes all company employees.
  - Type 3 – Headquarters report - includes all employees working at the main office, including those that work from home and report to the main office. This report is required even if fewer than 50 employees report to the headquarters office.
  - Type 4 – Establishment report – a separate report for each physical establishment with 50 or more employees.
  - For sites with fewer than 50 employees, either:
    - Type 8 – Establishment report like Type 4, OR
    - Type 6 – Establishment List (note with this report you must then physically enter date for the Type 2 report).

Where We Have Been: EEO-1

- Reports information about race/ethnicity, gender and job category
- 10 job categories
- 7 race/ethnicity categories
  - Hispanic or Latino
  - White
  - Black or African American
  - Native Hawaiian or other Pacific Islander
  - Asian
  - American Indian or Alaskan Native
  - Two or more races



Job Categories	Numbers of Employees (Report employees in only one category)														
	Race/Ethnicity														
	Hispanic or Latino		Not-Hispanic or Latino												
	Male		Male					Female							Total Col A - N
	Male	Female	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Exe/Senior Level Officials and Mgrs 1.1															
Mid-Level Officials and Managers 1.2															
Professionals 2															
Technicians 3															
Sales Workers 4															
Administrative Support Workers 5															
Craft Workers 6															
Operatives 7															
Laborers and Helpers 8															
Service Workers 9															
TOTAL 10															
PREVIOUS YEAR TOTAL 11															

July 14, 2016 Proposed Rule

- What and Why?
- Who is affected?
- What data would be collected?
- How does the EEOC plan to use the information?

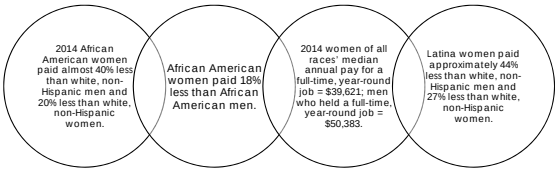
July 14, 2016 Proposed Rule: What?

- On July 14, 2016, the EEOC issued an updated proposed rule to collect pay data by race, ethnicity and sex from employers that already file the EEO-1 Report.
  - Followed an initial proposal published February 1, 2016, and public hearing March 16, 2016.
- New rule will encompass more than 63 million workers.
- Will add W-2 pay data and hours worked to the existing reporting requirements and change reporting date to March 31st to allow employers to collect year end (W-2) information.

July 14, 2016 Proposed Rule: Why?

- EEOC's increased focus on pay disparity following President's Equal Pay Task Force in 2010.
- EEOC has recovered more than $85 million for claims based on pay discrimination based on sex.
- EEOC continues to determine a significant pay disparity exists linked to sex, race and ethnicity.
  - "Even when controlling for other factors, workplace discrimination is an important contributing factor to these pay gaps."

July 14, 2016 Proposed Rule: Why?



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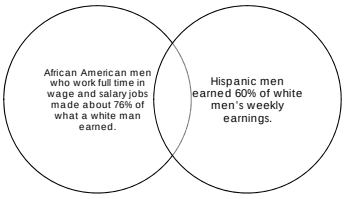

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How to Get the Deal Done: Tips and Wisdom from Employment Law Mediators

9:30 a.m. - 10:15 a.m.

Presented by

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Elizabeth Kennedy
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Friday, October 14, 2016

How to Get the Deal Done:

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Elizabeth Gregg Kennedy

After more than four decades representing a number of Iowa's esteemed private and public sector employers, Elizabeth Gregg Kennedy now focuses exclusively on mediating significant employment law cases pending in federal, state and appellate courts, and before administrative agencies. She is a frequent speaker on the subject of mediation and has been asked to provide training to various professional groups on the art of mediation.

Elizabeth has been recognized as:

- Chambers USA Senior Statesman
- Best Lawyers in America (1999-2016)
  - Des Moines Labor and Employment Lawyer of the Year (2010, 2012)
  - Employment Law-Management
  - Mediation
- Super Lawyers Great Plains – Employment & Labor (2009-2016)
- BTI Consulting Client Service All-Star (2016)
- Law 360 - General Counsel's Favorite Employment Lawyers (1 of 28 Employment lawyers recognized nationally)
- Labor & Employment Lawyer of the Year, Corporate Live Wire (2014)

David H. Goldman

David Goldman has had an employment law practice for nearly 40 years representing employers and employees. He is a member of the law firm of Babich Goldman, P.C. He has, in recent years, developed an active mediation practice to which he aspires to devote ever more of his working time. David serves as a member of the boards of directors of the American Academy of ADR attorneys and of the Iowa Association of mediators and is a Board Certified Mediator by both organizations. David has conducted hundreds of mediations in Iowa, Missouri, and Illinois.

MICHAEL G. MULLIN

Mike Mullin has been an attorney for 36 years. Between 1980 and 2000, Mr. Mullin tried more than 50 jury trials in cases involving personal injury, product liability, and toxic torts. He was inducted into the American Board of Trial Advocates, the International Association of Defense Counsel, and Litigation Counsel of America. His litigation practice has been recognized by Best Lawyers in America (recognized in the categories of Mediation, Arbitration, Insurance Law, and Personal Injury Defense), Chambers USA (named as a "Leading Lawyer"), SuperLawyers, and Benchmark Litigation (named a "Local Litigation Star").

Mr. Mullin mediated his first case in the year 2000. Since that time, he has mediated over 2,700 disputes in nine states thus far. Mr. Mullin currently mediates over 300 disputes per year. He mediates virtually all types of civil disputes, including personal injury claims, professional malpractice disputes, class actions. FLSA collective actions, FELA claims, employment discrimination claims, business and commercial disputes, environmental disputes, etc.

Mr. Mullin has been inducted as a Distinguished Fellow into the International Academy of Mediators, a Fellow of the American College of Civil Trial Mediators, a charter member of the National Academy of Distinguished Neutrals, and a certified member of the American Academy of ADR Attorneys. His mediation practice has also been recognized by Best Lawyers in America, Chambers USA, SuperLawyers, and Who's Who Legal: Mediation/ the International Who's Who in Commercial Mediation (recognized as one of the top 100 commercial mediators in the US since 2011). He is on the panel of approved mediators for the United States District Court for the District of Nebraska and the United States Bankruptcy Court for Nebraska. He is also an approved panelist for ADR Systems of America, Resolute Systems, and Mediation Works, Inc.

Mr. Mullin has demonstrated his commitment to his profession and to his community by serving on numerous law-related and civic boards and committees. He has previously served as President of the Omaha Bar Association. Since 1993 Mr. Mullin has served as an elected member of the Nebraska State Bar Association House of Delegates. He has previously served as a board member, officer and Fellow of the Nebraska State Bar Foundation, and is a Fellow of the American Bar Foundation. He also currently serves on the alumni advisory board of Creighton University School of Law and has previously served as President of the Board of Directors of the Omaha Children's Museum.

Mr. Mullin credits his mediation practice to his many years of helping his wife of 33 years negotiate the countless disputes among their four children.

To view Mr. Mullin's ADR web site and to see view his calendar of availability, please visit: www.kutakrock.com/mediation/mullin.

How to Get the Deal Done:
Tips and Wisdom from Employment Law Mediators

I. Arranging for Mediation

1. How do I know the time is right for mediation?
2. Is it ever too early?
3. How do I select the right mediator for my case?
    a. mediator soft skills
    b. substantive knowledge
    c. litigation experience
    d. credibility factors
4. What should I expect the mediator to do in terms of running conflict checks?
5. What should I expect a mediation agreement to include?
6. Is venue important?

II. Preparing for Mediation

1. What should I do to prepare for the mediation?
2. Is it ok to call the mediator in advance of the mediation, and if so, what is it proper to discuss during these calls?
3. Should I communicate with opposing counsel in advance of the mediation?
4. What do mediators find helpful in terms of mediation materials?
5. How far in advance of the mediation should I submit my mediation materials?
6. Who should attend the mediation?
7. What should I do to prepare my client(s) for mediation?

III. Conduction Mediation

1. Opening conference/statement

    a. What does the mediator want to accomplish during a joint opening conference?

    b. What are mediators' opinions about opening statements?

    c. What should I advise my client and/or insurance representative to do during an opening conference?

2. Mediation

    a. What does the mediator want to accomplish during private caucuses?

    b. How does the involvement of an insurance claims representative impact the mediation?

    c. How often do claims representatives show up in person rather than participate by phone?

    d. Does the mediator get access to the claims representative when they participate by phone?

    e. Is it ever proper for the mediator to meet privately with counsel (outside the presence of the litigants) during the mediation?

    f. Do mediators meet with counsel from both sides either with or without the litigants during the mediation and under what circumstances?

    g. Do the litigants ever meet with each other outside the presence of counsel during mediation?

    h. Do the mediators find that one side or the other tends to hold out longer, start higher/lower?

    i. Are there phases to the negotiations that occur during mediation?

        - What occurs during these phases?

    j. What are some effective mediator tools (brackets, mediator's numbers…)?

        - When is it helpful to use them?

IV. Conclusion/Settlement

1. When is it best to introduce language items to settlement terms?

2. How often do plaintiffs ask defendants to pay for mediation costs as a final move?

   a. How often is this request is granted/denied?

   b. Are there any ethical issues associated with raising it?

3. Do you memorialize the salient terms of the mediation when a case settles and who do you ask to do this?

4. Who do you have sign off on the terms?

5. How long do employment mediations generally take?

6. What percentage of the cases settle:

   a. at mediation;

   b. after mediation; or

   c. not at all?

7. What are some mistakes mediators see counsel making at mediation?

A BAKER'S DOZEN SUGGESTIONS FOR MAKING YOUR NEXT MEDIATION A SUCCESSFUL ONE
By Michael G. Mullin

1. Have your Mediation Procedures and Agreement to Mediate in writing.

a. Address expectations of the parties as to submission of position statements and other information.

b. Address confidentiality of the process.

c. Address fees to be paid by the parties to the mediation, and who is responsible for payment of the mediation fees.

d. Secure written waivers of any potential or actual conflict from the parties.

2. Prepare, prepare, prepare.

a. Personally, I do not restrict the amount of materials or the length of the parties' position statements. When asked what to send me, I tell attorneys to err on the side of submitting more materials than what I might need as opposed to less materials.

b. Read everything that is submitted to you by the parties.

c. Being able to recite from memory a particular answer on a specific page of a deposition, the date of a particular entry in a medical record, or the specific numbered clause from a contract, will enhance your credibility and confirm to the parties and their counsel that you are up to speed with the facts of the dispute.

3. Opening the mediation process.

a. Typically, I begin with a joint session where I spend approximately 15 minutes describing my background and how I conduct mediations.

i. My primary goal in my opening is to establish a level of confidence and trust in the participants that I know what I am doing. If the parties like me after the opening session, they will be more willing to listen to me if I need to become evaluative later in the mediation.

ii. A second goal is to have the parties feel comfortable with the process and to understand that it is THEIR process, not mine or their attorneys' process.

iii. A third goal is to let the parties know that compromise is an inevitable part of the mediation process, and that no one leaves a successful mediation

ecstatic with the result. To the contrary, a fair settlement is one in which each party leaves feeling a little bit disappointed.

b. I discourage opening statements by counsel as being too much like the confrontational, adversarial processes that occur in the courtrooms around our country.

i. Although I do not prohibit opening statements by counsel or the showing of PowerPoint presentations, Day-in-the-Life videos, or other argumentative presentations, I try to discourage them as much as possible.

ii. For example, upon learning that a party wishes to show a video or PowerPoint presentation in the opening joint session, I request permission to view them in caucus with the adverse party, thereby allowing me more freedom to have an open dialogue with that party about the content of the presentation.

iii. I tell attorneys wanting to give an argumentative opening statement that I have never seen an opening statement help resolve a dispute at mediation; rather, the cases settle despite the opening statement. I also tell the attorney that it typically takes me one to two hours to undo the damage caused by an adversarial opening statement, thereby leading to a longer mediation and increased costs to all parties involved.

iv. On the other hand, if one party indicates a willingness to merely thank the other party for participating in mediation, or to express regret that the dispute has arisen, I have no objection to those types of messages being conveyed in the opening session.

4. In most mediations, and virtually all personal injury disputes, I meet with the Plaintiff in the initial caucus sessions.

a. Even when it is the Defendant's position to move, meeting first with the Plaintiff allows me to determine to what extent the Plaintiff is emotionally invested in the dispute, whether the Plaintiff or Plaintiff's counsel (or both) have realistic or unrealistic expectations of settlement value, and to prepare the Plaintiff for what might be a very small opening or next offer from the Defendant.

b. It is very important in the initial caucus session of a personal injury dispute to allow the Plaintiff to describe how he/she is doing; the effect of the injury on his/her life, work, family life, recreational activities, etc. As a mediator, I try to draw out this information by questions to the Plaintiff. If a Plaintiff's attorney adds additional information, so be it, but I try to redirect the conversation as much as possible to a dialogue between the Plaintiff and myself. This is the opportunity for a Plaintiff be heard on the impact of the dispute on their lives. It is imperative for the Mediator to listen carefully, to ask open-ended questions encouraging the Plaintiff to speak, and to express empathy as appropriate.

c. In the first caucus sessions, I try not to be evaluative or to express concerns about any particular issues or unrealistic expectations. To the extent possible, the Plaintiff's concerns should be heard, validated, and treated with empathy and compassion, particularly in cases of significant or catastrophic injury or wrongful death claims.

d. In wrongful death and catastrophic injury claims, acknowledge that no monetary sums will ever fully compensate the Plaintiff. But neither will a jury verdict. In such cases, the purpose of mediation is to assess what a jury might do with its verdict, and compare that with Defendant's final offer.

5. Caucuses with the defense.

a. In the first caucus session with a Defendant, I ask whether there are any strategies that the party and attorney wish to use in the negotiation of the dispute.

i. For example, does the Defendant want to drag the negotiations out, cut to the chase more quickly, consider the use or non-use of bracketing, etc.

ii. Frequently, a Defendant or the attorney for a Defendant will tell me early in the process that they want to settle a case for a particular monetary sum. Sometimes such statement proves to be accurate, but more often than not it is just an example of a party that is negotiating with the Mediator. I take such statements with a grain of salt.

iii. Generally, I encourage Defendants not to negotiate on a reactionary basis with the Plaintiff. While sometimes a party needs a "cold splash of water to the face" to emphasize that the party's position may be unrealistic, I try to discourage such moves as being counter-productive to the process. A party unhappy or frustrated with the process is less likely to settle than one who feels that he or she has been treated with dignity and fairness during the negotiations.

6. Using brackets to close the gap.

a. In many mediations, a large gap exists between the parties' positions, and it is apparent that with traditional negotiating, the parties will still be miles apart when the Defendant puts its last offer on the table. In these situations, I suggest that the Defendant consider a bracket proposal, i.e., the Defendant will offer the Plaintiff $X if the Plaintiff agrees to reduce the demand to $Y.

b. There are many different ways in which brackets can be used. For example, brackets can be either negotiable or non-negotiable, they can be "wide" brackets or "narrow" brackets, etc. Occasionally, a party or that party's counsel has a preferred way of conducting bracket negotiations.

c. My preferred way of conducting bracket negotiations is as follows:

i. Try to have the Defendant make the first bracket proposal;

ii. Make the bracket negotiable, i.e., allow the Plaintiff to respond with a counter-bracket;

iii. Make the bracket fairly narrow, which allows more movement on the low parameter of the bracket but also reduces expectations on the high parameter of the bracket;

iv. Acknowledge the mid-point of the bracket, but communicate to the party receiving the bracket that there is no promise or guarantee that the party proposing the bracket will ever formally offer the mid-point of the bracket or any higher number;

v. Tell the party receiving the bracket proposal that there are four ways to respond (1) declare an immediate impasse; (2) demand a hard-dollar offer and refuse to negotiate in brackets; (3) accept the bracket proposal; and (4) respond with a counter-bracket proposal. I encourage parties to use the counter-bracket alternative.

vi. If the party receiving the bracket responds with a counter-bracket, I then need to assess how close or how far away the parties are in their respective brackets, and devise a way to close the gap. If the parties are still substantially apart, I may propose another round of bracket and counter-bracket negotiations. Otherwise, I may encourage the parties to step out of their brackets (hopefully, at their respective mid-points or better) and resume traditional negotiations to further close the gap.

7. Using "Oklahoma" settlement offers.

a. In and throughout Nebraska, an "Oklahoma" offer references an offer where a party does not make a formal offer, but indicates a willingness to settle for a given number if, and only if, the other party agrees to propose that number first.

b. "Oklahoma" offers are used when a particular party, typically a Defendant, is unwilling to place its top dollar settlement offer on the table unless it is certain that the case will settle at that number.

c. An "Oklahoma" offer can be communicated as follows: "The Defendant believes that it last offer was fair and reasonable for this claim, but it would be willing to try to get $X in settlement authority if, and only if, you agree to reduce your demand to $X. The Defendant is unwilling to seek authority for $X or to offer you $X to have it rejected. But if you are willing to reduce your demand to $X, there is a good/high/virtually certain chance that the Defendant will be able to secure authority for $X. If you are unwilling to reduce your demand to $X, the Defendant has indicated that it will declare an impasse."

d. Use of “Oklahoma” settlement proposals typically avoids the “nickel and diming” that can occur at the end of settlement negotiations.

8. Use caucus methods to avoid reaching impasse in the negotiations.

a. Typically, mediations are conducted with parties and their counsel in separate caucus rooms. However, it is not unusual for negotiations to reach a point where the parties are frustrated, are threatening to leave, and impasse seems to be looming. In such cases, I use different caucus strategies to keep the negotiations going and to avoid impasse.

b. In a case, particularly a business or commercial dispute, where the attorneys are very argumentative, I will try to get each party to agree to meet separately in caucus with the other party, without the attorneys being present. I facilitate those negotiations. I make it clear that the discussions are going to be non-confrontational and that I will shut down the discussion if the negotiations turn confrontational. Invariably, I can get the parties to agree at the beginning of such a caucus that if the dispute continues, their respective attorneys are the only ones guaranteed to come out ahead. If I reach agreement on this issue, I try to find another issue where the parties will easily and quickly reach agreement. I then gradually turn the discussion to the merits of the dispute, and talk to each party about the expenses of proceeding to trial, their respective best and worst case scenarios, and the risks that each has in proceeding to trial. If appropriate, I may even suggest a Mediator’s Proposal to the parties in such a caucus session. In many cases, particularly business and commercial disputes, I have been able to avoid impasse by getting the parties to negotiate directly with one another outside the presence of counsel.

c. In cases where one or more parties or attorneys have unrealistic expectations, or where the negotiations appear to be causing emotional distress for one of the parties, I may request a caucus of just the attorneys and myself. I am careful when to suggest this as an alternative because there are obvious risks in an attorney-only caucus. For example, one attorney might be more experienced, knowledgeable, or vocal than the other attorney. The parties themselves may question why they are being left out of the process. Yet I have had numerous mediations where attorney caucuses allowed the attorneys to speak frankly with each other, without the need to position in front of their respective clients, and determine that there might be common ground that both attorneys would be willing to recommend to their clients.

9. Never let ‘em see you sweat.

a. One of the greatest misperceptions about mediation is that it is an easy thing to do. Many litigators have told me that they could easily do mediations if they wished, and that it would be a lot easier and less stressful than conducting mediations. As every Mediator knows, they are wrong. I have been told by numerous litigators who conducted their first mediation as the neutral that it was

much more difficult than what they ever imagined. Many of them have told me that they never wanted to mediate again.

b. Although there will always be some stress in serving as a Mediator, and high levels of stress in some mediations, the Mediator should always maintain control over the process and not give any hint that the Mediator is feeling stress. If the parties or the attorneys see the "deer in the headlight" look or sense that the Mediator has lost confidence in his or her ability to facilitate the negotiations, the parties and the attorneys will almost certainly lose respect for the Mediator and place little or no weight on any evaluative statement that the Mediator might make.

c. As one example of what not to do, years ago I was representing a party in the mediation of a significant dispute with the negotiations in the eight figure range. A Mediator was brought in from another state who supposedly was an experienced mediator in large disputes. He wanted opening statements in the initial session, and the session turned contentious. I don't recall the Mediator trying to gain control over the process or to minimize the adversarial nature of the discussions. Eventually, the attorneys agreed to separate into our separate caucus rooms. About an hour later, I ran into one of the opposing attorneys in the rest room, and he commented that we must really be working over the Mediator because he had not yet stopped into their room. I replied that we had not seen the Mediator. This led to a search of the third (and only other) caucus room, and the Mediator was not there, either. Ultimately, we found the mediator sitting on a bench outside the office tower, smoking a cigarette with numerous cigarette butts on the ground beneath him. Although we were able to coax him back into the building, needless to say the negotiations went nowhere and an impasse was quickly reached.

10. Strategies to close the final gap.

a. Try to get every last concession from the Defendant. Will they pay the Plaintiff's mediation fees? Will they pay for the cost of determining whether a Medicare Set-Aside will be required? Can the Defendant expedite payment of the settlement funds? Will the defense attorney allow his mediation position statement to be used by Plaintiff's counsel in the negotiation of the lien and subrogation interests? Will the Defendant retract its demand for confidentiality and/or a non-disparagement agreement? Sometimes, just giving a Plaintiff the final "victory" or concession is sufficient to get a reluctant Plaintiff to agree to a resolution.

b. Talk to the Plaintiff about the fees and costs that will be saved via a settlement. For example, a Plaintiff may have a bottom line of $300,000 versus a final offer of $250,000. The Plaintiff needs to be told that while it sounds like the parties are $50,000 apart, such is not the case if you look at what will go into the Plaintiff's pocket. If the Plaintiff is going to incur $50,000 or more in fees and costs to litigate the matter, the Defendant's offer would put the same sum in Plaintiff's pocket, risk-free and appeal-free, as a $300,000 jury verdict. I will frequently do

the calculations on a sheet of paper in front of the Plaintiff and Plaintiff's counsel showing that the Plaintiff would need to get a significantly higher verdict at trial to pocket the same dollars that the Defendant's final offer would provide on a risk-free basis.

c. Where a Plaintiff's attorney has an unreasonable client, and one who will never be happy with a verdict in the expected verdict range, I will sometimes suggest that the attorney reduce his fee to get a case to resolution. Frankly, I suspect that this happens more frequently than I ever know about, but the savviest Plaintiff attorneys know that some files need to be resolved even if they have to give up a portion of their fee to get a client to a settlement.

11. Use of Mediator Proposals.

a. I consider Mediator Proposals to be the last and final attempt to breach a mediation impasse. Accordingly, I very, very rarely use Mediator Proposals during a mediation. In my view, the principle of self-determination is extremely important in the mediation process, and a Mediator's Proposal is generally inconsistent with the parties' right of self-determination.

b. However, I will use Mediator Proposals in two instances. First, if all of the parties at a mediation request a Mediator's Proposal from me, I will provide one as long as I am permitted to explain to each party my rationale and basis for my proposal. Second, if a mediation results in an impasse, I will frequently attempt a Mediator's Proposal following the mediation in an attempt to break the impasse. When I do a post-mediation Mediator's Proposal, I do it by email and without requesting permission from the parties to do so. I set a deadline by which the parties are to respond with a simple "We accept" or "We reject." Only if every party accepts do I send out an email indicating that the dispute has settled on the Mediator's Proposal. If one or more parties reject the proposal, my email to the parties is simply that the dispute did not settle on the Mediator's Proposal. In that way, the fact that any party accepted the proposal will never be known by the other party or parties.

c. I never indicate in advance whether I would be willing to submit a Mediator's Proposal. If a party knows at a mediation that the Mediator will do a Mediator's Proposal following the unsuccessful mediation, that party has an incentive not to put its best offer on the table at the mediation and to await the Mediator's Proposal.

12. Always get a signed Memorandum of Understanding at the conclusion of a successful mediation.

a. An MOU is extremely important to avoid post-mediation disputes over the terms of the settlement.

b. My MOUs provide that the settlement is a binding and enforceable settlement. I have each party and attorney sign the MOU. If a party has participated by

telephone, or is otherwise not available to sign the MOU, I either get the signature via email or provide that the attorney has been expressly authorized to accept the settlement terms and to sign the MOU on behalf of the absent party. Mediators need to be careful on this point because I recall reading about a case where a settlement was reached at mediation, and one of the parties left before the MOU was prepared for execution. The attorney for the absent party signed the MOU, but obviously the party did not. That party then changed his/her mind overnight, and refused to go along with the settlement. The Court refused to enforce the settlement because the party had not signed it.

c. In addition to the terms of the settlement, the MOU should address the timing of payment of the settlement funds, how the checks will be made payable, how to protect any lien and subrogation interests including Medicare or Medicaid if they are involved, etc.

d. If a personal injury settlement includes a confidentiality clause, always state some amount of consideration (I typically use $10.00 or $100.00 depending on the amount of the settlement) for the confidentiality provision. Otherwise, you are jeopardizing the tax-free status of the payment for the personal injuries. (See the Dennis Rodman tax court case.)

e. In employment discrimination cases, have the MOU set forth the amount of the settlement that represents lost wages and that will be reported on a W-2, and the amount of the settlement for the non-wage claims and that will be reported on a Form 1099.

13. Don't give up if your case does not settle on the day of the mediation.

a. Any file from a successful mediation is immediately closed and scheduled for destruction upon receipt of the final payment of fees. However, those cases that do not settle at mediation are kept under my desk in my office. In this way, I have to look at them every day I am in my office, and I have an incentive to get them out from under my desk. I frequently email and call the attorneys in those cases to inquire if there have been any developments that might allow further negotiations to occur. The attorneys do not seem to mind such inquiries, and in fact seem to appreciate that I am still interested in finding a resolution to their dispute.

b. Many times, after a court ruling or on the eve of trial, I am contacted and told that the parties are willing to enter into further negotiations. When this happens I typically facilitate those further negotiations by email and telephone conferences. If I am able to get the matter resolved with a couple of telephone calls and emails, I typically do not bill the parties for my additional time. While I have to write off some time by doing this, the goodwill that it generates more than makes up for the small loss of revenue. And for me, the best part of such a resolution is that it allows me to move a mediation from the "unsuccessful" column to the "successful" column.

The Federal Defend Trade Secrets Act of 2016 and Implications for Non-Compete and Confidentiality Agreements

10:30 a.m. - 11:30 a.m.

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The Defend Trade Secrets Act of 2016:
Has Anything Really Changed?

2016 Labor and Employment Law Seminar

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1. Background.

a. Trade secrets have becoming increasing important to the modern economy. Most companies today thrive or fail based on their intangible, as opposed to tangible, assets. Intangible assets commonly include financial information, engineering know-how, formulas, designs, processes, and computer code. Most intangible assets are kept secret and are protected by existing trade secret law.

b. On May 11, 2016, President Obama signed The Defend Trade Secret Act ("DTSA") The DTSA, among other things, amended the Economic Espionage Act of 1996 (the "EEA") to provide private litigants the right to assert a trade secret misappropriate claim in federal court. Federal courts now have original jurisdiction over trade secret claims.

c. The DTSA puts trade secrets on par with the other commonly recognized forms of intellectual property (i.e. patents, trademarks, and copyrights), all of which are protected primarily by federal law. The EEA, before it was amended, made it a federal crime to misappropriate a trade secret, but that only allowed the U.S. Department of Justice to pursue actions based on alleged trade secret misappropriations.

d. Before the DTSA became law, a company's trade secrets were protected, almost exclusively, by each state's trade secret law.

    i. The Uniform Law Commission passed the UTSA in 1979, and then amended it in 1985. The UTSA was passed "to bring certainty to the doubtful and confused status of both common law and statutory remedies" regarding trade secret misappropriation. *Foley, Keeping a Company's Confidences Secret: Trade Secret Enforcement Under Iowa's Uniform Trade Secrets Act, 59 Drake Law Review, 1 (2010).*

ii. The UTSA prohibits businesses and individuals from misappropriating another's trade secrets. Currently, every state, except New York and Massachusetts, has adopted some version of the Uniform Trade Secrets Act (UTSA).

iii. The Iowa General Assembly passed Iowa's version of the UTSA in April 1990. *See Iowa Code Chapter 550.* Under both common law and Iowa's version of the UTSA, a party asserting a claim for trade secret misappropriation must prove, (a) trade secret exists; (b) the trade secret was obtained as a result of a confidential relationship; and (3) the trade secret was used in an unauthorized manner. *Titan Int'l, Inc. v. Bridgestone Firestone N. American Tire, LLC*, 752 F.Supp.2d 1032, (S.D. Iowa 2010); *Basic Chemical, Inc. v. Benson*, 251 N.W.2d 220,226 (Iowa 1977); *Lemmon V. Hendrickson*, 559 N.W.2d 278, 279 (Iowa 1997); *SHI R2 Solutions, Inc. v. Pella Corp.*, 864 N.W.2d 553 (Iowa App. 2015).

e. By creating a federal cause of action for trade secret misappropriation, the DTSA virtually assures that most trade secret claims will be litigated in federal court and that a uniform body of law will, over time, displace the hodgepodge of state law decisions companies and individuals were forced to navigate to protect their trade secrets.

2. DTSA: Key Provisions.

a. **Interstate or Foreign Commerce Requirement**. The DTSA is limited to "owners" of misappropriated trade secrets. For the DTSA to apply, the trade secrets must "relate to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836 (b)(1).

b. **Civil Seizure.** The DTSA creates a new *ex parte* process through which applicants can, "but only in extraordinary circumstances," request courts to issue an "order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is subject of the action." 18 U.S.C. § 1836 (b)(2).

i. The process contemplates the actual seizure of property by federal marshals and other court-appointed officials; thus, making the process more muscular than obtaining a temporary restraining order or preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure.

ii. The DTSA lists specific assertions that must be included in any application requesting the seizure of property, as well as specific findings

and conclusions that must be included in any order requiring the seizure of that property. 18 U.S.C. § 1836 (b)(2)(A) and (B).

iii. The court ordering the seizure must take custody of any materials seized and must secure the secure the seized material from physical and electronic access during the seizure. 18 U.S.C. § 1836 (b)(2)(D).

iv. The seizure remains in place until a hearing can be held, which must, in most instances, take place "at the earliest possible time, and not later than 7 days after the order has issued,.." 18 U.S.C. § 1836 (b)(2)(B)(v).

v. A person "who suffers damage by reason of a wrongful or excessive seizure" can assert a claim against "the applicant for the order under which such seizure was made and can recover the same relief as provided under Section 34(d)(11) of the Trademark Act of 1946. 18 U.S.C. § 1836 (b)(2)(G).

c. **Remedies for Trade Secret Misappropriation**. The DTSA provides specific remedies for violations of its provisions. The remedies include injunctive relief and compensatory and exemplary damages.

i. **Injunctive Relief**. The DTSA allows injunctions to be awarded "to prevent or protect the actual or threatened misappropriation of a trade secret;" "to require affirmative steps be taken to protect the trade secret." In exceptional circumstances, the DTSA allows courts condition "future use of the trade secret upon payment of a reasonable royalty." 18 U.S.C. § 1836 (b)(3).

1. The injunctive relief cannot, however, "prevent a person from engaging in an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on information the persons knows…" 18 U.S.C. § 1836 (b)(3)(A)(i)(1).

2. And, it cannot otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business. 18 U.S.C. § 1836 (b)(3)(A)(i)(2).

3. The provision prohibiting DTSA injunctions from preventing persons from engaging in employment relationships and requiring that any conditions placed on employment be based on "evidence of threatened misappropriation" is widely viewed and eliminating the "inevitable disclosure doctrine" as a potential argument under

the DTSA. The inevitable disclosure doctrine "is essentially a theory of relief for claims of misappropriation of trade secrets when an employee's new employment will 'inevitably' lead him or her to rely on this former employer's trade secrets." *Interbake Foods, L.L.C. v. Tomasiello* 461 F.Supp.2d 943, 970 (N.D. Iowa 2006).

ii. **Compensatory Damages**. In addition to injunctive relief, compensatory damages caused by trade secret misappropriation can be awarded. The compensatory damages Courts can award include:

1. "Damages for actual loss caused by the misappropriation of the trade secret." 18 U.S.C. § 1836 (b)(3)(B)(i)(1).

2. "Damages for unjust enrichment caused by the misappropriation of the trade secret that is not address in computing damages for the actual loss; 18 U.S.C. § 1836 (b)(3)(B)(i)(2).

3. "[D]amages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret." 18 U.S.C. § 1836 (b)(3)(B)(i)(3). The royalty can only be awarded "in lieu of damages measured by other methods,…" *Id*.

iii. **Exemplary Damages**. The DTSA permits the awarding of exemplary damages. Exemplary damages "in an amount not more than 2 times the amount of" compensatory damages awarded can be awarded to the plaintiff if "the trade secret is willfully and maliciously misappropriated,.." 18 U.S.C. § 1836 (b)(3)(B)(i)(C).

iv. **Attorney Fees.** Reimbursement of "reasonable attorney fees" can be awarded to the prevailing party in three instances.

1. If a claim for trade secret misappropriation is made "in bad faith," which can be established "by circumstantial evidence…" 18 U.S.C. § 1836 (b)(3)(B)(i)(D).

2. If a "motion to terminate an injunction is made or opposed in bad faith…" *Id.*

3. If the "trade secret was willfully and maliciously misappropriated…" *Id*.

d. **Miscellaneous.** The DTSA has other more random provisions that are of interest.

i. **Misappropriation**. The DTSA contains a definition of misappropriation that is very similar to the definition contained in the UTSA. Under both the DTSA and UTSA, to be "misappropriated" the trade secret must have been acquired through "improper means." 18 U.S.C. § 1839 (5).

1. The DTSA defines "improper means" to include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." 18 U.S.C. § 1839 (6)(A).

2. The DTSA expressly provides that "improper means…does not include reverse engineering, independent derivation, or any other lawful means of acquisition." 18 U.S.C. § 1839 (6)(B).

ii. Effective Date. The DTSA applies to "any misappropriation of a trade secret…for which any act occurs on or after [May 11, 2016]."

iii. Statute of Limitation. A three-year statute of limitations applies to actions under the DTSA.

1. The three year statute of limitations runs from "the date on which the misappropriation with respect to which the action would relate is discovered or by the exercise of reasonable diligence should have been discovered." 18 U.S.C. § 1836 (d).

2. If the misappropriation takes place over time, the DTSA provides that "a continuing misappropriation constitutes a single claim of misappropriation." *Id*.

iv. **Whistle Blower Protections.** The DTSA provides immunity from civil and criminal liability for whistle blowers. The immunity applies to "any Federal or State trade secret law for the disclosure of a trade secret…" 18 U.S.C. § 1833 (b)(1).

1. The immunities apply to confidential disclosures of trade secrets made to "Federal, State, or local government official, either directly or indirectly, or to an attorney,…" 18 U.S.C. § 1833 (b)(1)(A)(i)

2. The disclosure to a Federal, State, or local government official or to an attorney must be "solely for the purpose of reporting or

investigating a suspected violation of law" for the immunity to apply. 18 U.S.C. § 1833 (b)(1)(A)(ii).

3. Immunity applies as well to disclosures of trade secrets "made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal." 18 U.S.C. § 1833 (b)(1)(B)

4. The DTSA contains other provisions that provide immunity to "an individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law…" 18 U.S.C. § 1833 (b)(2). The provision permits disclosure to an attorney and allows for use of the trade secret in "the court proceeding" if any document containing the trade secret is filed under seal if the individual does not disclose the trade secret, "except pursuant to court order." 18 U.S.C. § 1833 (b)(2)(B).

5. Employers must include notice of the available immunity "in any contract or agreement with an employee that governs the use of trade secret or other confidential information." 18 U.S.C. § 1833 (b)(3)(A). Employers who do not comply with this notice provision the employer cannot recover exemplary damages or attorney fees "in an action against an employee to whom notice was not provided." 18 U.S.C. § 1833 (b)(3)(C). Employee is broadly defined to include "any individual performing work as a contractor or consultant for an employer." 18 U.S.C. § 1833 (b)(4). The notice provision applies to agreements newly drafted or updated after May 11, 2016. 18 U.S.C. § 1833 (b)(3)(D).

3. Other Observations.

a. Now that the DTSA provides for a private cause of action for trade secret misappropriation in federal court, it will be interesting to see who, if anyone, will file trade secret lawsuits in state court. The DTSA does not contain any provision stating it preempts state law. In addition, the Iowa General Assembly expressly rejected to the USTA exclusive remedy provision, thus allowing parties to bring common law claims along with Chapter 550 claims. *205 Corp. v. Brandow*, 517 N.W.2d 548, 551-52 (Iowa 1994). The DTSA does nothing to change that.

b. Many lawsuits seeking enforcement of noncompete agreements also assert claims for actual or threatened trade secret misappropriation. Will this state's federal courts become the preferred court for those lawsuits? What type of facts need to exist before federal jurisdiction exists. Likewise, can, in some instances, the

DTSA, be used as a counterclaim in wrongful discharge and employment discrimination cases to create federal jurisdiction and

c. The DTSA contemplates the development of a unified body of federal trade secret law. Until that federal body of law is developed, will this state's federal courts continue to follow their previous decisions, all of which applied Iowa's version of the UTSA, or will they deviate from those decisions.

d. The DTSA essentially incorporates the definition of "trade secret" contained in the EEA. This definition is almost identical to the trade secret definition contained in the USTA. This means, that to obtain the benefits of the DTSA, owners of trade secrets must use reasonable measures to protect their trade secrets.

e. Are there any significant differences between Iowa Code Chapter 550 and the DTSA—other than the DTSA now gives litigants a federal cause of action for trade secret misappropriation?

THE DEFEND TRADE SECRETS ACT

Frank Harty
Nyemaster Goode, P.C.

The Defend Trade Secret Act of 2016

- Prior to DTSA
  - $300 billion annually in loss to economy from trade secret theft
  - Issues resulting from lack of uniformity

The Defend Trade Secrets Act of 2016 (DTSA)

- Amends the Economic Espionage Act of 1996 to create a private cause
- Creates a federal cause of action
- Allow for recovery of treble damages
- Provides for the recovery of attorneys fees
- Protects Whistleblowers
- Allows for the seizure of stolen property . . .

The Background Legal Landscape

- 48 states – including Iowa – have adopted the Uniform Trade Secret Act (USTA) (Iowa Code Chapter 550) (Maine and New York have common law claims)
- Trade secrets are being stolen at record pace – billions of dollars
- The problems: (1) employees; (2) hackers; and (3) spies
- Patchwork quilt of laws and remedies

Comparing the DTSA to Chapter 550

- Federal Jurisdiction
- Ex Parte Seizure
- Whistleblower notice/protections
- Arguably narrower definition of "trade secret"
- Different "improper means" definitions
- Damages

New Features

- Federalization – but no preemption
- Whistleblower immunity
- Ex parte seizure
- Requirement of Written Notice in agreements and policies

Whistleblower Protections

- Immunity from criminal and civil liability for disclosures to an attorney or the government
- Employer notice requirement – in contracts, agreements that address the use of trade secrets
- Failure to include notice – no exemplary damages or attorneys fees

Ex Parte Seizure

- Very limited scope
- There must be an immediate need for protection from dissemination

Preparation Checklist

- Include the whistleblower/immunity notice to employee, contracts, consultants (policies, employment agreements, severance agreements)
- Audit policies and arguments; cross – reference or re-open
- Examine all non-disclosure agreements

Preparation Checklist

- Trade Secret agreements
- Non-Competes
- Assignments of Inventions
- Equity Grants
- Settlement/Severance agreements

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Case Law Update

11:30 a.m. - 12:00 p.m.

Presented by

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Employment Appeal Board
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Des Moines, IA 50319
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Friday, October 14, 2016

IOWA STATE BAR ASSOCIATION
EMPLOYMENT LAW UPDATE

2015-16 EMPLOYMENT LAW UPDATE

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SUPREME COURT CASES

***EEOC v. Abercrombie & Fitch Stores, Inc.*, No. No. 14–86 (USCC 6/1/15)**

(http://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf)

The Employer, being concerned with employee image, bans caps for its associates. The complainant was not hired because she wore a head scarf as a religious requirement. Summary judgment for the defense was granted on the theory that failure-to-accommodate liability attaches only when the applicant provides the employer with actual knowledge of his need for an accommodation. The Supreme Court reversed on a 7-2 vote.

Title VII bans disparate treatment and impact based on "religion" but defines that term to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." §2000e(j). The Court concluded from this that "an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on." Slip op. at 4. The Court further observed that the provision "does not impose a knowledge requirement." Slip op. at 4. It is sufficient that the Employer acts with the motive of avoiding accommodation of a religious practice. It need not have been told about the practice or even know that the plaintiff has that practice. In a footnote the Court avoids the issue of whether "the motive requirement itself is not met unless the employer at least suspects that the practice in question is areligious practice—i.e., that he cannot discriminate 'because of' a 'religious practice' unless he knows or suspects it to be a religious practice." Slip op. at 6, FN 3. The Court does clarify that since Title VII creates an affirmative accommodation duty then failure to accommodate cases are brought as disparate treatment cases and not as disparate impact cases.

***Heffernan v. City of Patterson.*, No. 14–1280 (USCC 4/26/2016)**

(https://www.supremecourt.gov/opinions/15pdf/14-1280_k5fl.pdf)

The Plaintiff was a police office working for the City of Patterson, New Jersey. His supervisor and the Chief of the Police had been appointed by the incumbent mayor. The Plaintiff was seen with a yard sign for the mayor's opponent while at the opponent's campaign headquarters. The Plaintiff was then demoted for his "overt involvement" in the opponents campaign. This was a mistaken belief because the Plaintiff was actually just picking up a sign for his mom and had no involvement in the campaign at all. Plaintiff sued claiming he was demoted because of the City's belief he had engaged in protected speech. The lower courts dismissed on the theory that the claim was actionable under §1983 only if his employer's action was prompted by actual, rather than his perceived, exercise of free-speech rights. The Supreme Court reversed on a 6-2 vote.

For the purposes of analysis the Court assumed that the Plaintiff's *perceived* activities were of the sort that would be protected by the 1st Amendment but that the Employer was mistaken about the facts. Important to the analysis was the case of *Waters v. Churchill*, 511 U. S. 661 (1994)where the Court held no claim could lie where the employer had reasonably believed that the employee's action were not of the sort protected by the 1st Amendment and had dismissed the employee because of that mistaken belief. The Court then asked "If the employer's motive (and in particular the facts as the employer reasonably understood them) is what mattered in *Waters*, why is the same not true here? After all, in the law, what is sauce for the goose is normally sauce for the gander." Slip op. at 6. Applying the goose/gander rationale the Court **held** "When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U. S. C. §1983—even if, as here, the employer makes a factual mistake about the employee's behavior" Slip op. at 6. The Court backed up the holding by policy noting that the maintenance and implementation of such an approach by the government discourages protected speech to the same extent whether, in the end, the government was right or wrong about the particular Plaintiff's activities.

***Green v. Brennan.*, Postmaster General No. 14–613 (USCC 5/23/2016)**

(https://www.supremecourt.gov/opinions/15pdf/14-613_l5gm.pdf)

After allegations of racially discriminatory refusal to promote made by the Plaintiff, the Employer charged him with the crime of delaying the mail (as if anyone would notice). The Plaintiff then negotiated an agreement that in exchange for the PO not pursuing criminal charges the Plaintiff would retire or accept a demotion. The agreement was reached about three months before the Plaintiff signed paperwork resigning. He brought suit alleging constructive discharge and the issue was the timeliness given the short deadlines applicable to federal employees. The circuit court ran the limitations period from the date the paperwork was signed. The Supreme Court reversed on a 6-1 vote with Justice Alito concurring in the judgment.

The question is this case very much involves the "inevitable consequence" doctrine developed under *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U. S. 618 (2007), *Delaware State College v. Ricks,* 449 U. S. 250 and *United Air Lines, Inc. v. Evans,* 431 U. S. 553 (1977). Under this doctrine the limitation period once the discriminatory event occurs and is not

lengthened by consequences of that discriminatory events. For example, in *Ricks* the discriminatory refusal to offer a terminal contract triggered the filing period not the inevitable end of that terminal contract. " Green's resignation, by contrast, is not merely an inevitable consequence of the discrimination he suffered; it is an essential part of his constructive-discharge claim. That is, Green could not sue for constructive discharge until he actually resigned." Slip op. at 13. Instead the general rule is that "a limitations period commences when the plaintiff has a complete and present cause of action." Slip op. at 5. A complete and present cause of action does not exist until the plaintiff can sue and obtain relief. Slip op. at 5-6. In a constructive discharge case this does not happen until the resignation takes place, just as in an ordinary discharge case a wrongful discharge action does not accrue until the actual discharge. As the Court explained:

> A claim of constructive discharge therefore has two basic elements. A plaintiff must prove first that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign. [*Suders*], at 148. But he must also show that he actually resigned. Ibid. ("A constructive discharge involves both an employee's decision to leave and precipitating conduct . . ." (emphasis added)). In other words, an employee cannot bring a constructive-discharge claim until he is constructively discharged. Only after both elements are satisfied can he file suit to obtain relief.

Slip op. at 7. This being the case the cause of action was not "complete and present" until the Plaintiff actually resigned and this is the trigger for the limitations period.

In footnote 4 the Court explains that while the federal employee filing period has different language than for other workers filing under Title VII the EEOC treats the two as identical. The decision strongly suggests this holding will apply in Title VII cases as well.

***Tyson Foods v. Bouaphakeo* No. 14–1146 (USCC 3/22/2016)**

(https://www.supremecourt.gov/opinions/15pdf/14-1146_0pm1.pdf)

In this FLSA case out of Iowa the Plaintiffs sought overtime pay for time spent doffing and donning protective gear. The employer had had a policy of paying some of the workers for these activities but not all of them. Further the Employer did not record employee time spent on doffing and donning. The Plaintiffs certified their state law claims under rule 23 and the FLSA claims were brought as a collective action. Tyson objected to certification of both classes, arguing that, because of the variance in protective gear each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide basis. The Plaintiffs relied on a statistical study on video surveillance of a representative sample of workers doffing and donning their gear. The Court described the so-called "representative evidence" relied upon:

> As a result of Tyson's failure to keep records of donning and doffing time, however, the employees were forced to rely on what the parties describe as "representative evidence." This evidence included employee testimony, video recordings of donning and

> doffing at the plant, and, most important, a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mericle conducted 744 videotaped observations and analyzed how long various donning and doffing activities took. He then averaged the time taken in the observations to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department.

Slip op. at 5.

A jury awarded about 3 million in unpaid wages. The Iowa Court and the 8th Circuit both affirmed the verdict including the certification. The Supreme Court affirmed with 6 Justice in the majority.

As initial matter for the purposes of analysis the Court treated both class certifications as the same, and focused on rule 23. The case thus turned to the "predominance inquiry," that is, whether " questions of law or fact common to class members predominate over any questions affecting only individual members." Slip op. at 8. Here the common questions included whether the doffing and donning time was compensible in the first place, and the individual questions included the key issue of whether the worker had exceed 40 hours in a week and thus would be due *overtime*. Tyson argued that the person-specific inquiries into individual work time predominated over the common questions thus making class certification improper. The employees argued that " these individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle's sample." Slip op. at 8. So the case comes down to "sample or not to sample."

The Court declined invitations to paint with a broad brush. The Court noted that the reliability of representative evidence for proving liability is no different in class than in individual cases. " One way for respondents to show, then, that the sample relied upon here is a permissible method of proving class-wide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action." Slip op. at 11. Citing to *Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680, (1946) that in cases where the *Employers lack of recod keeping* has made it difficult or impossible to prove the specifics of an individual's claim of being underpaid there is a burden shifting process. The Plaintiff must prove being underpaid through evidence sufficient to lead to that conclusion as a matter of just and reasonable inference. The Defense can then come forward with evidence that shows the amount of work actually worked, or that challenges the inferences of the Plaintiff's evidence. Here evidence leading to a reasonable inference included the statistical study, and that study could have been introduced by each Plaintiff in individual suits. The challenge that the study is not in fact representative is actually based on factors *common* to all claims.

The Court made clear that *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011) " does not stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability." Slip op. at 13. Rather *Wal-Mart* is focused on how the sexual harassment claims in that case were in fact dissimilar. Thus an individual Wal-Mart Plaintiff could not have put on "representative" proof in the form of testimony that another worker was harassed by another harasser.

The Court made clear, of course, that not all FLSA representative evidence will be "just and reasonable" but noted that here the Defense did not challenge the admissibility of the evidence under *Daubert*. Once it was admitted then the question becomes a jury issue, and the Court found the study was sufficient to give rise to a reasonable inference concerning time worked by individual class members.

CRST Van Expedited v. EEOC **No. 1375 (USCC 5/19/2016)**

(https://www.supremecourt.gov/opinions/15pdf/14-1375_09m1.pdf)

In this EEOC class case out of Iowa all the claims of discrimination eventually ended up getting dismissed based on various grounds including, for 67 women, that the EEOC failed to discharge all its pre-suit obligations such as conciliation and investigation. Fees were awarded against the EEOC, but the 8th Circuit vacated the award on the theory that in order to award fees to a defendant there must be a judgment for the defendant on the merits. The Supreme Court granted certiorari on the question of whether this "on-the-merits" requirement is correct. In a unanimous decision the Court reversed.

Before the Supreme Court the EEOC conceded that the "on-the-merits" requirement was erroneous. The Court agreed, and emphasized the common sense notion that if the defendant gets the case dismissed without having to pay money to the plaintiff, or be subject to a court order then they won. The Court noted further there is no reason why the policy of sparing the expense of defending frivolous cases is any different if the frivolous nature of the claims is such that dismissal is not merits based. Moreover, in *Christiansburg Garment Co. v. EEOC*, 434 U. S. 412, 422 (1978) where the frivolous standard was first articulated the dismissal was not merits based. Yet the Court in *Christiansburg* based its determination on whether the agency's interpretation of law was "frivolous" and not on any merits/non-merits distinction. The remainder of the *CRST* opinion dealt with issues the Court decided not to deal with.

If this issue of EEOC pre-suit obligations seems familiar you may recall from last year: *Mach Mining v. EEOC*, No. 13–1019 (USSC 4/29/15) http://www.supremecourt.gov/opinions/14pdf/13-1019_c1o2.pdf - This case deals with the narrow issue of what conciliation efforts the EEOC must go through before commencing suit against an employer. While the Court found conciliation attempts to be reviewable under the APA, it limited the review severely. Basically, it would not second guess whether the EEOC had done enough to settle, or was negotiating in good faith. Rather the EEOC must inform the employer about the specific discrimination allegation by describing what the employer has done and which employees (or class of employees) have suffered. Then the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. The Court found that a sworn affidavit from the EEOC stating that it has performed these obligations should suffice to show that it has met the conciliation requirement. If the employer could prove conciliation did not take place the remedy would be to hold conciliation.

James v. Boise **No. 15-493 (USCC 1/25/2016)**

(https://www.supremecourt.gov/opinions/15pdf/15-493_5h26.pdf)

In this very brief case decided while Justice Scalia was still alive, the Court made clear to what extent state courts may choose to deviate from USSC precedent on federal matters: NONE. In the case the Idaho state court had refused to apply USSC precedent to a section 1988 fee claim, reasoning that attorneys fees is discretionary and "[a]lthough the Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute." Slip op. at 1. The Idaho court then award fees to a prevailing defendant without first determining that the action was frivolous. The United States Supreme Court was not impressed.

In a *per curiam* decision the Court wrote:

> Section 1988 is a federal statute. "It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." (citations omitted)..And for good reason. As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable." Martin v. Hunter's Lessee, 1 Wheat. 304, 348 (1816).

Encino Motor Cars v. Navarro **No. 15-415 (USCC 6/20/2016)**

(https://www.supremecourt.gov/opinions/15pdf/15-415_mlho.pdf)

This case has more to do with federal administrative law than employment law. The effect on employment law is the final ruling and little else. The FLSA has an exemption for "any salesman, parts-man, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership." For many years DOL rules and handbooks have included "service advisors" in this exemption. Such advisors sell maintenance and repair contracts, but not cars. In 2011 the DOL passed a rule taking away the service advisor exemption, but according to this opinion failed to give adequate reasons for the change. The Court thus instructed the statutory salesman exemption must be construed without giving any weight to the regulation, and remanded for this.

Direct TV v. Imburgia **No. 14-462 (USCC 12/14/2015)**

(https://www.supremecourt.gov/opinions/15pdf/14-462_2co3.pdf)

In this consumer class action the California courts had allowed the case to proceed despite the arbitration clause. The California courts hung their hats on the clause in the agreement adopting the "law of California" which at the time of drafting of the agreement barred forced arbitration of consumer class claims. This bar was subsequently held to be a violation of the Federal Arbitration Act. The bottom line on the case was the the Supreme Court would not permit the parties to incorporate California law that was *invalid as a matter of federal law*, and thus the plaintiffs were forced into arbitration. Among other things the Court ruled that "[t]he

view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept as a general matter and to apply in other contexts." Slip op. at 9. Thus the Court found that California was treating arbitration agreements differently than other contracts and this is prohibited by the FAA. Notably Iowa law prohibits arbitration of employer/employee claims, but this case makes clear even incorporating Iowa law will not breathe life into such a ban - unless it's specifically referenced in which case why have an arbitration agreement to begin with. Iowa Code § 679A.1(b); *Polk County Secondary Roads v. Iowa Civil Rights Commission*, 468 N.W.2d 811 (Iowa 1991); *Heaberlin Farms, Inc. v. IGF Insurance Co.,* 641 N.W.2d 816 (Iowa 2002).

***Campbell-Ewald Co. v. Gomez* No. 14-857 (USCC 1/20/2016)**

(https://www.supremecourt.gov/opinions/15pdf/14-857%20-%20new_gfbi.pdf)

In this class action alleging damages based on unwanted mass text messages, in violation of the Telephone Consumer Protection Act, the defendant offered full relief to the Plaintiff under rule 68. The Plaintiff rejected the offer, and the defendant now argues that no case or controversy remains and that there is no continuing federal jurisdiction over the class claim. In a 6-3 decision the Supreme Court decided otherwise. The essence of the holding and rationale is simply that a rejected offer has no legal effect on the adversarial position of the parties. The Court expressly adopted the reasoning of Justice Kagan in *Genesis HealthCare Corp. v. Symczyk*, (2013):

> When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains justwhat it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.' *Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill,* 119 U. S. 149, 151 (1886). Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that '[a]n unaccepted offer is considered withdrawn.' Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted."

Slip op. at 7-8.

IOWA APPELLATE COURT CASES

***Anderson v. State*, No. 15-0212 (Iowa App.10-28-2015)**

http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/Recent_Opinions/20151028/15-0212.pdf

Anderson brought suit against the State, the Iowa Senate, the Iowa Senate Republican Caucus and certain individuals under the Iowa Civil Rights Act

for sex discrimination and sexual harassment. The State moved to dismiss on the ground that the Plaintiff failed to *plead* that she complied with the exhaustion requirements of the ICRA. Not that she didn't comply with them, that she failed to plead them. The motion was granted and this appeal followed.

On the pleading issue the State argued that the Court "may not 'speculate as to non-pleaded facts,' including a plaintiff's compliance with procedural requirements such as those found in Iowa Code section 216.16" Slip op. at 5. The Court deemed this antithetical to the purpose of Iowa's notice pleading. The Court found not legal basis for the argument and remarked that "[t]he State's interpretation of our notice pleading requirements defeats the policy behind our rules of pleading: to secure a just, speedy, and inexpensive determination of all controversies on their merits." Slip op. at 5 (internal quotations omitted). In short, "[t]he pleading gave the State fair notice of the claims asserted and permitted it to adequately respond" and "[n]othing more was required." Slip op. at 7. Not discussed by the Court, because really nothing more was necessary, is the weirdness that if the State had succeeded a plaintiff who neither plead nor exhausted administrative remedies could always go back and get a RTS, file suit, and go forward, but a Plaintiff who exhausted but only failed to plead would not have this option, the 90 days having run, if that Plaintiff were dismissed.

The more substantive issue was whether the Iowa Senate and the Iowa Senate Republican Caucus are "persons" under the ICRA. The Court rejected the argument that they were not based on the common meaning of the word "persons" and the directive to broadly construe the ICRA. The Court also noted that "the low bar of our notice pleading standard applies to the State's claim at this pre-answer stage of the proceedings," although it is not obvious what difference this makes on the pure legal issue of who is a "person."

By so ruling on "persons" the Court thus avoids the issue of whether legislative employees have an implied cause of action under Iowa Code §2.11, which incorporates the anti-harassment provisions of Iowa Code §19B.12 and makes them applicable to "full-time, part-time, and temporary employees, including, but not limited to, interns, clerks, and pages." Iowa Code§2.11. Interestingly, Code §2.11 requires the legislature to "implement the sexual harassment prohibitions and grievance, violation, and disposition procedures of section 19B.12" but then provides "[t]his section does not supersede the remedies provided under chapter 216." Obviously if legislative workers were not expected to able to invoke the protection of 216 the section would not need to take care to preserve those remedies.

***McQuistion v. City of Clinton*, No. 14-0413 (Iowa 12-24-2016)**

(http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20151224/14-0413.pdf)

This case deals with the issue of when, and under what conditions, a pregnant employee must be give reasonable accommodation of her pregnancy.

The Plaintiff works as an engineer and paramedic for the City of Clinton at the fire department. After becoming pregnant she requested light duty for the duration of her pregnancy. " The requested accommodation was based

solely on her pregnancy and the nature of her job and not on any underlying pregnancy-related medical condition amounting to disability." Slip op. at 3. The City accommodated on-the-job injuries with light duty assignments, and also pregnant police officers were eligible for light duty under the CBA. Otherwise disabilities were accommodated, but light duty was not available. The Plaintiff continued to perform her regular duties as the Fire Chief's attempt to get City approval for light duty had been unsuccessful. The Plaintiff eventually became unable to perform her regular duties and her protective gear no longer fit. She took accrued paid leave and then went on unpaid leave. After delivery she returned to work. She now sues for the lost pay under the ICRA and the constitution.

"The district court found McQuistion was unable to show an inference of discrimination under the Iowa Civil Rights Act because the City policy denies light work to both pregnant employees and nonpregnant disabled employees who are not injured on the job." Slip op. at 6. The same reasoning defeated the other theories of recovery.

On appeal the first reviewing the Iowa precedent establishing that " under the Iowa Civil Rights Act, terms and conditions under an employment disability policy must apply to pregnant employees the same as they apply to all other employees." Slip op. at 9. The Court then discussed *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 191 L. Ed. 2d 279 (2015) which had refused to mandate *more favorable* treatment for pregnant workers. Instead *Young* applied essentially a disparate impact analysis to policies, such as no light duty for non-work injuries, that might adverse affect pregnant workers at a higher rate than non-pregnant workers. " Accordingly, the PDA does not mandate employers provide pregnant employees with benefits such as light-duty assignments, but rather requires an examination of the facts and circumstances in each individual case whether the employer was treating the pregnant employee the same as others “similar in their ability or inability to work.” Slip op. at 12.

Turning to Iowa law the Court note that the ICRA states " employment policies and practices involving matters such as the commencement and duration of leave . . . and other benefits and privileges . . . shall be applied to a disability due to the employee’s pregnancy . . . on the same terms and conditions as they are applied to other temporary disabilities." Iowa Code 216.6(2)(b). The Court held that his only means that *if* a disability is caused by pregnancy it must be treated the same under the employer's policies as any other disability. But here the question is "whether an employment plan for benefits complies with the statutory requirement to be applicable to disabilities due to pregnancy on the same terms and conditions as other temporary disabilities when a gender-neutral term or condition applicable to all disabilities under the plan excludes a class of temporary disabilities that includes disabilities caused by pregnancy." Slip op. at 17. That question is answered, says the Court, by applying the usual discrimination analysis: if the Plaintiff can prove the policies, or their application, intentionally discriminate on pregnancy then a violation is shown. The Court then remanded to apply the standards articulated in *Young.*

The Court then went on to find sufficiently rationale reasons for the difference in treatment among injured or temporarily disabled workers to defeat any equal protection challenge.

***Lee v. State*, No. 14-1386 (Iowa 2-12-2016)**

(http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20160212/14-1386.pdf)

In this FMLA self-care case the issue remaining on this third appeal is attorney fees. The first time through the case ultimately resulted in no damages for the Plaintiff since the State remained immune to FMLA suits when the claim is based on the "self-care" provisions. *Lee v. State* (Lee I), 815 N.W.2d 731, 738–39 (Iowa 2012). But after the verdict in *Lee I* the district court had also ordered reinstatement as well as training on FMLA for state employees. Eventually the judgment was stayed pending the outcome of the appeal, and in the end the State was immune to money relief. On remand, since the stay was lifted, reinstatement proceeded and back wages were paid from the date of the original order of reinstatement. This, of course, is because regardless of immunity prospective relief can be granted. *Lee v. State* (Lee II), 844 N.W.2d 668(Iowa 2014). After this award and order was affirmed in *Lee II* the parties moved on - to the attorney fees of course!

The main issue was whether fees incurred to achieve prospective relief, which is not barred by immunity, are nevertheless barred by immunity. The Court discussed the precedent - all of it - and held "[b]ecause attorney fees constitute reimbursement of expenses incurred in seeking prospective relief, not retroactive liability for prelitigation conduct, courts may award them under *Ex parte Young*." Slip op. at 17. " Accordingly, we conclude state sovereign immunity did not bar the district court from awarding Lee attorney fees and costs she incurred in seeking prospective relief to remedy violations of the self-care provision of the FMLA in her action against state officials under Ex parte Young." Slip op. at 18.

The next step was to address whether the Plaintiff had achieved a judgment under FMLA which would mandate an award of fees. The Court pointed out that the FMLA fee provision does not award fees to prevailing "parties" but only to prevailing "plaintiff's." The Court also held that the fee award is mandatory because the FMLA says that fees "shall" be awarded not that they "may" be awarded as with other fee shifting statutes. All that Lee needs for a fee award is a judgment in her favor on the FMLA claim. Since, in the end, the plaintiff eventually got some relief she is a prevailing party for fee shifting purposes. It does not matter for the purposes of determining a right to *some* fee that some relief was taken away. " [A] party is a prevailing party entitled to attorney fees so long as it won the war, even if it lost a battle or two along the way." Slip op. at 25. The Court then remanded to make sure that no fees were awarded for time spent only on claims that were ultimately not successful.

No doubt we can look forward to another case over the fees spent pursuing the fees case.

***Smith v. ISU*, No. 15-0852 (Iowa App.3-23-2016)**

http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/Recent_Opinions/20160323/15-0852.pdf

This is yet another attorneys fees case. In as much as further review has been granted, and the case submitted to the Supreme Court discussion is limited to the issues on further review.

The Plaintiff had been successful in his intentional infliction case, and in his whistleblower case but had damages reduced by about half by the Supreme Court. The essence of the fees case, then, is what does the reduction in success on the merits mean for the fees. The problem is that the reduction was all on the whistleblower claim, which went from 780K to 150K, and that the whistleblower claim is the sole legal basis for awarding fees. The State sought to reduce fees because (1) some of the work was solely on claims that were either unsuccessful or where fees cannot be recovered (intentional infliction), and (2) because block billing made it hard to separate intentional infliction work from whistleblower work, and (3) lack of success on the whistleblower case.

The Court of Appeal focused on the fact that the whistleblower claim, the sole source of fees, was unsuccessful for lack of causation and that the 150K survived only for failure to preserve error. The district court did not consider these issues and the Court of Appeal vacated the award and remanded to consider this. " On remand, the court should direct Smith's counsel to submit an attorney fee affidavit that better details the amount of time spent on each task, rather than using block billing that specifies only daily activities but does not indicate how much time was spent on each task." Slip op. at 9.

In the application for further review the Plaintiff argued that fees can be awarded under the Whistleblower law with no damages awarded. The plaintiff asserts it is against public policy to limit an award of fees based upon the amount of damages. The Plaintiff further asserts that all that is required to base a fee award on work done on the intentional infliction case is a "common core of facts," arguing that "[d]ue to their inseparable nature *all* of Smith's claims are appropriately viewed as a co-extensive whole." *Application for Further Review*, p. 14.

***Sage v. Innovative Lighting*, No. 15-0783 (Iowa App.5-25-2016)**

http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/Recent_Opinions/20160525/15-0783.pdf

In this "upside down" worker's compensation case the injured worker sues claiming he is **not** an employee and thus free to sue for negligence. Summary judgment was granted to the defense upon the finding that the Plaintiff was an employee and the plaintiff now appeals arguing he was not.

The Defendant Hawkeye "employs 'operators' through a staffing agency, Jacobson Staffing, to gather and package the products from the machines. Hawkeye does not directly employ its operators, but it refers all parties interested in such positions to Jacobson." Slip op. at 2. The contract between Hawkeye and Jacobsen specifies the worker is an employee of Jacobsen but assigns supervisory authority to Hawkeye when working at Hawkeye even if assigned to work outside of the Hawkeye facility. Hawkeye can reject a worker assigned to it. Hawkeye provides Jacobsen workers with lunch, and a holiday gift, but Jacobsen workers do not wear clothing with the Hawkeye logo. Jacobsen workers submit hours to Hawkeye, like Hawkeye

workers, who certifies the hours and then submits them to Jacobsen for payment. " Hawkeye pays Jacobson based on the number of hours the temporary employees work plus a 45% markup. From the percentage markup Jacobson collects its fee and provides the administrative functions of employment such as unemployment insurance; workers' compensation coverage; medical, dental, and vision insurance; and tax withholdings, for the temporary workers." Slip op. at 3.

The Plaintiff started to work for Jacobsen who assigned him to Hawkeye where he was trained by Hawkeye workers. He was injured when hot plastic landed on the back of his hand. He received a WC settlement from Jacobsen's carrier. Hawkeye did not file a first report of injury or report the injury to OSHA. When the attorney Plaintiff wrote a letter to Hawkeye mentioning a possible 3rd party gross negligence case the HR at Hawkeye responded that Plaintiff was not a Hawkeye employee and WC inquiries should be referred to Jacobsen.

The Plaintiff then sued Hawkeye for negligence. Hawkeye was granted summary judgment on the ground that the Plaintiff was an employee who was barred from suing for negligence. On appeal the Court of Appeals reverses.

Since there was no express contract of employment, the issue was " whether it can be determined as a matter of law that Hawkeye did or did not have an implied employment contract with Sager, which would make this issue ripe for summary judgment, or whether reasonable minds could draw different conclusions from the facts, such that the issue should be submitted to a factfinder, not decided as a matter of law." Slip op. at 7. The Court noted that in general the presumption is that the general employer - Jacobsen - remains the sole employer.

In such cases the Court looks to evidence of the *employee's* consent to the employment relationship. The five factors in a "borrowed servant" case are " (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) the identity of the employer as the authority in charge of the work or for whose benefit it is performed." Slip op. at 7-8. But the key remains the intent to form a contract of employment.

After discussing in some detail the facts in the precedent, the Court noted that the written contract here did little to illuminate Hawkeye's intent since it was drafted by Jacobsen. The Court then repeated the facts detailed above mentioning that Hawkeye could reject workers, but not terminate them, and detailing the payment arrangements. As for the Plaintiff's intent he asserts he understood he was to work for Jacobsen, but on the other hand it is clear he applied at Jacobsen so he could get job at Hawkeye. The Court then, of course, mentioned the HR personnel's disclaimer of any employment relationship. Given these conflicts the Court ultimately determined the matter could not be resolved on summary judgment and reversed and remanded. " While the facts are largely undisputed, the inferences that can be drawn from those facts are not." Slip op. at 12.

***Wright v. State*, No. 15-0723 (Iowa App.6-15-2016)**

http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/Recent_Opinions/20160615/15-0782.pdf

A state trooper who is not covered by a collective bargaining agreement is not subject to discharge, or demotion, or disciplinary loss of pay without having a right to a hearing before the Iowa Employment Appeal Board as provided for in Code section 80.15. The Plaintiff had risen to the rank of Sergeant until he was demoted back t a Trooper III for asserted disciplinary reasons. He was informed "You have the right to appeal this action. A copy of this notice will be filed with the Employment Appeal Board as the statement of charges set forth in [Iowa Code] section 80.15 [(2011)]. Pursuant to the Board's rules, you have 30 days to file an appeal with the Board." Slip op. at 2. The notice was filed with EAB and Wright retired rather than file within the 30 days provided for by EAB regulation.

Wright sued claiming constructive discharge. He claimed the demotion was retaliatory in contravention of public policy and that the State failed to follow the section 80.15 process. The case was dismissed on summary judgment and the issue before the Court of Appeals was whether the Plaintiff had exhausted his remedies under Code section 80.15.

Citing to EAB rules (since clarified by amendment) the Court found that there was a right to a hearing on the demotion, but only if the Plaintiff filed an appeal with the EAB within 30 days of the notice that he was being demoted. Slip op. at 6. Without much discussion the Court rejected an argument that the EAB hearing must precede the notice to dismiss. Slip op. at 6. The Court then held " Section 80.15 provided an administrative remedy to Wright, and there is nothing in the record to show this remedy was inadequate. We find no error in the district court's determination there was an adequate administrative remedy for the claimed wrong... Additionally, section 80.15 and rule 486-6.1(6) require the administrative remedy to be exhausted before allowing judicial review. See id. Since these requirements have not been met, the doctrine of exhaustion of administrative remedies applies in this case." Slip op. at 6-7.

It is questionable whether this case applies much outside the state trooper context. One big difference between these cases and typical civil service appeals is that with EAB hearing the notice of discipline goes out, the trooper is demoted, suspended, etc. but then if an appeal is filed the trooper continues to be paid and receive all benefits. For example when Rodney Hickok was fired, and then contested the termination before the Board he received full pay, insurance, accrual of seniority, pension contributions, etc. etc. during the pendency of the case until a final decision was issued affirming the dismissal. With 80.15 cases, then, it is much more like a paid suspension than a discharge. And demotion is more like a reassignment of duties where pay and benefits is unaffected. Thus the EAB has no authority, and needs not authority, to award retroactive relief. The worker should basically remain legally unharmed pending the outcome of the appeal.

Further review on this case was denied August 29.

***Viafeld v. Engels*, No. 15-1663 (Iowa App.7-27-2016)**

http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/Recent_Opinions/20160727/15-1663.pdf

In this unpaid wages claim the employer won because the wages were not actually due. "Engels argues Viafield failed to pay him wages in the form of unused 'paid time off' that he had accrued prior to his termination." Slip op. at 2. The employer had employee handbooks that described its PTO policy. The policy set out how PTO was calculated and that employees "shall be paid regular pay for all unused accrued leave, providing that they give a proper two weeks['] notice of resignation." Slip op at 2. Where termination was for just cause the CEO decided if unused accrued PTO would be paid.

The Employer fired the Plaintiff while he had 19K in unused PTO, but the employer never paid this. When the Employer eventually sued for breach of contract and fraudulent conversion, the worker countersued for his 19K. The worker won on the main suit, but lost on the countersuit. The countersuit failed because the jury found the termination was for "just cause" and the trial court found this mean the unpaid PTO was not due under the handbook. On appeal the worker argues that the handbook was not a valid contract, and that he never got the thing.

The Court of Appeals agreed the handbook did not create a contract, but this did not alter the outcome. The fact is the law does not require the payment of accrued but unpaid PTO [vacation] unless the employer's policies say that it will pay such amounts upon separation. "Section 91A.2(7)(b) provides an employee is entitled to payment of wages due to an employee 'under an agreement with the employer or under a policy of the employer.'" Slip op. at 5. Since the evidence supported the finding that the worker got the handbook, "[t]here is no evidence of an agreement or employment policy that required Viafield to pay Engels his unused accrued PTO as wages upon termination." and thus the worker failed in his burden of proving that the unpaid wages were actually due.

EIGHTH CIRCUIT CASES

All 8th circuit cases since last years update. More significant cases are indicated with an arrow.
When a number ending in "pdf" follows an Eighth Circuit cite this number can be used to determine the URL for the case by http://www.ca8.uscourts.gov/opndir/YY/MM/NUMBER. Thus for a case decided on 4/30/98 with case number 971234P.pdf the URL would be http://www.ca8.uscourts.gov/opndir/98/04/971234P.pdf.

Standards For A Discrimination Plaintiff To Survive Summary Judgment And Present A Submissible Case

Brown v. Diversified Distribution, (8th Cir. 09/04/2015)(142685P.pdf)(Murphy, Author, with Riley and Bright) – The Plaintiff brings an FMLA entitlement claim based on being put in a lower position when she returned from maternity leave, and an FMLA discrimination claim based on her subsequent dismissal. The Court allowed the entitlement claim for the simple reason that the defense basically admitted it, but tried to limit entitlement to just the granting of leave. Naturally reinstatement is also covered so summary judgment on the entitlement claim was reversed. As for discrimination, the Court also reversed the grant of summary judgment. The two key facts working against the employer was how long it had known about the grounds for the decision, and that it implemented that decision only 5 days after she complained about not being reinstated to her former position. The Court found that "because only five days elapsed between Brown's FMLA complaint and her termination, temporal

proximity provides strong support for an inference of retaliatory intent." Slip op. at 10. Also "where an employer has known about its stated reason for taking adverse action against an employee "for an extended period of time," but only acts after the employee engages in protected activity, the employer's earlier inaction supports an inference of pretext." Slip op. at 11. The FMLA causes of action were thus reinstated.

Melvin Smith v. URS Corporation, (8th Cir. 10/14/2015) (133645P.pdf)(Melloy, Author, with Benton and Shepherd) – The Circuit Court reversed a grant of summary judgment to the defense in the race discrimination case. The plaintiff, an African-American man, applied for and received a job at level 12. A White man then applied for the same job but was hired a level higher. Then another African-American man applied for the level 12 job but was hired at a lower pay grade. There was no meaningful difference in qualifications. When the Plaintiff found out he complained and asked for more money but supervisor Howard indicated that the client might not like that. Then as the project wound down Howard ranked employee, but without a discernable metric, and the two African-American men were ranked lower than the White man and another White man. Yet all qualification and experience were similar, and the two African-American men had clean records while the two White men had been disciplined. The difference in job descriptions were slight, as was any difference in experience or training, and "URS has not explained how any differences that may exist are material.' Slip op. at 11. For example, "URS asserts that Griffin had more management experience without explaining the nature of this experience or its relevance to the training positions." *Id.* And it certainly cannot have helped the moving party that the Court felt moved to write " We also note the briefs and summary judgment record in this regard are extremely confusing." Slip op. at 11. The Court also found support for the Plaintiff in the fact tat Howard initially denied involvement in the layoff ranking when it is clear it was his doing. This could reasonably be taken as evidence of a desire to hide an impermissible motive.

Cosby v. Steak N Shake, (8th Cir. 11/04/2015)(151052P.pdf) (Murphy, Author, Melloy and Smith) – The Plaintiff was dismissed on summary judgment on his claim that he was demoted because of his disability, and then retaliated against following medical leave. On the demotion the key is whether the Employer knew about the disability at the time of demotion. The Employer claimed that it told the Plaintiff at a meeting on November 3, 2010 of the demotion. The Plaintiff alleged the meeting never took place. The Circuit Court effectively resolved the factual issue against the Plaintiff because it was hard to believe him. "Cosby claims that this November 3 meeting never occurred, but an entry on Pfeiffer's calendar lists a November 3 meeting. Moreover, Cosby signed a letter stating that he had attended it. Thus, Cosby's subsequent unsupported assertion is not sufficient to create a genuine issue of material fact." Slip op. at 5. The Court thus concluded the decision predated knowledge of the disability and that no causal link could be shown. The Court found that the Plaintiff could no show a couple disciplines made his working conditions intolerable and moreover he failed to give the Employer a reasonable opportunity to remedy the situation.

Noreen v. PharMerica Corporation (8th Cir. 08/19/2016) (152917P.pdf)(Colloton, Author, Riley, Kelly) - In this RIF case the Court affirms defense summary judgment. The first interesting twist in the case

is that in making the RIF the company deviated from its own guidelines. As a result the Plaintiff was laid off when he should not have been, and yet no reasonable inference of discrimination results. This is because the deviation from the written guidelines was company wide.

The employer supplied pharmacists to other companies and lost one of its contracts. As a result it implemented a RIF. The employer's system was supposed to divide workers into main categories like "Outstanding", "Meets Expectations," "Needs Improvement," or "Stinky Pants" (or something like that). Then within the main categories subgrouping took place by assigning numeric scores to certain factors like "productivity," and "versatility." The subgroups was supposed to serve as the means to rank main categories. Layoff would then take place by moving from bottom to top: bottom of the Stinky Pants, then once all those stinkers are gone, more on the bottom of Needs Improvement, and so on. What the Employer did, and this was all the time, was to lump together everyone and rank them with the subgrouping numbers only, and then go from the bottom up. You'd hope that all the Stinky Pants would rank under all the Needs IMprovement when scored on work related subgrouping but it was not to be. Of course, this shows the subjectivity of such fake numbers. In any event the result is that while the Plaintiff Meet Expectations he was laid off while a Needs Improvement was kept.

Normally this would spell trouble for the Employer, but the key here was that this mistake was done everywhere. " This court has recognized that an employer’s failure to follow its own policies may support an inference of discriminatory motive when the departure affects only one person. ... But we also have explained that departures from policy do not support an inference of discrimination when the variation is applied more generally." Slip op. at 8. Distinguishing precedent the Court noted " Unlike Hilde, where the employer manipulated only Hilde’s scores, ...PharMerica consistently sub-ranked all pharmacists together and consistently relied on those sub-rankings when making termination decisions" and there really isn't any reason to think this was a targeted error for the purposes of age discrimination.

Following up on 8th Circuit precedent the Plaintiff cited a decrease in average age due to the layoff. The Court then sensibly wrote " The mere recitation of statistics, however, without some evidence tending to show that they indicate a meaningful phenomenon, does not show discriminatory motive. ... A decrease in average age by itself does not support an inference of discrimination based on age." Slip op. at 9. Of course the Court in the past has relied on the *failure* to show a decrease in average age to grant summary judgment. Those hoping from some statistical sophistication on this at long last had their hopes dashed when the Court then launched into yet another discussion of average ages. It then found against the Plaintiff as his statistics were not indicative of any discriminatory phenomenon.

The Court again treats as significant proof concerning the percentage of protected age employees before and after the layoff. This ignores that a RIF that involves a small percentage of total workers could intentionally target only protected workers without affecting the average age significantly. An employer of 2000 workers, with 1600 between 20 and 40, 300 between 40 and 50, and 100 between 50 and 60, could intentionally layoff all 50 year olds and reduce its average age by only a very small amount (e.g. from 33.5 to 32.3 assuming symmetry within bands for ease of

calculation). Unusually asymmetrical distribution of ages, which could be caused by age discrimination, would also tend to undermine the meaningfulness of the before/after snapshot. And once we start throwing in rehires the picture gets even more muddle in as much as a few really old hires could mask an overall pattern of hiring only young workers. By itself the mean age before and after layoff is, mathematically if not legally, largely meaningless.

A simple statistic that is more enlightening would simply to say "What was the overall layoff rate?" And then use mathematical methods to assess whether that rate was higher for those over a given age than the overall number. The fundamental problem with using averages it treats discrimination against people over 40 as if it was more prohibited if the people were a lot over 40 and less prohibited the closer they get to 40. But protection is binary not graded.

That a Court is subject to criticism for poor or muddled analysis is not, unfortunately, altogether rare. But rare it is, or should be, that they engage in mathematically demonstrable bad thinking. Yet the 8th Circuit in this case continues is tradition of citing nearly meaningless statistics as if they were enlightening. In the case of *EEOC v. McDonnell Douglas Corp*., 191 F.3d 948, 952 (8th Cir. 1999) the Court wrote "We have previously recognized, however, that an important statistic to consider in the RIF context is the difference in the percentage of older employees in the work force before and after the RIF" and cited cases from as far back as 1985. As set out above, a process that compares means of pools of numbers and tries to draw a conclusion about what happened to the typical number is, well, silly. I am just as enthusiastic about *stare decisis* as the next fellow but surely one is not required, a la Winston Smith, to declare that "2+2=5" simply because judicial oracles so decree.

Blomker v. Sally Jewell, Sec't Dept. of Interior, (8th Cir. 08/05/2016) (151787P.pdf) (Smith, Author, with Loken and Beam) - This is not really a summary judgment case. It is a 12(b)(6) dismissal on the pleadings, but reads very much like a summary judgment decision. It is this that drew a sharp dissent from Judge Beam. The Petition alleged sexual harassment and retaliation.

The Petition in the case alleged seven incidents over two years by two different men. Two of the incidents alleged visible erections as the primary feature. One the man put his hand uncomfortably close to her chest and said "I can put a button right here." In one while talking with the Plaintiff a man picked at a seam in his crotch. One was digging noisily through a candy jar, one was blocking a cubicle while on the phone, and the last was standing too close behind her. After citing the law on pleading, and on sexual harassment the Court dismissed the Petition *on the pleadings*. " Accepting as true the factual allegations contained in Blomker's complaint and granting her the benefit of all reasonable inferences that can be drawn from those allegations...we find, as a matter of law, that the facts alleged in Blomker's complaint fail to show harassment so severe or pervasive that they satisfy the high threshold for a sexual harassment claim based on hostile work environment." Slip op. at 8. The Court, of course, cited the ever popular *Duncan v. Gen. Motors Corp*., 300 F.3d 928, 934–35 (8th Cir. 2002) and also noted " none of the alleged incidents involved actual touching. And some of the allegations, such as Will playing with candy, are not definitively sexual in nature based on the facts alleged." Slip op. at 10.

In addition the Petition attached the letter of termination. According to this letter the Plaintiff was fired for "(1) calling her supervisor 'a god-d***ed f***ing liar' and grabbing a supervisor's arm and twisting it, (2) stating that she would send copies of e-mails in her possession to the Equal Employment Opportunity Commission (EEOC) and the court, and (3) copying unnecessary people on e-mails after repeated warnings to cease doing so." Slip op. at 2. The Court acknowledged that "[t]wo of the these specifications [(reasons for discharge)] mention her intent to file an EEO complaint." Slip op. at 12. But this is a federal employer and so the case must meet the federal "but for" standard for retaliation cases. *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). On this the arm twisting did the Plaintiff in because she did not "plausibly allege" that the retaliation rather than the arm twisting was the reason for the termination. Apparently the Court took the letter attached to the Petition to establish as a matter of law that the Plaintiff would have been fired for the arm twisting alone. This seems plausible but how is plausibility on something like this any different than the Court just making a credibility determination as a matter of law? Thus Judge Beam found the whole thing to be premature at this stage.

Some additional background on this termination is found in the review of the unemployment case found online:
https://mn.gov/law-library-stat/archive/ctapun/2015/opa150046-082415.pdf

Non-Summary Judgment/Verdict Review Cases

Acosta v. Tyson Foods, (8th Cir. 08/26/2015)(141582P.pdf)(Colloton, Author, Beam and Kelly) – The Plaintiffs brought a state law unpaid wages and FLSA claim concerning pre- and post- shift work. The Employer had agreed to pay up to four minutes of such work but the Plaintiffs claim uncompensated work (a couple minutes each person, each day) in excess of the four minutes. Although the Plaintiffs plead a "collective action" under the FLSA "none of the plaintiffs timely filed consent in writing to become a party, pursuant to 29 U.S.C. §§ 216(b) and 256,and the district court never certified a collective action." Slip op. at 3. The Circuit Court found that since a collective action was plead, since collective action relief was sought, and since the Plaintiff's prayed to proceed as a collective action then the Plaintiff's had to satisfy the collective action requirement of filing a consent to become a party. The Court rejected the Plaintiff's argument that he really filed an individual action that never became a collective action. "That contention rings hollow when the complaint on file continued to allege a collective action, and Acosta filed consents from other employees several weeks after the deadline for a certification motion—a filing that would have been nonsensical if the complaint alleged an individual action. Acosta never made clear that he intended to convert the collective action pleaded in the complaint into an individual action on behalf of himself alone. Therefore, Acosta was required to file a written consent to proceed as a party plaintiff." Slip op. at 5-6. As for the state law claim the Employer only agreed to pay the four minutes and thus could only be liable to pay for those four minutes under the Nebraska statute requiring payment of wages according to agreement. "That the employees might have been underpaid according to the terms of the federal statute, however, does not establish that Tyson previously had agreed to pay the compensation that they seek, such that the employees may recover under the Collection Act." Slip op. at 7.

Hernandez v. Bridgestone Americas Tire, (8th Cir. 08/04/2016)(152042P.pdf)(Per Curiam, Shepherd, Beam and Kelly) - In this Iowa FMLA case the Court taketh and the court giveth back (or vica versa if you are the defense). The Plaintiff worked 12 hour shifts working 36 hours one week, and 48 hours the next, getting paid 42 hours per week (six two much one week, six two little the next). Twelve weeks of leave at 42 hours per week is 504 hours. He also worked overtime shifts. This is done by having tire building sign a sheet asking to work overtime. The Company then selects who is to work overtime base on seniority and who has worked overtime lately, and then posts a list. The workers on the list are then required to work the designated overtime shifts, and are charged for any absence from the required shift. If the employee misses for an FMLA-qualifying reason, the twelve-hour overtime shift is deducted from the employee's FMLA entitlement.

Here the Plaintiff was fired for exceeding his FMLA allotment and this included instances where he was absent for overtime shifts.

The district court granted summary judgment for the defense on the FMLA discrimination, retaliation, and harassment claims but for the Plaintiff on interference. " The court held that absences for missed overtime shifts should not have been deducted from Hernandez's FMLA entitlement because he initially volunteered for the sporadic overtime." Slip op. at 5. The district court reasoned "because BATO treated Hernandez's occasional overtime as voluntary for purposes of calculating his FMLA-leave allotment, it must also treat the overtime hours as voluntary for purposes of deducting hours from his FMLA entitlement." Slip op. at 6. Trial was thus on damages on the FMLA interference. As is traditional both sides appeal, the defense on the grant of summary judgment to the Plaintiff and the Plaintiff on the fees award.

The Circuit Court found that the overtime shifts were mandatory and not voluntary. Although one initially volunteers once you do then you have to show up. Kinda like the army. The Court applied a definition of "voluntary" for these purposes as being "not part of the employee's usual or normal workweek." Slip op. at 9. In this the Court agreed with the district court. It parted ways because "if Hernandez signed up and was selected for overtime, he was then required to work unless he had an excuse. The selected overtime shift became mandatory and was treated as a part of Hernandez's 'usual or normal workweek.'" Slip op. at 10. In addition the final agency rule states that overtime is mandatory " is whether the employee would have been required to work the overtime hours but for the taking of FMLA leave ." Slip op. at 10. Since the Plaintiff would have had to work the overtime shift but for the family care leave it was mandatory overtime. Thus is was correct for the employer to deduct 12 hours for missing mandatory overtime shift for FMLA reasons. But wait, there's more!

"The DOL intended for hours missed for FMLA-qualifying reasons to be deducted from the employee's FMLA-leave entitlement only if those hours were included in the employee's leave allotment." Slip op. at 11. This means when calculating what the Plaintiff's "week" was the employer was required to account for overtime, and then multiply by 12 to get his entire FMLA hours allotment. " Thus, instead of holding that 'BATO inappropriately deducted from plaintiff's annual allotment for scheduled overtime shifts plaintiff missed due to an FMLA-qualifying purpose,' as the district court

held, we now hold that BATO interfered with Hernandez's rights under the FMLA by improperly calculating his FMLA-leave entitlement." Slip op. at 12. Since the schedule varied the employer was required to come up with a 12 month average under 29 CFR § 825.205(b)(3).

On fees the only notable ruling, following its precedent from last year, was to make the cost of computerized legal research compensable.

As an aside, the Court states that "pays employees who work this schedule for forty-two hours of work each week." Presumably an adjustment for overtime is made. 42 hours for two weeks is 80 hours of regular time and four hours of overtime - two each week. 36 hours one week plus 48 hours the next is 76 hours of regular time and 8 hours of overtime. I presume the Employer accounts for missing 6 hours of regular pay in the check.

Litigating Employment Claims in Federal Court

1:00 p.m. - 2:00 p.m.

Presented by

Hon. Leonard Strand
United States District Judge
for the Northern District of Iowa
320 6th St.
Sioux City, IA 51101

Hon. Helen C. Adams
United States Magistrate Judge
for the Southern District of Iowa
123 E. Walnut St.
Des Moines, IA 50309

Hon. Rebecca Goodgame Ebinger
United States District Judge
for the Southern District of Iowa
123 E. Walnut St.
Des Moines, IA 50309

Hon. CJ Williams
United States Magistrate Judge
for the Northern District of Iowa
111 Seventh Ave. SE
Cedar Rapids, IA 52401

Friday, October 14, 2016

Key Topics in Employment Litigation

Pleadings

1. Common problem in many employment cases is overpleading.
    a. Including every possible claim regardless of strength or weakness.
    b. This happens both with respect to plaintiff's claims and defendant's affirmative defenses.

TIP: Start with the viewpoint of the jury. What will your verdict form and jury instructions look like? Are your claims confusing or could they lead to an inconsistent verdict?

2. Make sure that your claims are clear?
    a. Are you asserting both federal and state claims or just federal claims, etc.?
    b. What relief are you seeking under each claim you have asserted?

Common Discovery Issues

1. Consider early exchange of document production requests before the Rule 26 planning conference. This should allow for a better and more productive discussion at that conference.
2. Focus on and discuss ESI issues often and early.
    a. How many custodians and who are they?
    b. Have litigation holds been put in place.
    c. What is the temporal scope of the search?
    d. What search terms will be used?
    e. Will social media be searched? If so, how will that be handled?

    TIP: Look at the ESI template available on the SDIA website.

3. Common Scope Issues
    a. Geographic and temporal scope of discovery
    b. Personnel files (whose) (what information) (protective order)
4. Comparator issues
    a. Who is an appropriate comparator?
        i. *Philip v. Ford Motor Co.,* 413 F.3d 766,768 (8th Cir. 2005)
        ii. *Pye v. Nu Aire, Inc.,* 641 F.3d 1011, 1019 (8th Cir. 2011)
    b. Consider use of sampling
    c. Consider use of coded information
5. Is a psychological examination of plaintiff appropriate?

Summary Judgment Motions

1. Think about the motion from the court's perspective. What information and in what format will be the most beneficial to the court.
2. If there are genuine material facts in dispute, don't file the motion. We will figure it out.
3. If after discovery, you realize that some of the claims or defenses are weak, dismiss them and don't make opposing counsel and the court wade through a motion to get to the same point (dismissal of the claim). Concede when appropriate. It helps you build credibility with the court.

Motions in Limine

1. Make sure you provide the court with adequate information to decide the issue.
2. If your issue involves exhibits or other documents, make sure that you provide them to the court as part of the motion.
3. Make your motions narrow and note the Rule of Evidence that applies.
4. In many employment cases, context does matter. This is especially true in harassment cases.
    a. *Oncale v. Sundowner Offshore Services, Inc., et al.*, 523 U.S. 75 (1998) (The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all of the circumstances. That inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing and illegal harassment.)

Trial

1. Do you really always want a jury trial?
    a. How likeable is your client?
    b. How likeable are the other side's witnesses?
    c. How complicated/complex are the issues in this case?
    d. What kind and amount of damages are you requesting?
2. Is bifurcation appropriate?
    a. After-acquired evidence doctrine
    b. Punitive damages

Damages

1. Emotional distress damages
2. Punitive damages
3. Back pay
4. Reinstatement/front pay
5. Other injunctive relief

Court Statistics

A. <u>SDIA Federal District Court Case Status and Updates</u>

1. Summary

Since January 1, 2013 approximately 249 employment-related cases were filed in the U.S. District Court for the Southern District of Iowa. As of August 31, 2016 there were approximately 60 employment-related cases pending (a few of which had settled but had not been closed yet).[1]

2. Overall breakdown:

a. By case type (based on filing codes):

FMLA	23%
Title VII	22%
ADA	17%
FLSA	11%
Wrongful Termination	6%
ADEA	5%
§ 1983	4%
FELA	2%
Equal Pay	2%
State Law Claims	2%
Miscellaneous Claims[2]	6%

[1] All figures are rough estimates based on chambers' review of the docket and filing codes used by filers or Clerk's office case managers.

[2] Bad faith workers' compensation, NLRA, breach of contract, 42 U.S.C. § 1981, claims for confirmation of results of labor-related arbitration proceedings, labor agreement disputes, SOX claims, FRSA claim.

b. By disposition:

Settlement	47%
Dispositive Motion (for defendants)	12%
Trial	2%
Other Disposition[3]	15%
Remain pending	24%

3. Current Cases by type:

Title VII	22%
FMLA	20%
FLSA	15%
ADA	10%
FELA	7%
§ 1983	7%
Wrongful Termination	5%
ADEA	3%
Equal Pay	3%
§ 1981	3%
State Law Claims	3%
Workers Comp	2%

4. Trial Results

a. Of the four cases which went to trial, one resulted in verdict for defendant (a retrial of a remanded case).

b. Three plaintiff's verdicts: one (an FMLA case) for $75,681 in compensatory damages and $75,681 in liquidated damages (currently on appeal); the second (a FELA case) for $75,000; and a third (an FRSA case) for a total of $500,000 in damages – post-trial motions are pending.

[3] Dismissal based on venue, jurisdiction, failure to prosecute, sanction for failing to comply with court orders; remanded back to state court; transferred to another court; consolidated with pending cases; consent judgment; arbitration award affirmed; voluntary dismissal.

B. NDIA Federal District Court Case Status and Updates

1. Summary

Since January 1, 2013, parties file approximately 143 employment-related cases in the United States District Court for the Northern District of Iowa. As of August 31, 2016, there were approximately 39 employment-related cases pending (a few have settled, but not yet been closed).[4]

2. Overall breakdown:

a. By case type (based on filing codes)

Title VII	50%
ADA	15%
FLSA	10%
FMLA	10%
Wrongful termination	5%
ADEA	3%
§ 1983	1%
FELA	1%
Equal Pay	1%
State Law Claims	2%
Miscellaneous[5]	2%

b. By disposition:

Settlement	41%	
Dispositive motion (for defendants)	15%	
Trial	3%	
Other Disposition[6]		14%
Remaining pending	27%	

[4] All figures are rough estimates based on chambers' review of the docket and filing codes used by filers or the Clerk's office case managers.

[5] This includes NLRA, breach of contracts, and FRSA claims.

[6] Dismissal based on venue, jurisdiction, failure to prosecute, remand to state court, consent judgment, voluntary dismissal.

3. **Current Cases by Type:**

Title VII	38%
ADA	15%
FLSA	10%
FMLA	10%
Wrongful termination	5%
ADEA	3%
§ 1983	2%
FELA	2%
Equal Pay	1%
State Law Claims	2%
Miscellaneous	2%

Q&A

Using Social Media Ethically and Effectively

2:00 p.m. - 3:00 p.m.

Presented by

Timothy Semelroth
RSH Legal
425 2nd St SE
Suite 1140
Cedar Rapids, IA 52401
Phone: 319-409-6575

Friday, October 14, 2016

Social Media in Litigation:
Discovery & Evidentiary Issues

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SOCIAL MEDIA DISCOVERY – Questions and answers about the current state of the law

Q: Is the information from a party's social media account discoverable?

A: Trial courts around the country have repeatedly determined that social media evidence is discoverable. *See* Christopher B. Hopkins & Tracy T. Segal, *Discoverability of Facebook Content in Florida Cases*, 31 No. 2 Trial Advoc. Q, 14(Spring 2012).

Q: But don't people have a right to privacy regarding their social media accounts?

A: The Federal Rules, and equivalent state rules, do not recognize any "privacy" exception to the requirements of discovery (much less a "social networking privacy exception"). *See* Fed. R. Civ. P. 33 advisory committee's note referencing "sensitive interests of confidentiality or privacy" in responding to certain interrogatories but not suggesting a general privacy exception.

Q: Does it make a difference if a party has high privacy settings on his or her social media account?

A: By sharing the content with others - even if only a limited number of specially selected "friends" - the litigant has no reasonable expectation of privacy with respect to the shared content. A user who places information on a social media network, but who also implements the service's privacy settings, does not shield the information from discovery or otherwise place it outside of the court's reach. *See EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

Q: So does that mean that a party always gets full access to the other side's social media account?

A: Most courts have not granted unfettered discovery of a party's social media account. *See Holter v. Wells Fargo and Co.*, 281 F.R.D. 340 (D. Minn. 2011). Pure fishing expeditions are not permitted. *See Abrams v. Pecile*, 83 A.D.3d 527 (1st Dept 2011) and *Root v. Balfour Beatty Construction LLC*, 2014 WL 444005 (Fla. Dist. Ct. App. 2014).

Q: So when is the information from a party's social media account discoverable?

A: Most courts require a factual predicate showing the relevance of what is being sought and showing that additional relevant information is likely hidden behind the privacy settings of a party's social media account. *See e.g. Kregg v. Maldonado*, 98 A.D.3d 1289 (N.Y. App. Div. 4th Dept. 2012; *Thompkins v. Detroit Metro. Airport*, 278 F.R.D. 387 (E.D. Mich. 2012).

Q: How does a party go about getting information from the opposing party's social media account?

A: The usual methods of discovery can be used - informal requests, written interrogatories and document production requests to parties and subpoenas to non-parties. Discovery of information on social networking sites simply requires applying "basic discovery principles in a novel context." *See EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010).

Q: Can a party seek to directly access the other side's social media account?

A: A plaintiff does not have to provide the "defendant with any passwords or user names to any social websites, so that defendant can conduct its own search and review." *Holter v. Wells Fargo and Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011). Another court has held that a blanket request for login information is *per se* unreasonable. *See Trail v. Lesko*, No. GD-10-017249 (Pa. C.C.P. July 12, 2012).

Q: Must a party rely upon the other side's judgment about what social media information it must reveal in discovery?

A: In an effort to guard against overly broad disclosure of a party's social media information, some courts have conducted an *in camera* review prior to production. *See Offenback v. Bowman*, 2011 U.S. Dist. LEXIS 66432 (M.D. Pa. June 22, 2011); *Douglas v. Riverwalk Grill, LLC*, 2012 U.S. Dist. LEXIS 120538 (E.D. Mich. Aug. 24, 2012).

Q: Can a party just skip dealing with the other side and subpoena the social media information directly from the social media site itself?

Discovery requests and trial subpoenas served directly on social media sites will likely be met with objections or even a non-response as courts are not likely to force social media sites to respond to the subpoena in a civil action unless the party to the action has given consent.

SOCIAL MEDIA EVIDENTIARY ISSUES – Eight key rules and one helpful resource

Traditional evidentiary principles provide a starting place for analysis of the admissibility of social media evidence. What follows are the relevant excerpts of eight key Iowa Rules of Evidence to consider when seeking to admit social media evidence along with significant social media cases from other jurisdictions interpreting the Federal Rules of Evidence.

1. Rule 5.104 - Preliminary questions of admissibility

a. Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of rule 5.104(b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

b. Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

e. Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

2. Rule 5.901 - Requirement of authentication or identification

a. General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

> "[A] piece of paper or electronically stored information, without any indication of its creator, source, or custodian may not be authenticated under Federal Rule of Evidence 901." *United States v. O'Keefe*, 537 F. Supp. 2d 14, 20 (D.D.C. 2008)

b. Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Information found on social media sites is susceptible to fraud and manipulation. *See Griffin v. Maryland*, 19 A.3d 415, 426 (Md. App. Ct. 2011).

Electronically stored information "may require greater scrutiny than that required for the authentication of 'hard copy' documents. *Lorraine v. Markel American Ins. Co.,* 241 F.R.D. 534 (D. Md. 2007).

"Precedent holds that the authentication of Internet printouts requires a witness declaration in combination with a document's circumstantial indicia of authenticity (i.e., the date and web address that appear on them) to support a reasonable juror in the belief that the documents are what the declarant says they are. Without either, authentication fails." *Kennerty v. Carrsow-Franklin* (*In re Carrsow-Franklin*), 456 B.R. 753, 756-57 (Bankr. D.S.C. 2011).

3. Rule 5.401 - Definition of "relevant evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Defendants could show photos of plaintiff from a social media site if she testified on direct examination about her emotional distress after the incident. *See Quagliarello v. Dewees*, 2011 U.S. Dist. LEXIS 86914 at 9-10 (E.D. Pa. Aug. 4, 2011).

4. Rule 5.403 - Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Photographs from social networking sites cannot be admitted only to prove bad character. *Quagliarello v. Dewees*, 2011 U.S. Dist. LEXIS 86914 at 7-8 (E.D. Pa. Aug. 4, 2011); *see also Rice v. Reliastar Life Insurance Co.,* 2011 U.S. Dist. LEXIS 32831 (M.D.La. Mar. 29, 2011).

5. Rule 5.801 – Hearsay Definitions

The following definitions apply under this article:

a. Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

b. Declarant. A "declarant" is a person who makes a statement.

c. Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

d. Statements which are not hearsay. The following statements are not hearsay:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

6. Rule 5.803 - Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) ***Present sense impression***
A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) ***Excited utterance***
A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) ***Then existing mental, emotional, or physical condition***
A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(5) ***Recorded recollection***
A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

7. Rule 5.804 - Hearsay exceptions; declarant unavailable

a. Definition of unavailability

"Unavailability as a witness" includes situations in which the declarant:
(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) Is unable to be present or to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity; or
(5) Is absent from the trial or hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

b. Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(2) ***Statement under belief of impending death***
A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statement against interest*
A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history* .
(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, dissolution, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or
(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

8. Rule 5.1003 Admissibility of duplicates ("Best Evidence Rule")

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) under the circumstances, admission of the duplicate would be unfair.

A printout of an instant message chat was admissible as a duplicate under Rule 1003. *See United States v. Nobrega*, 2011 U.S. Dist. LEXIS 55271, at 20-21 (D. Me. May 23, 2011).

Author's Recommendation:

On the topic of admissibility of social media evidence, I highly recommend the excellent and comprehensive legal article: "Authentication of Social Media Evidence," *American Journal of Trial Advocacy*, 36 Am. J. Trial Advoc. 433 (2013).

Its primary author, Maryland U.S. District Court Judge Paul Grimm is widely seen as the one of the most influential judges concerning electronic discovery issues. He is known for several ground breaking decisions in the field including *Lorraine v. Markel (2007),* and *Victor Stanley, Inc. v. Creative Pipe Inc. (2008).*

Discovery of Social Media:
How to Get What You Need . . . Ethically

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5 (Relatively) Recent Cases You Should Know

1. ***Nucci v. Target Corp.,* 2015 WL 71726 (Fla. 4th Dist. App. Jan. 7, 2015)**

Summary:

A Florida appellate court held that a plaintiff must produce over five years' worth of Facebook photos as part of discovery in a slip-and-fall lawsuit against Target Corp. The court concluded that the plaintiff has a "limited privacy interest, if any," in pictures posted on social networking sites, regardless of her privacy settings.

Key Quote:

"From testimony alone, it is often difficult for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a "day in the life" slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully relevant to the damage issues in the lawsuit."

2. ***United States v. Gatson*, District Court of New Jersey Criminal No. 13–705 (December 15, 2014)**

Summary:

A United States District Court Judge in New Jersey ruled that photos from a person's private Instagram account only accessible to approved "friends" can be admitted as evidence even though the photos were discovered by the police using a fake Instagram account.

Key Quote:

"Where Facebook privacy settings allow viewership of postings by 'friends,' the Government may access them through a cooperating witness who is a 'friend' without violating the Fourth Amendment. See *U.S. v. Meregildo* (883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012)(Facebook "friend" was a cooperating witness and allowed law enforcement to access Meregildo's posts regarding his violent acts and gang activity)."

3. ***Williams v. Apria Healthcare and New Hampshire Ins. Co.*** **(Iowa Workers' Compensation Commission File No. 5046557) Ruling on Motion to Compel, filed June 6, 2014.**

Summary:

Iowa Deputy Workers' Compensation Commissioner overruled a motion to compel filed by a defendant employer seeking "all social media posts and pictures" from an injured worker seeking workers' compensation benefits.

Key Quote:

"Requiring claimant to turn over all electronically stored information on his Facebook account is overly broad and unduly burdensome. A reasonable limit must be placed on discovering Facebook information by restricting access to information that is not available to the general public. Claimant has provided defendant with the username. This gives defendant any information that is available to the general public."

4. ***In the Matter of Matthew B. Murray*****, Virginia State Bar Disciplinary Board, Nos. 11-070-088405 and 11-070-088422, July 17, 2013**

Summary:

Matthew B. Murray represented plaintiff Isaiah Lester against defendant Allied Concrete in a wrongful-death action for the loss of Lester's wife after a cement truck crossed the center line. A jury returned a verdict of $8.5 million for Lester.

It was later discovered that Murray had instructed Lester, through his assistant, to "clean up" his Facebook account during discovery, cautioning Lester that: "We do not want blow ups of other pics at trial so please, please clean up your Facebook and MySpace!" Lester deleted 16 photos from his Facebook account—all of which were later recovered by Allied's attorneys. Notably, the recovered material included a picture of Lester with a beer can wearing a T-shirt that read: "I ♥ hot moms."

After the trial court knew the full extent of Murray's behavior, it ordered Murray and Lester to pay $772,000 for Allied's legal fees, and slashed Lester's $8.5 million jury award in half (the Virginia Supreme Court reinstated the full verdict two years later). Murray eventually agreed to a five-year suspension for violating ethics rules governing candor toward the tribunal, fairness to opposing party and counsel, and misconduct.

5. ***Gatto v. United Air Lines*****, 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar. 25, 2013)**

Summary:

A federal magistrate judge in New Jersey sanctioned a personal injury plaintiff for spoliation of evidence after the plaintiff deactivated his Facebook profile after access had been sought by the defendant. Facebook automatically – and irreparably – deleted the plaintiff's account 14 days after the deactivation.

Key Quote:

> "Even if [Gatto] did not intend to permanently deprive the defendants of the information associated with his Facebook account, there is no dispute that [he] intentionally deactivated the account . . . and then fail[ed] to reactive the account within the necessary time period. As a result, defendants . . . have lost access to evidence that is potentially relevant to plaintiff's damages and credibility."

Know Your Revised Agency Rules, Part 2: FLSA Developments

3:00 p.m. - 3:30 p.m.

Presented by

Kendra Hanson
Fredrikson & Byron, P.A.
505 E. Grand Ave.,
Suite 200
Des Moines, IA 50309
Phone: 515-242-8919

Friday, October 14, 2016

Piecing Together the New Wage & Hour Reality

Kendra D. (Hanson) Simmons

Fredrikson & Byron, P.A.

Preview

- Background – Current Law until 11/30/16
- Final Rule – What's New as of 12/1/16
- Importance and Potential Exposure
- Next Steps and Options
- Q&A

Fredrikson & Byron, P.A.

Background

- Fair Labor Standards Act ("FLSA")
- State law
  - Iowa generally tracks FLSA, with some exceptions
- Conflict? Law that gives employee the greatest protection controls.

Fredrikson & Byron, P.A.

Background

- Minimum wage: currently $7.25
- Overtime: time-and-a-half for hours worked over 40 per week unless exempt

Fredrikson & Byron, P.A.

Background

- Covered employer:
  - annual revenue of at least $500,000
  - hospitals, medical or nursing care for residents, schools and preschools, and government agencies

OR

- Covered employee:

Fredrikson & Byron, P.A.

Background

- Covered employee:
  - work involves "interstate commerce" (out-of state phone calls/mail/email, ordering/receiving goods from out of state, handling credit card transactions)
  - Work, communications, etc. that cross state lines
- If covered, default is that EEs are non-exempt.

Fredrikson & Byron, P.A.

Background

Non-exempt employees

- Record hours worked
- Must pay at least minimum wage for all hours worked
- Must pay overtime at 1.5x regular rate of pay for all hours worked over 40 in workweek
- Can pay hourly, salary or other, but most are paid hourly

Background

Exempt employees

- No need to record hours worked
- Not entitled to OT pay
- Must qualify under at least one FLSA exemption

Background

- Primary FLSA Exemptions
  - Executive exemption
  - Administrative exemption
  - Professional exemption
  - Computer exemption
  - Highly compensated exemption

Background

Executive Exemption

- Annualized salary of at least $23,660 ($455/week); AND
- Required job duties
  - Primary duty of managing enterprise/recognized department
  - Customarily and regularly direct the work of at least two other employees
  - Hiring/firing authority or at least some influence over status change

Fredrikson & Byron, P.A.

Background

Administrative Exemption

- Annualized salary (or fee basis) of at least $23,660 ($455/week); AND
- Required job duties
  - Primarily perform office/non-manual labor directly related to management/general business operations
  - Discretion and independent judgment on matters of significance

Fredrikson & Byron, P.A.

Background

Professional Exemption

- Annualized salary (or fee basis) of at least $23,660 ($455/week); AND
- Required job duties
  - Advanced knowledge in field acquired by prolonged course of study; predominantly intellectual in character; discretion and independent judgment
  - OR work requiring invention, imagination, originality or talent in recognized field of artistic or creative endeavor

Fredrikson & Byron, P.A.

Background

Computer Exemption

- Annualized salary (or fee basis) of at least $23,660 ($455/week) *OR* hourly rate of at least $27.63; AND
- Required job duties
  - High-level software engineering or other high-level computer activities (e.g., not help desk)

Background

Highly Compensated Exemption

- Annualized salary (or fee basis) of at least $23,660 ($455/week);
- Total annual compensation of at least $100,000; AND
- Required exempt job duty.

Background

- Other exemptions
  - Outside sales people (e.g., pharmaceutical sales reps)
  - Trainees/interns
  - Certain agricultural workers

What's New as of 12/1/16

- Exempt Employees:
  - No change in the required job duties
  - Big change in the required salary level

New Required Salary

- As of 12/1/16*:
  - Annual Salary: $47,476
  - Weekly Salary: $913
  - Bi-weekly Salary: $1,826
  - Semi-monthly Salary: $1,978
  - Monthly Salary: $3,956
- Automatic updates of salary threshold starting in 2020

New Required Salary

- The new salary amount:
  - Based on the "40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region, exclusive of board, lodging or other facilities."
- Changed from proposed basis of average earnings of all workers nationally

New Required Salary

- Up to 10% can be
  - Nondiscretionary bonuses
  - Incentives
  - Commissions
- Which must be paid
  - No less than quarterly
  - No later than first pay period after end of a quarter

New Required Salary

- Must receive the minimum weekly salary amount ($913)
- Exempt EE also may receive additional pay:
  - Commission on sales
  - Percentage of sales or profits
  - Extra pay for extra hours worked
    - Hourly pay, flat sum, bonus, time and a half

Highly Compensated EEs

- FLSA
  - $134,004 total annual compensation (with weekly salary of $913), AND
  - At least one exempt duty

New Required Salary

- Special rules for
  - American Samoa
    - $767 per week as of 12/1/16
  - Motion picture producing industry
    - $1,397 per week as of 12/1/16
  - Computer employees:
    - $27.63 per hour
- Puerto Rico: 2-year delay

New Required Salary

- Special rules for
  - Administrative EEs of Educational Establishments:
    - Salary or fee equivalent of $913/week, OR
    - Salary at least equal to the entrance salary for teachers in the educational establishment by which employed.
- Teachers (29 CFR 541.303), physicians and attorneys (29 CFR 541.304) are not covered by the salary requirements.

New Required Salary

- Beginning 1/1/20 and every 3 years thereafter:
  - The Secretary of Labor will update
  - Must be published in the Federal Register by 150 days before the January 1st effective date (August 3rd of the prior calendar year)
- Change from annual update originally proposed

New Required Salary

- Salary basis rules still apply:
  - No deduction for quality or quantity
  - Full weekly salary regardless of hours worked
  - No salary for week if perform no work
  - No deduction for ER-caused absences

New Required Salary

- Be sure you include in the employee handbook/personnel manual:
  - Safe harbor language regarding inadvertent deductions to the salary of exempt EEs

New Required Salary

- Applies to both FT and PT
  - Example:
    - Professional exempt physical therapist works two days per week for 16 hours
    - Currently paid weekly salary of $800
    - Under the new salary rules, must be paid $913/week or converted to "salaried, non-exempt" and track hours and receive OT after 40 hours
      - (Remember that benefit plans may use different methods for tracking work hours than FLSA)

New Required Salary

- DOL will not enforce new required salary until March 17, 2019 for
  - Providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds
- But DOL will enforce job duties tests, $455 per week, all other FLSA provisions

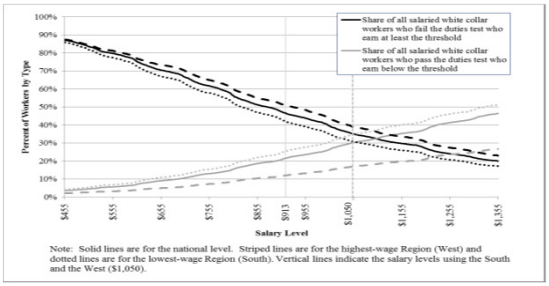
Non-Profits and the New Required Salary

- Enterprise coverage under FLSA:
  - All hospitals, institutions that care for older adults and people with disabilities who reside on premises, schools for children with disabilities, etc.
  - Others covered if have sales made or business done annually of $500,000+
    - Gift shop, sale of donated clothing, operate restaurant, etc.

Rulemaking

- Culmination of 2+ year process
- DOL received over 270,000 comments over 60 days after announcing rule
- Overview of comments
- Disagreement on effect of re-classification

New Required Salary—Effect



Note: Solid lines are for the national level. Striped lines are for the highest-wage Region (West) and dotted lines are for the lowest-wage Region (South). Vertical lines indicate the salary levels using the South and the West ($1,050).

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New Required Salary—Effect

- Estimated to affect 4.2 million workers (est. 44,000 in Iowa)
- Would pass standard duties test but not salary level
- Expected to most impact those who regularly work OT

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New Required Salary—Effect

- Expected to affect hospitality and retail industries the most
- More managers making between old and new salary levels ($23k and $47k)
- Estimated 110,000 exempt construction managers and supervisors could soon qualify for OT
- Start-up companies

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Effect—Cost to Employers

- Regulatory familiarization, adjustment, managerial
- Estimated total cost average of $295.1 million/year

Effect—Other/Misc.

- Less work time by affected exempt workers—potential health benefits
- Second jobs taken on by workers?
- Increased efficiency?

What's the Risk?

- Audit of:
  - exempt/nonexempt classifications
  - current compensation
  - assess economic impact
  - timekeeping processes
  - bonuses and commission payments
  - review of policies

Litigation Risks

- Costs of Getting It Wrong:
  - Back wages – up to 3 years
  - Liquidated (double) damages
  - Attorneys' fees and costs
    - Court costs
    - Litigation costs – discovery, court reporters, deposition transcripts, experts
    - Mediation costs

Litigation Risks

- Types of Actions:
  - Single-plaintiff action
  - Collective action
    - Opt in—must affirmatively join the suit
    - All "similarly-situated" individuals
    - Conditional certification and judicial notice
  - Class action
    - Automatically included, unless "opt-out"

Litigation Risks

- **Strict-liability standard**
  - Not a defense:
    - Ignorance
    - Confusion/misunderstanding
    - Good intentions
    - Agreements/employee requests

Litigation Risks

- **Strict-liability standard**
  - Defense to damages only:
    - Good faith/not willful
      - What did you do to try to get it right?
        - » Advice of counsel?
        - » Audits?
    - Effect:
      - 2-year statute of limitation instead of 3
      - No liquidated damages

Litigation Risks

- Increase in wage & hour suits from 2,000 in 2001 to 8,000 in 2012 partly out of employer confusion re: classification for exemption
- Disagreement in comments in Final Rule
- DOL predicts decreased litigation

Litigation Risks—Top Suits

- Uber—class action settlement?
- FedEx—class action settlement
- Brownlow Plastering—DOL settlement
- NY nail salons—DOL settlement
- Potato chip manufacturer drivers—class action settlement
- Chevron—DOL settlement

Next Steps

- Where do the new regulations leave us?
- Reality check:
  - Internal/external complaints
  - Federal DOL audit risk
  - State DOL audit risk

Next Steps—Overview

- Assess and audit current practices
- Consider options and determine action items
- Communicate to affected employees

Next Steps

- Audit of:
  - exempt/nonexempt classifications
  - current compensation
  - assess economic impact
  - timekeeping processes
  - bonuses and commission payments
  - review of policies

Action Items and Options

- Update/correct practices based on audit results
  - Timekeeping, breaks, off-site work, misclassification based on duties, etc.
  - Dec. 1 opportunity to correct with potentially fewer red flags

Options Overview

- Pay time-and-a-half for OT work; re-classify EE as non-exempt
- Continue exempt status—raise salary
- Limit hours to 40/week
- Fluctuating workweek
- Reduce regular rate of pay

Options

(1) Reclassification as nonexempt
  - Reclassification may be required
  - Can continue to pay salary, change to hourly (or other method), but must pay overtime
    - Can adjust rate of pay
    - Can manage hours worked
  - Must track hours worked—req. training

Action Items and Options

(2) Continue exempt status
- Increase salary
- Consider nondiscretionary bonuses and commissions
- Process for future salary adjustments
- State law considerations

Action Items and Options

(3) Limit hours to 40/week
- DOL: expected to be most popular
- Bring in more workers or eat lost productivity; shift duties

Action Items and Options

(4) Fluctuating workweek method
- Benefit of paying OT at half-rate
- Requirements
- Clear understanding by EE and ER
- Can't fall below minimum wage equivalent
- Best for any bonuses to be performance-based and not discretionary

Action Items and Options

(5) Reduce rate but not hours
- Reduce regular rate of pay so that total weekly earnings and hours don't change after OT is paid
- Limitations—practical and otherwise

(6) Combination

Factors to Consider

- Financial impact
- Travel time
- Comp time
- Off-hours work
- Administrative burden
- Perception by employees

Communication

- Review and revise policies
  - Communicate and enforce policies prohibiting off-the-clock work, unauthorized overtime by nonexempt employees
- Reclassified employees
- Other employees

Presenter

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What You Didn't Learn in Law School: How to Effectively Manage a Law Practice

3:45 p.m. - 4:15 p.m.

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I. MANAGING A PLAINTIFF'S LAW PRACTICE.

A. Cash Flow Or The Lack Thereof.

The most challenging part of doing plaintiff's work is effectively dealing with the ebb and flow of the practice itself. The spigot is trickling or completely off for weeks, months, sometimes years at a time. It is imperative to have alternative sources of funding.

1. **Retainers.** Most clients can't pay retainers, but some can. I think it is important for all clients (even those of modest means) to pay something toward their case. It gives them "skin in the game."

2. **Secure a Line of Credit**.

    a. Find a banker who understands the up and down nature of your business and can live with it.

        i. UCC filing
        ii. Your house

3. **Alternative Funding Sources.** Similar to a line of credit where financing and administrative expenses are repaid as costs at the end of the case –e.g. Advocate Capital

4. **Hourly Work**. If possible do severance agreements, divorces or criminal work to improve cash flow.

B. Screen Your Clients.

Someone much wiser than me said that sometimes the most important decision you make about a case is not to take it at all. You will spend as much or more time on poor or mediocre cases than you will on good cases. There are many questions you need to ask yourself at the beginning of a case. The two most important in my book are:

Do you like and will a jury/judge like your client? You will be spending the next two years with this person. It will be a dreadful experience if they don't listen, annoy you or otherwise get under your skin.

Do the damages justify your time and energy? (I sometimes break this rule if the cause is just.)

1. Intake.

a. Done by paralegal/law clerk over phone-prepare a memo
b. If warranted, attorney makes follow up phone call-obtain/review necessary records

2. Initial Meeting.

a. How does the client treat your staff?
b. If your staff doesn't like him/her there is a reason. Listen to them!
c. After initial meeting - Do a thorough background check-civil and criminal

3. Decline. You should write a timely decline letter and return everything they gave you. The letter should make it clear you do not and will not represent them.

4. Accept-Sign the contract. Make sure they understand the contingent nature of your fee. Talk with them about how the costs will be paid as the case progresses.

C. Taxes and Other Stuff They Didn't Teach You in Law School.

1. Get Quickbooks or a similar program and have someone on your staff learn how to effectively use it.

2. The books need to be reconciled at least once a quarter-payroll taxes paid.

3. Get A Good Accountant.

a. He/she needs to understand the up and down nature of your business. They can prepare and help you plan a strategy for paying quarterly state and federal taxes.

b. Set up a separate tax account.
If you take an owner's draw make sure and put 40% into a separate tax account.

c. Set Up a 401k or Retirement Account
   i. For you and your employees
   ii. Better to put the money away for your retirement than give it to Uncle Sam.

D. Employee Handbooks- If you have more than one employee it's never a bad idea to have an employee handbook. The handbook should contain things like workplace safety, harassment and discrimination, vacation, sick leave, health insurance options and rules for opting into any retirement plans.