



**Tuesday, October 2, 2012**

**9:00 AM - 10:30 AM**

## **504 – Employment Law Update**

**David Berndt**

*Attorney*

Attorney

**Jennifer Deitloff**

*Senior Counsel*

ConAgra Foods, Inc.

**Peter Moskowitz**

*Partner*

Jackson Lewis LLP

**Gregory Watchman**

*Associate General Counsel*

Freddie Mac

## Faculty Biographies

### **David Berndt**

David Berndt is the director of employment compliance at Walmart. He is responsible for all wage and hour, EEO and related matters throughout the company.

Prior to Walmart, Mr. Berndt worked as in-house legal counsel for several employers including Terex, a global manufacturer; Boston Medical Center; One Communications (a telecommunications service provider); and Ford Motor Company.

Mr. Berndt has also been very active as a volunteer. For over four years, he has served as the co-chair of the Policy Committee for the ACC Employment and Labor Law Committee. In addition, he has been the chair and a board member of the New Hampshire chapter of the American Red Cross.

Mr. Berndt received his law degree from Brigham Young University. He also has a master's in communications from the University of Michigan and a bachelor's in business and risk management from California State University, Fresno.

### **Jennifer Deitloff**

Jennifer R. Deitloff is an attorney specializing in labor and employment and immigration matters. Ms. Deitloff is senior counsel for ConAgra Foods, Inc., where she advises the company on labor, employment and immigration related matters including litigation management, administrative proceedings, employment, labor and immigration compliance and day-to-day legal advice.

Prior to joining ConAgra, Ms. Deitloff worked as an attorney at McGrath North Mullin & Kratz, PC LLO in the firm's labor and employment group. She represented management interests with respect to labor and employment and immigration matters including litigating matters in state and federal courts and handling arbitrations.

She is a member of the American Bar Association, the Association of Corporate Counsel, the Minority Corporate Counsel Association, the Federal Bar Association, the American Immigration Lawyers Association, and the Nebraska Bar Association.

Ms. Deitloff received a bachelor's degree in communication studies from the University of Nebraska and a JD from the University Of Nebraska College Of Law.

**Peter Moskowitz**

Peter C. Moskowitz is a partner in the New York, NY office of Jackson Lewis LLP. Mr. Moskowitz specializes in employment litigation and counseling. He has defended employers and litigated actions pending before federal and state courts and agencies involving gender, race, disability, pregnancy, and national origin discrimination, FMLA, ERISA, - 1981, FLSA, wage and hour, retaliation, restrictive covenant, non-solicitation and sexual harassment claims.

Mr. Moskowitz's practice includes counseling clients concerning all aspects of their employment relationships, including preventive strategies and compliance with applicable statutes and regulations. In addition to single plaintiff cases, Mr. Moskowitz represents employers in complex litigations involving multiple plaintiffs as well as class and collective actions. He has conducted trials before federal and state judges, administrative agencies and FINRA, NASD and AAA arbitration panels. He has argued before the Second Circuit Court of Appeals, the First Department of the Appellate Division of the State of New York and the Ninth Circuit Bankruptcy Panel.

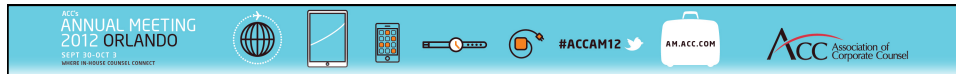
Mr. Moskowitz received his undergraduate degree in economics from Northwestern University and graduated cum laude from Fordham Law School where he was a member of the *Fordham Law Review*. Mr. Moskowitz is a member of the Association of the Bar of the City of New York.

**Gregory Watchman**

Gregory R. Watchman is associate general counsel for employment law at Freddie Mac in McLean, VA. He has 26 years' experience in the field of employment law and policy, and is active in the Association of Corporate Counsel and its local Washington, D.C., area chapter (WMAACCA).

Previously, Mr. Watchman served as a senior OSHA official at the U.S. Department of Labor, and as labor counsel to the labor committees in the U.S. Senate and House of Representatives. Mr. Watchman also practiced employment law with the national firms Paul Hastings and Morgan Lewis.

Mr. Watchman is a graduate of Cornell Law School and Williams College.



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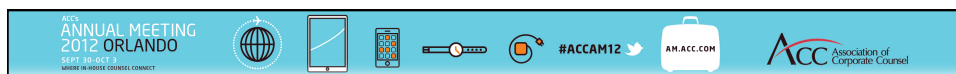
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# Employment Law Update

Session #504  
Association of Corporate Counsel 2012 Annual Meeting  
Orlando, Florida

David Berndt, Compliance Counsel, Wal-Mart  
Jennifer Deitloff, Counsel, ConAgra Foods  
Peter Moskowitz, Partner, Jackson Lewis LLP  
Greg Watchman, Associate General Counsel, Freddie Mac



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## Recent Supreme Court Decisions

- *National Federation of Independent Businesses et al. v. Sebelius* (June 28, 2012)
  - Health Care Reform Law
- *Arizona et al. v. U.S.* (June 25, 2012)
  - Arizona Immigration Law
- *Christopher v. SmithKline Beecham Corp.* (June 18, 2012)
  - Pharmaceutical Sales Representatives' Status Under FMLA


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## Health Care Reform

1. The Individual Mandate is Constitutional
  - Chief Justice Roberts, joined by Breyer, Ginsburg, Sotomayor, and Kagan, ruled that the individual mandate of the Affordable Care Act is constitutional under the General Welfare Clause – Congress' power to tax and spend
2. The Expansion of Medicaid is Constitutional
  - Chief Justice Roberts, joined by Breyer, Ginsburg, Sotomayor, and Kagan, also held Congress has the power to expand the Medicaid program and to withhold additional funding from any State that chooses not to participate in the expanded program


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## Affordable Health Care Act: Where Are We Now?

- Many provisions are already effective
- Compliance: What comes next?
- Many regulations already issued and more to come
- Many remaining provisions effective 2014


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## Polling Question


Which *key provision* of the PPCA has the biggest impact on your company?

- a) Play or Pay
- b) Benefit dollar limitations
- c) Retiree drug costs
- d) Tax reporting


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## Arizona Immigration Law: *Arizona et al. v. U.S.*

- In a 5-3 decision, the Supreme Court largely upheld a lower court's injunction against S.B. 1070 on the grounds the law intrudes upon the federal government's broad enforcement powers
- S.B. 1070 – controversial Arizona statute giving state law enforcement an expanded role in combating illegal immigration


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## Provisions Struck

- The Court upheld the injunction with respect to three of the four challenged provisions
- The Court emphasized that the federal government has broad powers in the area of immigration, and that there are significant policy reasons for having a unified, comprehensive system for the enforcement of immigration laws
- The three provisions struck down require legal immigrants to carry registration documents at all times; allow state police to arrest any individual for suspicion of being an illegal immigrant; and make it a crime for an illegal immigrant to search for a job (or to hold one) in the state


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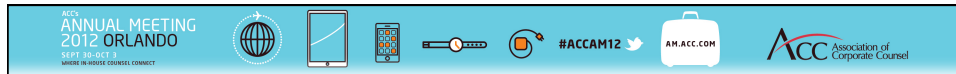


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## Surviving Provision

- The Court, however, reversed the injunction against a provision of S.B. 1070 requiring law enforcement officials to attempt to determine immigration status of any person reasonably suspected to be an alien unlawfully present in the United States
- While the Court concluded there was insufficient evidence the provision would undermine or conflict with the federal immigration laws, it left the door open to future challenges based on evidence regarding the manner in which the provision is applied by law enforcement officials and interpreted by the Arizona courts

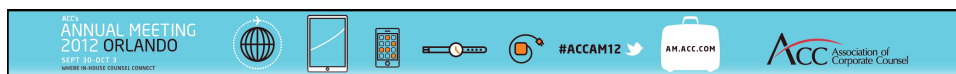


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## STATUS OF PHARMACEUTICAL SALES REPRESENTATIVES UNDER FLSA



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### ***Christopher v. SmithKline Beecham Corp.***


- Two Questions on Review
  1. Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and
  2. Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives




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## Holding Regarding Deference


- The Court owed no deference to the Secretary's interpretation of the FLSA's outside sales exemption and related regulations
  - Justice Alito, writing for the majority, noted that although in ordinary circumstances, deference to an agency's interpretation of its own ambiguous regulation is appropriate, deference is unwarranted when the agency's interpretation is "plainly erroneous or inconsistent with the regulation" or when the interpretation "does not reflect the agency's fair and considered judgment on the matter in question"
  - Justice Alito said an important, "strong reason" for the Court withholding deference was the element of surprise to the pharmaceutical industry after 70 years of DOL acquiescence to the practice of classifying reps as exempt employees under the FLSA
  - The Court also noted that it found the DOL's interpretation unpersuasive
- Both the majority and dissent agreed

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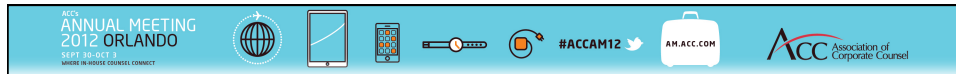
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## Status of Pharmaceutical Sales Representatives

- As to the second question, a majority of the Court, 5 to 4, held pharmaceutical sales representatives are outside salesmen exempt from the overtime requirements of the Fair Labor Standards Act
- The majority found the applicability of the outside sales exemption to reps hinged solely on whether reps make a "sale" when providing product information to physicians



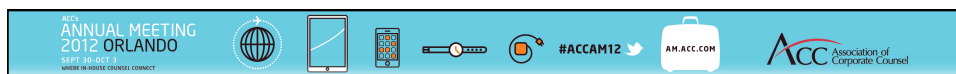
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## LOOKING AHEAD: SUPREME COURT DECISIONS IN THE 2012-2013 TERM



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## Looking Ahead


- *Vance v. Ball State Univ.* (7th Cir. 2011), cert. granted, June 25, 2012
  - Whether the “supervisor” vicarious liability rule is limited to situations in which the alleged harasser has the power to hire, fire, demote, promote, transfer, or discipline the target of the alleged harassment, or whether the rule also extends to those employees in whom the employer vests the authority to direct or oversee day-to-day work activities but who do not have the power to hire and fire
- *Comcast v. Behrend* (3rd Cir. 2011), cert. granted, June 25, 2012
  - Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis

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## Legislative Overview

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### Obama Administration Agenda - Poll

How effective has the Obama Administration been in implementing its aggressive worker protection agenda?

- a) Highly effective
- b) Somewhat effective
- c) Somewhat ineffective
- d) Highly ineffective

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## Obama Administration Agenda

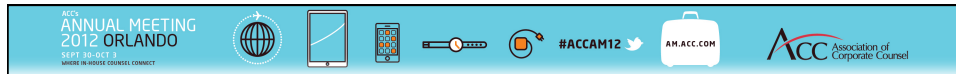
- Ledbetter Legislation: ENACTED
- EFCA: FAILED
- NLRA Poster Requirement: STAYED
- Paycheck Fairness Act: LOST CLOTURE VOTE
- ENDA: FAILED
- NLRB Quickie Elections Rules: STAYED
- OSHA Injury & Illness Prevention Programs Standard: STALLED
- Paid Sick Leave Bill: FAILED
- Worker Misclassification Bills: FAILED

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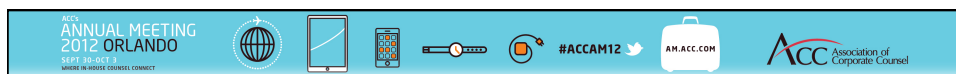
## 2012 Legislative Developments

- Overview: Legislative Stalemate
- Immigration: E-Verify Legislation
- DOJ Appropriations Bill (House Version):
  - Prohibits EEOC enforcement of new ADEA/RFOA regs and criminal background checks guidance
  - Prohibits DOJ enforcement of new ADA regs
- DOL Appropriations Bill (House Version)
  - Prohibits NLRB enforcement of “quickie elections” rules, the *Specialty Healthcare* decision
  - Prohibits DOL from narrowing scope of “advice” exemption from LMRDA disclosure rules
  - Prohibits OSHA from issuing Injury & Illness Prevention Programs Standard



## 2012 Legislative Developments

- Unemployment Discrimination Legislation
- Paycheck Fairness Act (amends Equal Pay Act):
  - Unlimited compensatory & punitive damages; opt-out class actions; “business necessity” replaces “factor other than sex”
  - Defeated on Senate cloture vote 52-47 (June 5, 2012)
- ADEA/*Gross* Legislation: Overturn *Gross*, align ADEA proof standard with Title VII (“a motivating factor” rather than “but for” test)



## 2012 Legislative Developments

- NLRA Elections Legislation:
  - Counteracts NLRB “quickie election” rules
  - Passed House in 2011; Administration opposes
- NLRA Remedies Bill:
  - Responds to Boeing ULP; limits NLRB remedies
  - Passed House 2011, Administration opposes
- Democratic initiatives (paid sick leave, worker misclassification, minimum wage, etc.) unlikely to pass

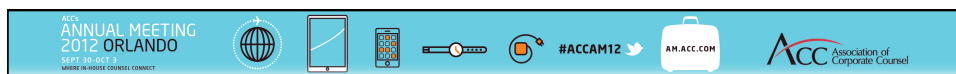


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## EEO Developments



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## Background Check Guidance

- In April, the EEOC issued guidance on criminal background checks under Title VII
  - Guidance doesn't alter earlier policy statements, rather it provides more analysis
    - Discusses disparate treatment analysis in more detail
    - Explains how the EEOC looks at the "job related and consistent with business necessity" standard for criminal record exclusions
    - Provides best practices for employers to consider when making employment decisions based on criminal records

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## New Rule on RFOA

- In April, the EEOC finalized a new rule on the Reasonable Factors Other Than Age (RFOA) defense
  - ADEA prohibits:
    - *disparate treatment* – intentional discrimination against older workers; and
    - *disparate impact* – practices that have the effect of harming older workers more than younger workers, unless the employer can show the practice is based on a reasonable factor other than age
  - RFOA is an affirmative defense; applies only to disparate impact discrimination






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## RFOA Continued...

- Burden of Proof
  - Plaintiff(s) must first identify a specific employment practice that has a significant disparate impact on older workers
  - Employer must then prove such practice is based on a reasonable factor other than age
- Factors in RFOA Determination
  - Rule clarifies that the factors are not required elements or duties, merely common characteristics of reasonable practices
  - Defense is not established just because one or more factor is present
- Rule does not preclude any other defenses permitted under the ADEA


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## Systemic Discrimination

- “A practice or policy that has a broad discriminatory impact on an industry, profession, company or geographic area”
- Major area of focus for the EEOC
  - Failure to accommodate people with disabilities (\$20 million Verizon settlement)
- Minimizing Risk:
  - Judicious use of criminal/credit background checks
  - Consistency in applying hiring policies
  - Audit employment practices and conduct adverse impact analyses
- Recent cases have limited the EEOC’s reach
  - *EEOC v. BNSF Railway Co.*
  - *EEOC v. CRST Van Expedited*


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## Office of Federal Contract Compliance Programs (“OFCCP”)




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## OFCCP Survey


Do you know if your company is subject to an OFCCP audit?

- a. YES
- b. NO


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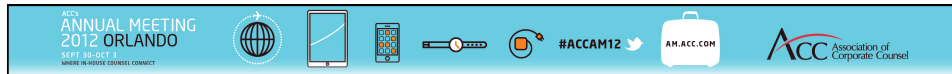


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## OFCCP

- More investigators = more investigations!
- Few investigations BUT greater \$
- 12/9/11: proposed revisions to Fed'l register re: recruitment, hiring & tracking of individuals w/ disabilities
  - 7% hiring goal for federal contractors



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## OFCCP

- Examples of OFCCP activity this year:
- 12/11: Filed suit against Cargill Meat Solutions
  - Alleged favoring of Asian & Pacific Islanders over other applications; seeking cancellation of \$550 million in government contracts
- 05/12: Complaint against FedEx
  - \$3 million settlement for “discriminatory hiring practices”
  - Based SOLELY on statistical analysis & not on any individual complaint








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## National Labor Relations Board (“NRLB”)


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## NLRB Topics of Discussion

- NLRB Notice Posting Rule
- NLRB "Quickie Election" Rule
- Class Action Waiver and Arbitration Agreements
- NLRA and Social Media
- Confidentiality and Internal Investigations


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## NLRB Notice Posting Rule


- Effective date stayed
- First ruling: Federal District Court in Washington D.C.
  - NLRB had authority to promulgate the posting rule
  - NLRB exceeded its authority with respect to provisions that (1) make failure to post an unfair labor practice and (2) toll the statute of limitations
- Second ruling: Federal District Court in South Carolina – Contrary finding
  - NLRB did not have the authority to promulgate the rule
- Third ruling: Court of Appeals for the D.C. Circuit
  - Granted an emergency injunction preventing the rule from taking effect. The Court ordered expedited briefing and oral argument in September 2012
- As a result, the rule will not go into operation, if at all, until the fall
- Board reaction: Decision to postpone the effective date

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## NLRB “Quickie Election” Rule


- **New rules went into effect on April 30, 2012**
- **District Court Ruling:** On May 14, 2012 the District Court for the District of Columbia concluded that the NLRB did not have a proper “quorum” when it issued the rule and therefore the rule was invalid
  - *The Court never addressed the merits of the rule*
- **Board reaction:** On May 15, 2012, in light of the District Court decision, the Board suspended implementation of the rule
- **Subsequent Ruling:** On July 27, 2012 the District Court rejected an NLRB motion to alter or amend the judgment. The Board’s motion offered new evidence that Member Hayes had been in the “electronic voting room” at the time of the vote but had made a conscious decision to abstain. The Court held that it had previously considered and rejected the argument that Member Hayes should be counted towards the quorum and that the NLRB did not adequately explain why it could not have presented the new evidence at the summary judgment stage.

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## Class Action Waiver and Arbitration Agreements

***Class Action Waiver in Mutual Arbitration Agreement Found to Violate the NLRA***

- January 3, 2012 – *D.R. Horton NLRB Decision*
- The dispute in *D.R. Horton* arose when counsel for an employee (a superintendent) wrote to the company that his firm had been retained by the employee and a nationwide class of similarly situated employees over a claim that the company was misclassifying these employees under the Fair Labor Standards Act.
- When the company’s counsel replied that an effective notice of intent to arbitrate had not been provided because the company’s mutual arbitration agreement (MAA) barred collective claims, the lead employee filed a charge with the NLRB. A complaint was issued, alleging that employees were prevented from pursuing misclassification claims under the FLSA in a class or collective action.
- The Board concluded that the MAA prohibited the exercise of substantive rights protected by the NLRA, noting that the Board has consistently held that concerted legal action addressing wages, hours or working conditions is protected by NLRA section 7.

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## Class Action Waiver and Arbitration Agreements (Recent Activity)

- *D.R. Horton* is on review in the United States Court of Appeals for the Fifth Circuit
- On July 18, 2012, in *Nelsen v. Legacy Partners Residential, Inc.*, the California Court of Appeals rejected an employee's reliance on *D.R. Horton*
  - In *Nelson*, the Court affirmed an order compelling individual arbitration in a class action alleging state labor law violations
  - The Court held, where the parties' arbitration agreement was neither unconscionable nor in violation of public policy, an employee must arbitrate her individual wage and hour claims against her employer
  - Significantly, the Court rejected the employee's reliance on *D.R. Horton* and noted it was not inclined to follow the Board's *D.R. Horton* decision, declaring the decision not binding and that it went beyond the scope of the Board's expertise






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## Social Media & NLRA

- On May 30, 2012, the NLRB's Acting General Counsel published a third report regarding the legality of language contained in social media policies
- New report highlights importance of issue to NLRB
- The cases discussed in the report provide further guidance to employers struggling with developing and enforcing employee policies regulating social media activity
- The GC's recent report identifies problematic policy language
- Report contains a modified sample social media policy

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## A Lawful Social Media Policy


For the first time, the GC's report included a sample social media policy deemed to be lawful. Insight:

- Policy should provide examples of prohibited conduct so in context employees would not reasonably read the rules to prohibit protected, concerted activity
- Explain the Basis of Restrictions
- Avoid Undefined Terms
- Disclaimers Will Not Cure
  - GC's report noted a social media policy's "savings clause" stating the policy would "be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)" was insufficient to cure ambiguities in the policy's overbroad rules
- It Remains Lawful to:
  - Prohibit employees from sharing confidential and proprietary information online (provide explanation and examples)
  - Prohibit employees from using vulgar or obscene language online

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## Polling Question


When was the last time you had your organization's social media/electronic communications policy reviewed by outside counsel?

- a) Last year
- b) Three years ago
- c) More than five years ago
- d) Social media policy? What's that?


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## Employee Discussion of Internal Investigations


***Banner Health System d/b/a Banner Estrella Medical Center***

- On July 30, 2012, the NLRB held an Arizona hospital violated the NLRA by prohibiting employee discussion of misconduct allegations that were under investigation by the employer
- Notably, the NLRB found that merely suggesting to employees that they should not speak to co-workers about on-going inquiries could violate Section 8(a)(1)
- Based on this new decision, it appears even general policy language such as “we encourage you to not discuss the details of the investigation” is problematic
- As opposed to employing a “blanket” approach to maintaining confidentiality in investigations, employers should evaluate witness protection issues, risks of evidence tampering and influence on testimony before suggesting confidentiality


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# CLASS ACTIONS

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## Wal-Mart v. Dukes (June 20, 2011)

- Court unanimously reversed the Ninth Circuit and decertified the Class (opinion by Justice Scalia)
  - Claims for individualized relief, such as the backpay sought by plaintiffs, cannot be brought under Rule 23(b)(2)
  - “Trials by formula” are prohibited
- Rigorous Analysis: “Rule 23 does not set forth a mere pleading standard”
  - “A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.”
  - “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”

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## Definition of Commonality

- “What matters to class certification ... is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.” (Quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N. Y. U. L. Rev. 97, 132 (2009)).
- “That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”
- “Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.”



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## Post-Dukes Landscape

- As of June 30, 2012, 560+ court decisions had cited *Dukes*
  - U.S. Supreme Court (1)
  - U.S. Court of Appeals (37)
  - U.S. District Court (490)
  - U.S. Court of Federal Claims (1)
  - U.S. Bankruptcy Court (1)
  - State supreme or intermediate appellate court (25)
  - State trial court decisions (6)
- Critical importance of Rule 23(f) appeals

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## Post-Dukes Trends: Rigorous Analysis of Commonality

- *M.D. ex rel. Stukenberg v. Perry (5th Cir. Mar. 23, 2012)*
  - “[T]he district court conducted no analysis of the elements and defenses for establishing any of the proposed class claims, nor did it adequately explain how those claims depend on a common legal contention whose resolution ‘would resolve an issue that is central to each of the [individual’s] claims in one stroke.’”
  - “[T]he district court must explain its reasoning with specific reference to the ‘claims, defenses, relevant facts, and applicable substantive law’ raised by the class claims, in order to ensure that ‘dissimilarities within the proposed class’ do not ‘have the potential to impede the generation of common answers.’”

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## Post-Dukes Trends: Rigorous Analysis of Commonality








- *Ross, et al. v. RBS Citizens, N.A., et al. (7th Cir. Jan. 27, 2012)*
  - Distinguished from *Dukes*. “In *Dukes*, 1.5 million nationwide claimants were required to prove that thousands of store managers had the same discriminatory intent . . . Here, there are 1,129 Hourly class members and substantially fewer AMB class members all of whom are based only in Illinois ... [and t]he plaintiffs’ [] claim requires no proof of individual discriminatory intent.”
  - “Although there might be slight variations in how Charter One enforced its overtime policy, both classes maintain a common claim that Charter One broadly enforced an unlawful policy denying employees earned-overtime compensation. This unofficial policy is the common answer that potentially drives the resolution of this litigation . . . For that reason, we find that the district court’s certification order satisfies the commonality prerequisite . . .”

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## Post-Dukes Trends: Burden to Establish Specific, Common Practices

- *Grant v. Metropolitan Gov. of Nashville & Davidson County (6th Cir. Aug. 26, 2011)*
  - “Plaintiffs’ general claim is that [the employer] has engaged in ‘preselection’ which caused an adverse, disparate impact on black employees . . . The problem, however, is that Plaintiffs make no effort to isolate any of these practices or to examine their individual effects on the promotions process . . . The district court appears to have assumed that merely challenging the promotions process as a whole is sufficient to take advantage of the statutory exception, but that is simply not the law.”
- *McReynolds, et al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (7th Cir. Feb. 24, 2012)*
  - “[The policies in this case] are practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim. Therefore challenging those policies in a class action is not forbidden by the [*Dukes*] decision; rather that decision helps (as the district judge sensed) to show on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls.”

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## Post-*Dukes* Trends: Rejection of “Trial by Formula”

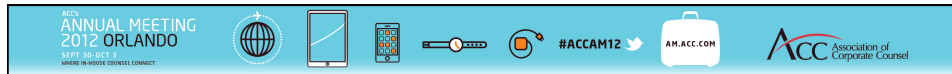
- *Duran v. U.S. Bank Nat’l Ass’n (Cal. App. 1st Dist. 2012)*
  - “The same type of ‘Trial by Formula’ that the United States Supreme Court disapproved of in [*Dukes*] is essentially what occurred in this case [as the lower court relied on a 21-person sample to determine classwide liability and restitution] ... While [*Dukes*] is not dispositive of our case, we agree with the reasoning that underlies the court’s view that representative sampling may not be used to prevent employers from asserting individualized affirmative defenses in cases where they are entitled to do so.”

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## Class Action – Survey

How concerned are you about potential exposure  
to class action litigation?

- a. Very concerned
- b. Somewhat concerned
- c. Not concerned
- d. Had not previously reflected on the risk, but will consider speaking to outside counsel soon



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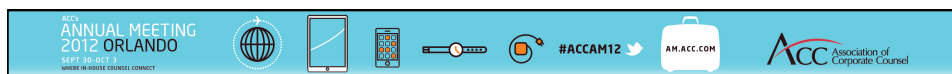
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## Class Action – Survey

I will consider implementing the following practices to minimize my class action exposure:

- Allowing management discretion within an objective criteria framework
- Creating a well-drafted EEO policy
- Reviewing our open position procedures
- All of the above








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## Americans with Disabilities Act ("ADA")


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## ADA Developments

- **Remission of Illness No Bar to Coverage.** *Katz v. Adecco USA Inc.* (S.D.N.Y. 2012) (inactive status of cancer was irrelevant to disability determination; cell growth impaired)
- **Disability Analysis Considers Negative But Not Ameliorative Effects of Mitigating Measures.** *Wells v. Cincinnati Children's Hospital Med. Ctr.* (S.D. Ohio 2/23/12) (disorientation caused by prescription drugs was relevant to determination of whether plaintiff's gastrointestinal condition was a disability; ameliorative effects of drugs were not relevant)


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## ADA Developments

- **Recent Case:** Municipal trash collection and lawn care worker returned to work after medical leave. His doctor advised significant lifting restrictions, but the employee insisted he could perform the duties of the job.
- Poll: What should his employer do?
  - a. Engage in an interactive process to identify possible accommodations
  - b. Require the employee to undergo a fitness test
  - c. Create a new position with less physical duties
  - d. Terminate the employee for being unqualified to perform the job


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## ADA Developments

- **Employer Can Disregard Employee's Assertions Re: Ability to Perform When Contradicted By His Physician.** *Otto v. Victoria* (8<sup>th</sup> Cir. 7/19/12) (upholding employer's termination based on doctor's lifting restrictions, despite employee's insistence that he could perform lifting duties required by trash collection and lawn care job)

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## ADA Developments


- **Inability to Work OT Not a Substantial Limitation on Working.** *Boitnott v. Corning Inc.* (4<sup>th</sup> Cir. 2/10/12) (joins circuits 1, 3, 5, 6 & 8; case predates ADAAA)
- **ADA Claims Subject to "But For" Standard.** *Lewis v. Humboldt Acquisition Corp.* (6<sup>th</sup> Cir. 5/25/12) (rejecting earlier 6<sup>th</sup> Circuit precedent requiring proof of "sole cause")
- **Accommodation Not Required for Commute Issue.** *Regan v. Faurecia Auto. Seating Inc.* (6<sup>th</sup> Cir. 5/10/12); *but see Colwell v. Right Aid* (3d Cir. 2010)

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# Retaliation

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## Retaliation Developments - Poll

Do the people managers at your firm fully understand the concept of retaliation?

- a. Most fully understand
- b. Most somewhat understand
- c. Most are somewhat lacking in understanding
- d. Most have little understanding

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## Retaliation Developments

- **Retaliation Claims on the Rise**
  - FY2011: 99,947 EEOC charges; 37% included retaliation claims, more than any other category
- **Common Culture Gap: Do Managers Get It?**
  - Understanding what retaliation is
    - *Burlington Northern* standard
  - Understanding that even if the underlying claim lacks merit, a retaliation claim can still have merit
  - Train, train, train!

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## Retaliation Developments


- **Key Development: ARB's Aggressive Effort to Broaden SOX Protections**
- **DOL ARB Refuses to Follow First Circuit on SOX Coverage of Contractors' Employees**
  - *Lawson v. FMR LLC* (1<sup>st</sup> Cir. 2/3/12) (employees of contractors of public companies not covered; leaves open question of coverage if public company directed the contractor's retaliation; contractor employees can still trigger claims by reporting to SEC)
  - *Spinner v. David Landau & Assocs. LLC* (ARB Nos. 10-111, 10-115 5/31/12) (employees of contractors are covered; cites DOL regs; analogizes to other whistleblower laws; references Enron facts)




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## Retaliation Developments

- **ARB Rejects SOX Requirement That the Underlying Complaint “Definitely and Specifically Relate” to Laws Named in SOX § 806.** *Sylvester v. Parexel Int’l LLC* (ARB No. 07-123 5/25/11) (rejecting previous ARB rulings and four appellate decisions; reasonable belief of violation is all that is required).
- **ARB Broadens *Burlington Northern’s* Retaliation Threshold Standard to Encompass Any “Non-Trivial” Act.** *Menendez v. Halliburton* (ARB Nos. 09-002, 09-003 9/13/11) (disclosure of complainant’s name could constitute actionable retaliation; minimizes importance of § 806 language covering only retaliation “in the terms and conditions of employment,” finding that those “are not significantly limiting words”).


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## Retaliation Developments


- **ARB: Theft of Corporate Information Could Be Protected Activity.** *Vannoy v. Celanese* (ARB No. 09-1118 9/28/11) (employee admitted giving co-workers’ PPI and other proprietary corporate documents to IRS; despite violation of policy and corporate agreement, theft may be protected “unless unlawful”).
- **ARB: Absence of Fraud Allegation No Bar to SOX Claim.** *Prioleau v. Sikorski* (ARB No. 10-060 11/9/11) (reversing ALJ summary judgment for employer where employee memo raised theoretical possibility that email deletion practice could conflict with litigation hold policy; dissent points out that “giant leaps in logic” would be needed to connect theoretical concern to financial reporting or fraud).

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## Contingent Workers

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## Contingent Workers


What percent of your workforce is composed of contingent workers?

- a. Less than 2%
- b. 2% to 5%
- c. 6% to 10%
- d. More than 10%


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## Contingent Workers


Has the percentage of contingent workers in your workforce grown over the past 5 years?

- No, we don't have any
- No, we've stayed about the same
- Yes, by about 20% or less
- Yes, everyone's contingent now!


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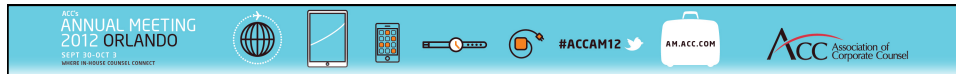


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## Contingent Workers

- More headaches every year!
- Federal/state developments = complexity & confusion
- Types & flavors:
  - Joint employment
  - Independent contractors
  - Temp workers
  - Etc.




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## Contingent Workers

- Legal areas to consider for legal risks:
  - Wage & hour laws
  - Employment taxes
  - FMLA
  - ADA
  - Workers Comp.



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## Contingent Workers


- Dept. of Labor MoU re: employee misclassification
- At least 13 states have signed on:
  - CA, CO, CT, HI, IL, LA, MA, MD, MN, MO, MT, UT, WA
- Allows DOL to share info & to coordinate efforts with participating states

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## Contingent Workers


- States & DOL cracking down
  - Agencies filing companion administrative charges against staffing firm & their clients
- More state laws
  - Maine, RI
    - Presumption that worker is “employee”; places burden on company to prove otherwise

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## Contingent Workers


- Joint employment & FLSA
  - 3<sup>rd</sup> Circuit: set forth new test for determining when a joint employer relationship exists (In re: Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation, No. 11-2883 (June 28, 2012))
    - Ability to hire & fire the relevant employees
    - Ability to issue & implement work rule/assignments
    - Ability to establish conditions of employment
    - Involvement in day-to-day supervision of workers
    - Actual control of employee records (e.g., payroll)
    - Therefore: Enterprise Holdings was not a joint employee

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## Fair Labor Standards Act ("FLSA")


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### FLSA

- By July 2012, 7,064 FLSA-based lawsuits filed (60 more than filed in all of 2011; > than 2x the amount of cases filed 10 years ago!)
- Primary focus: misclassification of employees

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## FLSA Survey

Has your company reclassified employees from exempt to non-exempt during the past 5 years?

- YES
- NO

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## FLSA

- Exempt status?
- *John Orton v. Johnny's Lunch Franchise, LLC*, No. 10-2044, 6<sup>th</sup> Circuit (Feb. 21, 2012)
  - Clarified that employment agreements no longer the relevant start point for whether an employee is paid on a salary basis. Defendant has burden of proving the affirmative defense that employee was exempt


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## FLSA

- Mootness Defense?
- *Laura Symczyk v. Genesis Healthcare Corp.*, No. 10-3178, 3<sup>rd</sup> Circuit (Aug. 31, 2011)
  - Defendant sought to moot a putative collective action by offering “full relief” to the named Plaintiff before she could file motion seeking conditional certification of her claims
  - Court said mootness defense shouldn’t apply to FLSA cases
- *Perry R. Dionne v. Floormasters Enterprises, Inc.*, No. 09-15405, 11<sup>th</sup> Circuit (Jan. 13, 2012): called into question mootness defense viability; plaintiff would need to concede claim is moot!
- June 25, 2012: USSC granted Cert to *Genesis*


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## FLSA


- Meal and Rest Breaks!
  - 22 states & territories have laws requiring meal breaks
  - 8 states require both meal & rest breaks
  - *Brinker v. Superior Court*, No. S166350, CA Sup. Ct. (April 12, 2012)
    - Meal breaks must only be “provided”
    - Rest breaks must be “permitted”
    - Employer’s policies will help decide whether a lawsuit against the employer can be treated as class action




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## FLSA

- Exempt status battles
  - USSC: pharmaceutical sales reps = exempt
  - U.S. District Court, D.C.: mortgage loan officers = non-exempt
- Internal complaints
  - 4<sup>th</sup> circuit joined the majority of circuits: held that internal complaints = protected activity under FLSA (must be “sufficiently clear & detailed” per *Kasten v. Saint-Gobain Performance Plastics Corp.*)(*Minor v. Bostwick Labs Inc.*, 4<sup>th</sup> Circuit (Jan. 27, 2012))


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## FLSA

- By July 2012, 7,064 FLSA-based lawsuits filed (60 more than filed in all of 2011; > than 2x the amount of cases filed 10 years ago!)
- Primary focus: misclassification of employees




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## Family and Medical Leave Act ("FMLA")



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## FMLA

- DOL's Wage & Hour Division issued a notice of proposed rulemaking in January 2012
  - Statutory amendments would expand FMLA's military leave provision
    - Extend military caregiver leave to family members of veterans who are undergoing medical treatment or therapy
      - Versus covering family members of currently serving service members
    - More flexible definition of "serious injury or illness"
      - Includes injuries and illnesses that existed prior to service and were aggravated in the line of duty


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## FMLA

- Proposed expansions continued...
  - Authorize private health care providers not affiliated with DOD or VA to provide “serious illness or injury” certification
  - Qualifying exigency leave would include family members of Regular Armed Forces called to active duty
    - Versus family members of National Guard, reservists and retired service members
  - Increase the amount of time an employee can take for R&R leave
  - Foreign deployment requirement

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## Immigration Compliance

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## New Form I-9

- U.S. Citizenship & Immigration Services proposed a new Form I-9 in March 2012
  - Proposed I-9 expands from one page to two
  - Entire Form expands from five to nine pages
  - Collection of information is estimated at 13 minutes
    - This exceeds current reporting burden by one minute
  - Increases potential for error and thus fines!

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**Employment Eligibility Verification**  
Department of Homeland Security  
U.S. Citizenship and Immigration Services (USCIS)

USCIS  
Form I-9  
OMB No. 1615-0047  
Expires 08/31/2012

**\* START HERE. Read instructions carefully before completing this form. The instructions must be available during completion of this form. ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.**

**Section 1. Employee Information and Attestation (Employees must complete and sign Section 1 of Form I-9 no later than the first day of work for pay, but not before accepting a job offer.)**

Print Name: Family Name (Last Name) Given Name (First Name) Middle Initial Maiden Name, if applicable

Address - Street Number and Name Apt. Number City or Town State Zip Code

Date of Birth (mm/dd/yyyy) U.S. Social Security Number E-mail Address (optional) Telephone Number (optional)

I am aware that Federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

A citizen of the United States

A noncitizen national of the United States (see instructions)

A lawful permanent resident (Alien Registration Number/USCIS-Number) \_\_\_\_\_

An alien authorized to work until (expiration date, if applicable, month/day/year) \_\_\_\_\_. Some aliens may write "N/A" on this line. See instructions.

For aliens authorized to work, list your Alien Registration Number / USCIS-Number or Form I-94 Admission Number:

1. Alien Registration Number / USCIS-Number: \_\_\_\_\_

2. Form I-94 Admission Number: \_\_\_\_\_

If you received your Form I-94 when traveling to the United States, include the following:

Foreign Passport Number: \_\_\_\_\_

Country of Issuance: \_\_\_\_\_

Some aliens may write "N/A" on the foreign passport number and country of issuance lines. See instructions.

Signature of Employee: \_\_\_\_\_ Date (mm/dd/yyyy): \_\_\_\_\_

Preparer and/or Translator Certification. (To be completed and signed if Section 1 is prepared by a person other than the employee.)

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer/Translator: \_\_\_\_\_ Date (mm/dd/yyyy): \_\_\_\_\_

Print Family Name of Preparer (Last Name) Given Name (First Name) Middle Initial

Address (Street Number and Name) City or Town State Zip Code

1-D Barcode

Form I-9 03/08/12 N Go to Next page > Page 7 of 9

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Employee Family Name in Caps (Last Name),  
Given Name (First Name), and Middle Initial:

**Section 2. Employer Review and Verification**  
(Employer must complete and sign Section 2 within 3 business days of the employee's first day of work for pay. Employers must examine one document from List A OR examine a combination of one document from List B and one document from List C as listed on the "List of Acceptable Documents" on the next page of this form. For each document you review, record the following information: document title, issuing authority, document number, and expiration date, if any.)

Document title: List A	OR	List B	AND	List C
Document title:		Document title:		Document title:
Issuing authority:		Issuing authority:		Issuing authority:
Document Number:		Document Number:		Document Number:
Expiration Date (if any): (mm/dd/yyyy) ▶		Expiration Date (if any): (mm/dd/yyyy) ▶		Expiration Date (if any): (mm/dd/yyyy) ▶
Document Number:		Document Number:		Document Number:
Expiration Date (if any): (mm/dd/yyyy) ▶		Expiration Date (if any): (mm/dd/yyyy) ▶		Expiration Date (if any): (mm/dd/yyyy) ▶
Document Number:		Document Number:		Document Number:
Expiration Date (if any): (mm/dd/yyyy) ▶		Expiration Date (if any): (mm/dd/yyyy) ▶		Expiration Date (if any): (mm/dd/yyyy) ▶

**Certification**  
I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.  
The employee's first day of work for pay (mm/dd/yyyy): (State employment agencies may omit this date.)

Signature of Employer or Authorized Representative: \_\_\_\_\_ Title of Employer or Authorized Representative: \_\_\_\_\_ Date (mm/dd/yyyy): \_\_\_\_\_

Print Family Name (Last Name) \_\_\_\_\_ Given Name (First Name) \_\_\_\_\_ Employer's Business or Organization Name \_\_\_\_\_

Employee's Address (Street Number and Name) \_\_\_\_\_ City or Town \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

**Section 3. Reverification and Rehires (To be completed and signed by employer.)**

A. New Hire (if applicable)  
Family Name (Last Name) \_\_\_\_\_ Given Name (First Name) \_\_\_\_\_ Middle Initial \_\_\_\_\_  
B. Date of Rehire (if applicable)  
(mm/dd/yyyy) ▶ \_\_\_\_\_

C. If employee's previous grant of employment authorization has expired, provide the information for the document that establishes current employment authorization in the space provided below:  
Document Title: \_\_\_\_\_ Document Number: \_\_\_\_\_ Expiration Date (if any) (mm/dd/yyyy): \_\_\_\_\_

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative: \_\_\_\_\_ Date (mm/dd/yyyy): \_\_\_\_\_

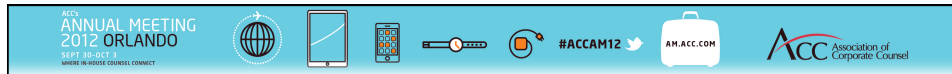
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# Employee Benefits



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## Employee Benefits

- USSC Decision in Patient Protection & Affordable Care Act (PPACA)
- ERISA 408(b)(2) Fee Disclosure deadline
  - Defined benefit and defined contribution plans should have received disclosure statements from “covered service providers”
  - Deadline: July 1, 2012
  - Fees need to be “reasonable” (does NOT mean lowest cost option)




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## Privacy Issues


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## Privacy

- Evolving technology = more complicated world
- Social media
- Personal identifiable information (“PII”)
- Computer Fraud & Abuse Act

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## Privacy - Survey


Does your company have a social media policy?

- a. YES
- b. NO
- c. WHAT’S THAT?


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## Privacy – Social Media

- Maryland and Illinois are the first states to prohibit employers from asking for social media passwords
  - Employers cannot ask for passwords or access social media accounts of prospective or current employees
  - These laws may also shield companies from suits alleging failure to properly monitor an employee's private electronic content
- Similar legislation is pending in CA, DE, MA, MI, MN, NJ, NY, SC, and WA
  - Federal legislation has also been introduced (Social Networking Online Protection Act)


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## Privacy – Social Media

- Employer policies
  - May 30, 2012 - NLRB issued new report on social media policies
    - Reviewed several existing corporate policies and found all but one (Wal-Mart) unlawful or inadequate
    - Wal-Mart's policy:
      - 2 pages
      - Gives employees clear notice of prohibited behavior "without burdening protected communications about terms & conditions of employment"



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## Privacy – PII

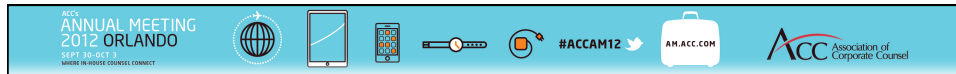
- Data security breach laws – only 4 states **DON'T** have them (AL, KY, NM, SD)
- Expectations of personal privacy – disappearing slowly
  - GPS – USSC: “need a search warrant” (U.S. v. Jones, Jan. 23, 2012)
  - Email – balancing interests of employers v. employees (policy language = critical!)
  - Video monitoring – employer can go “too far” (Carter v. County of Los Angeles (C.D. Cal 2011), 770 F.Supp. 2d 1042 – hidden camera to record inappropriate acts in dispatch room; “less intrusive methods available”)

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## Privacy – Computer Fraud & Abuse Act

- “Exceeds authorized access” – “not meant to criminalize an employee exceeding his employer’s computer use policies” (U.S. v. Nosal, 9<sup>th</sup> Circuit (April 10, 2012))
  - Creates split with 5<sup>th</sup>, 7<sup>th</sup>, and 11<sup>th</sup> Circuits (which said CFAA covers violations of corporate computer use restrictions or violations of duty of loyalty)
- Solicitor General still debating filing a petition for writ of cert (as of early Aug. 2012)

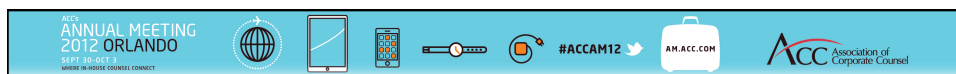


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## Occupational Health & Safety Act ("OSHA") Developments



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## OSHA Developments

- **Enforcement: Penalties Doubled in FY2011**
- **Standards: Injury & Illness Prevention Programs ("I2P2")**
  - Requires all employers to adopt safety & health programs
  - On hold; release NPRM after election?
- **Safety Incentive Programs**
  - 25% of manufacturing firms have an SIP.
  - OSHA says some programs may discourage injury or illness reporting.
  - GAO: OSHA can't cite employers for SIPs, but can cite for unreported injuries.
- **Hazard Communication Rule**
  - Revised to align with UN Globally Harmonized System of Classification & Labeling of Chemicals
  - Train employees by 12/1/13; comply by 6/1/15; update Haz Comm program by 6/1/16
  - Legal challenges brought