


ME

- Managing Partner at Constangy, Brooks, Smith & Propheo
- "Top Ranked Labor & Employment Lawyer" - U.S. Chamber of Commerce
- "Best Lawyer" - Ingram's
- "Top 100 Labor Lawyers in America" - LRI
- SHRM Member and former SHRM-Kansas City President




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What We'll Cover


- What's Going on With the Feds?
 - Laws & Regulations
 - Judicial Decisions
- What's Going on in Our State?



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**What's Going On
With the Feds?**



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What's Going On With Feds: Legislation

• Return to Divided Government

- Republicans
 - Paid Leave
 - Regulatory Changes
- Democrats
 - Equal Pay Act
 - Minimum Wage
 - Freedom To Negotiate Act (NLRA)
 - Strike Protections
 - Financial Penalties for NLRA violations
- Prediction: Gridlock but Leave and MW Possible



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What's Going On With Feds: DOL

- Department of Labor (W&H)
 - Employer-Friendly Enforcement
 - Not seeking liquidated damages unless goes to court
 - No 3rd year unless clearly acted in bad faith
 - New White Collar Regulations
 - Addressed Salary Level Only
 - \$679 per week (\$35,308 per year) – Not Scored to Inflation
 - Up to 10% of the salary may be made up of nondiscretionary bonuses, with an annual "true-up" to ensure the threshold is met.
 - HCE moved from \$100,000 per year to \$147,414



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Coming Soon From DOL: PAID



- DOL nationwide pilot program, the **Payroll Audit Independent Determination (PAID)**
- Goal: facilitate resolution of potential overtime and minimum wage violations under the FLSA
- Primary objectives: resolve such claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed—faster.



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FLSA Hot Topics

- Hot Topic in FLSA Litigation
 - Remote Devices and Hours Worked
 - Starbucks/Evolution Fresh (delivery driver lawsuit claims not compensated for calls outside of shift)
 - ABM Industries (\$5.4M settlement for time using personal phones for business during off-duty hours)
 - Issue is whether the time is "de minimis"



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States and Locales Not Waiting

- Minimum Wage Increases
 - 19 States
 - West coast and many large cities (13 total) moving to \$15
 - Colorado \$11.10
 - Missouri \$8.6
 - Nebraska \$9
 - Kansas \$7.25
 - Iowa \$7.25
 - Illinois \$8.25
 - Arkansas \$9.25



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PAID FMLA ON THE HORIZON

- Senator Rubio Proposal
 - Employees making less than \$65000 could "borrow" from their Social Security benefits to pay 50-70% of their wages while on FMLA for birth or adoption.
 - "Paid for" by employee taking reduced benefits initially upon retiring or delaying retirement age.
- Democrat Proposal
 - Wage replacement similar to amount received while on unemployment for duration of FMLA period.
 - Paid for by California-style payroll deduction tax



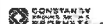
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What's Going On With Feds: EEOC

- EEOC

- Charges Increase (#metoo)
 - 7609 harassment charges – 13.6% increase
- Significant Enforcement Continues
 - EEOC filed 66 lawsuits/41 for sexual harassment
 - EEOC recovered \$70M in harassment cases up from \$47.5M
 - Reasonable cause findings 23.6% increase
- EEO-1 Pay Data Due September 30, 2019
- Orientation/Gender Identity Still In Limbo



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The EEOC Also Wants to Be Your Friend

- Training programs offered to employers
- "Leading for Respect" (for supervisors)
- "Respect in the Workplace" for employees
- Programs focus on "respect, acceptable workplace conduct, and the types of behaviors that contribute to a respectful and inclusive workplace."
- EEOC Guidelines on Sexual Harassment (2018)

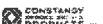


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#metoo - #timesup

- Movement still having large impact on workplace
- Employers Must Strengthen Culture and EEO Policy
- Key Issues
 - Harassment – Must Do Training Now
 - Compensation Equality



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Wage Discrimination (80.1%)



Cyber-Harassment

With social media, harassment can now occur **24 hours a day**.



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States Very Busy with #metoo



- Ban Non-Disclosure Agreements in Sex Harassment Cases (AZ, CA, MD, NY, TN, VT, WA)
- Ban On Mandatory Arbitration in Harassment Cases (MD, NY, VT, WA)
- Mandatory Training (CA, DE, LA, MD, NY, OR, VT)

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EEO Litigation

- **Supreme Court ("Relisted" January/2019)**
 - **Bostock v. Clayton County & Altitude Express v. Zarda** (Title VII cover sexual orientation)
 - **Harris Funeral Homes** (Title VII cover gender status)
 - **Most Recent: 5th Circuit Says Orientation/Identity Not Covered**
 - **EEOC:** Covered
 - **DOJ:** Not Covered
 - **Kansas Law:** Governor reinstates protection for LGBT state employees

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EEO Litigation

- **Supreme Court (Certification Granted)**
 - **Rizo v. Yovino** (Whether an employee's past salary history is a legitimate factor other than sex under EPA) (9th Circuit said NO)
 - **Lamps Plus v. Varela** (Whether an arbitration agreement must explicitly call for class arbitration for class cases to be subject to arbitration)

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EEO Litigation (Lower Courts)

- **Pregnancy Discrimination/Accommodation**
 - **EEOC:** Employer's must accommodate pregnancy same as if does other non-pregnancy conditions including providing light or transitional duty.
- **Hills v. AT&T Mobility**
 - Class action case where employee alleges she was unfairly assessed points under attendance policy and then terminated for absences in connection with pregnancy; also claims failure to accommodate under PDA & ADA)
 - Employee further alleges that "pregnancy" should be added to list of 13 items that are excused under attendance policy

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Pregnancy Discrimination

- EEOC v. Scottish Pines (Filed 3/7/2018)
- Pregnant CNAs restricted to no lifting, pulling or pushing 50/20 pounds.
- Employer limited assignments of light duty/ transitional tasks to those with restrictions due to work-related injuries
- Employees placed on LOA then fired at end of leave
- EEOC says employer could have accommodated using available lifting devices and co-worker assistance along with some duty re-assignment



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ADEA Turns 50



- ADEA enacted December, 1967
- 1967 - 1/3 of workers over 40; 2018 - 1/2 over 40
- By 2020 – more than 25% of workers over 55
- Age discrimination claims increasing
 - 1997 – 15,785 EEOC age charges (19.6 % of all charges)
 - 2018 - 20,857 EEOC age charges (21.8% of all charges)
- Healthcare and disability claims increasing



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EEO Litigation

- **Supreme Court (Decided)**
 - **Epic Systems** (class action waivers valid and enforceable)
 - **Schein v. Archer** (when arbitration agreement delegates "arbitrability" to arbitrator, courts should not decide question even if it is clear the dispute is not covered by arbitration)
 - Note: Soos v. Easter Seals (NO Supreme Court) rules same delegation authority applies under MO State law
 - **Oliveira v. New Prime** (FAA does not apply to employees or contract drivers in transportation industry)
 - **Encino Motorcars v. Navarro** (overruled 50 years of precedent saying FLSA exemptions should be narrowly construed and now should "be given a fair reading")

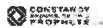


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A Cautionary Tale

- **Sicuso v. Carrington Golf Club**
 - Older employee terminated
 - Manager secretly recorded telling employee during termination he was not a good fit and that there were "generational difference" between him and rest of the workforce.
 - Manager claimed comment was to lighten the blow of termination.
 - Jury decides whether the comment was evidence of age discrimination



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Discrimination/Harassment Prevention

- Well-written policy
 - Go directly to HR with complaints
 - Have alternate contact if don't feel matter handled appropriately
- Company-wide training
- Training for managers and supervisors
- Updates
- Timely investigations
- Consistent enforcement



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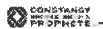
Final Thoughts on Prevention

Famous Quotes

- **Judge:** Am I never to hear the truth?
- **Counsel:** No, your honor, only the evidence



Truth – What Happened


Evidence – What You Have to Show What Happened



National Trends To Watch




- Californication of America: Unprecedented State/Local Revolt
 - Marijuana
 - Ban the Box/Pay
 - Paid FMLA and Paid Sick
 - Minimum Wages
 - Sexual Orientation/Gender
 - "Scheduling" Laws





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Marijuana


- 33 states and the District of Columbia now have laws legalizing marijuana in some form.
- 11 states allow recreational use.






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Accommodation of Medical Marijuana?


- *Barbuto v. Advantage Sales & Marketing (Mass.)*
 - Plaintiff tells employer she will fail drug test because of medical marijuana; says she doesn't use it before or during work
 - Company fires employee for failed drug test
 - Court: plaintiff was handicapped under state discrimination law and subject to accommodation analysis (modification of policy, alternate accommodations, or perhaps undue hardship existed)
 - Court: fact that possession violated federal law was irrelevant.
 - Watch: California and Oklahoma




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MISSOURI MARIJUANA

- Nothing in the law permits a person to:
 - Bring a claim against any employer, former employer, or prospective employer for wrongful discharge, discrimination, or any similar cause of action or remedy, based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from being under the influence of marijuana while at work or disciplining employee or former employee, up to and including termination from employment for working or attempting to work while under the influence of marijuana.



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Let's Talk About Applicants

Interviewer: So where do you see yourself in five years?
 Me: I'd say my biggest weakness is listening





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
Ban the Box

- Prohibit employers from inquiring about criminal background until after job offer
- State/local actions
- EEOC's stance on background checks
- FCRA


JOB APPLICATION

Have you ever been convicted of a criminal offense?

Ban the BOX



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Ban the Box: Kansas City Style

- Prohibit employers from inquiring about criminal background until after job offer
- Prohibits Employer from refusing to hire based on background check. Employer must review nature, frequency and how recent crime and show it would impact on job duties to deny employment
- Effective June 8, 2018

JOB APPLICATION

Have you ever been convicted of a criminal offense?

Ban the BOX



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Ban the Pay Talk

- Prohibits asking employees current salary as part of hiring process
- Mostly east/west coast for now



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Paid FMLA Leave

State Activity on Paid Family Leave 2019

Legend: State with program in place, State with program in development



Bloomberg Law

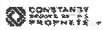


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Paid Sick Leave Laws

- Ten States, DC and PR have paid sick leave laws
- Many states have "multiple" laws due to non-preemption of city ordinances (California and Washington)
- Others preempt (NJ)
- Patchwork is increasingly difficult for multi-state employers (unless/until Feds act)



Scheduling Laws

- Laws requiring advance notice before a schedule can be changed (range from 1-4 weeks)
- Oregon Passed/NY Likely Next
- Four Cities (San Francisco, Philadelphia, NY, Seattle)



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Identity Theft/Employer Liability

- *Castillo v. Seagate Technology, LLC* (2017)
- Phishing scam - email from person posing as CEO, asked for employee W-2 forms
- One employee complied - resulted in breach of personal information of 10,000 employees
- Class action suit filed against employer for breach of implied contract and violation of California state privacy law
- Result: \$6,000,000 settlement to provide identity protection to employees



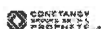
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Good Idea?

- Tech company - Three Square Market held microchip party. Employees could volunteer to have microchip inserted in hand
- 50 employees agreed
- Microchips used to log onto computer, use copier and buy snacks

- Swedish company – Epicenter – implanted chips in employees to monitor work time and bathroom breaks



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Hang On To Your Hair, Glasses and Gavel



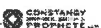
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Questions



Timothy A. Davis
Constangy, Brooks, Smith & Prophete, LLP
Telephone: 816.472.6400
Email: tadavis@constangy.com



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