EMPLOYMENT LAW UPDATE

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Kentucky Bar Association
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I. CASE LAW UPDATE

A. United States Supreme Court


A pregnant employee can establish a *prima facie* case of disparate treatment under the Pregnancy Discrimination Act by showing, under the McDonald Douglas burden-shifting framework, that: (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others "similar in their ability or inability to work." If these elements are established, the burden shifts to the employer to proffer a legitimate, non-discriminatory reason for denying the accommodation. This reason must be more than an employer's claim that it is more expensive or less convenient to add pregnant women to the categories of those whom the employee accommodates. If the employer proffers a legitimate, non-discriminatory reason, the employee must establish that the employer's reason is pretextual.


Before suing an employer for employment discrimination under Title VII of the Civil Rights Act, the EEOC must first endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Once the EEOC determines that conciliation has failed, it may file suit in federal court.


A claim that a fiduciary breached its duty under the Employment Retirement Income Securities Act (ERISA) by failing to properly monitor investments and remove imprudent ones is timely so long as the breach occurred within six years of the commencement of the lawsuit.


An employer will be liable under Title VII of the Civil Rights Act for religious discrimination if an applicant can show that the employer's decision not to hire the applicant was based on a desire to avoid having to accommodate a religious practice. A job applicant who wore a headscarf to a job interview was not...
required to advise the employer of the need for a religious accommodation. Title VII does not impose a knowledge requirement, and employers cannot defend on the basis that a candidate did not specifically inform the employer of a need for an accommodation.


Applicable large employers (those with fifty or more full-time and full-time equivalent employees) in states without a state-operated exchange that fail to offer group health plan coverage to full-time employees are subject to the Affordable Care Act's rules relating to employer-shared responsibilities, including potential penalties for non-compliance under the Act.

### B. Court of Appeals for the Sixth Circuit

1. **Tilley v. Kalamazoo County Road Com'n**, 777 F.3d 303 (6th Cir. 2015).

Terry Tilley was fifty-nine years old when he received a final warning from the Kalamazoo Road Commission for failing to complete his work assignments. He took a leave of absence after experiencing chest pain but was terminated because he still had not completed his work to the commission's expectations. Tilley filed suit, claiming he was discriminated against on the basis of his age and also claimed FMLA interference and retaliation. The commission claimed he was not an eligible employee under the FMLA, since he did not work at a location where the company employed fifty or more employees within a seventy-five-mile radius. The district court granted summary judgment to the company on all claims, but the Court of Appeals for the Sixth Circuit reversed as to the FMLA claims, holding Tilley had presented sufficient evidence to create a material factual dispute on his claim that the company was equitably estopped from denying he was an eligible employee under the FMLA. Tilley alleged he took leave and sought medical treatment prior to completing his work assignment, because of the unqualified provisions in his employee handbook that stated he was eligible if he had been employed over twelve months and had worked more than 1,250 hours within the past year. The handbook did not mention that he must be working at a location where the commission employed fifty or more employees within a seventy-five-mile radius. The court held that a reasonable person in Tilley's position could have believed he or she was covered by the FMLA and sent the case back for a jury trial.


Jane Harris was employed by Ford as a steel resale buyer, which Ford maintained required face-to-face interactions at the
manufacturing site. Harris suffered from irritable bowel syndrome, and as an accommodation, she asked to work from home as needed, up to four days per week. Ford refused her request, because it claimed it prevented her from performing the essential functions of her job. Ford offered alternative accommodations, which Harris rejected before filing a charge of disability discrimination with the EEOC. In August 2011, the EEOC sued Ford on Harris's behalf. The district court granted Ford's motion for summary judgment, concluding that working from home up to four days per week was not a reasonable accommodation under the ADA. The EEOC appealed, and in April 2014, a divided panel of three Sixth Circuit judges reversed, concluding that there was an issue of fact as to whether Harris's telecommuting proposal was reasonable. The full Sixth Circuit vacated that decision and reheard the appeal en banc. On April 10, 2015, it affirmed summary judgment for Ford, finding that regular and predictable on-site attendance was an essential function of Harris' job and that it was a prerequisite to other essential functions. The court also held that with regard to jobs involving teamwork and a high level of interaction, employers can require regular and predictable on-site attendance and that most jobs would be fundamentally altered if that regular and predictable attendance requirement was removed.


David Williams worked in Fruit of the Loom's (FOL) Internal Audit Department from April 1983 through June 1998 and then again from March 2007 until his employment was terminated on December 31, 2011. Williams' wife was covered under his insurance plan through the company and had been diagnosed with Wegener's Vascular Disease, an illness that weakened her immune system and made her very susceptible to contracting other diseases. Williams alleged that FOL terminated him in violation of the ADA, because it believed his wife's disability would be too costly for the company.

Williams also alleged the company discriminated against him on the basis of his age. The trial court granted summary judgment in favor of FOL, and the Sixth Circuit affirmed. The court determined that for an ADA association claim, the injured party has to show that the employer excluded or otherwise denied equal jobs or benefits to the qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship. The court reasoned that Williams had failed to meet that burden, because there was no evidence that his supervisor acted adversely when he disclosed his wife's medical condition and his need to keep his health insurance. In addition, there was no evidence that his poor performance was related to his caring for his wife. With respect to the age discrimination
claim, the Sixth Circuit held that Williams had failed to show that
the company had replaced him with a younger employee.


Lauri Huffman became pregnant while working as a shift leader for
Speedway. Her doctor issued an initial set of restrictions concerning her work hours, and Speedway accommodated those
restrictions. The doctor then issued another set of restrictions which prevented Huffman from performing all of her duties, particularly when she worked alone. Speedway determined it could not accommodate these restrictions since it prevented Huffman from performing duties which needed to be completed for the convenience of the customers. As a result, Huffman was told she should not return to work but that she was eligible for FMLA leave, and she was given the necessary paperwork to complete. Huffman continually refused to complete the necessary paperwork and was ultimately terminated for job abandonment. Huffman filed suit, claiming that Speedway interfered with her FMLA rights; however, the Sixth Circuit ruled that the interference claim failed, because an involuntary FMLA leave only interferes with the employee's right to take FMLA if later during the same year, the employee requests leave and has none left because of the prior involuntary leave. Huffman also claimed that Speedway had retaliated against her for refusing to take FMLA leave, but the Sixth Circuit held that terminating an employee for refusing involuntary leave is not retaliation.


The Sixth Circuit examined the "cat's paw" theory of liability in this sex discrimination case involving a failure to promote claim and overturned the lower court's award of summary judgment. In consideration of the fact that Cassandra DeNoma had eleven more years of experience than the candidate selected for the promotion as well as the fact that her evaluations did not note any performance issues, the court determined that a jury should decide whether the decision of the hiring committee was improperly influenced by DeNoma's supervisor, who was alleged to have given more authority to male employees.


Robert Hurtt was a senior business analyst who repeatedly requested changes to his schedule due to health issues. He also asked for FMLA leave due to acute anxiety and depression. The day after requesting FMLA leave, the company switched him from a compensation plan that included a yearly draw plus a percentage commission on sales to a commission-only plan and
also terminated its agreement to prepay his travel expenses. Hurtt sued, claiming, among other things, FMLA interference and retaliation as well as disability discrimination and retaliation. The district court granted summary judgment to the employer on all claims, but the Sixth Circuit reversed the lower court, finding that simply requesting an accommodation is sufficient to raise the specter of retaliation, regardless of whether the employee is actually disabled. Specifically, the court held that the appropriate inquiry was not whether Hurtt had proven he had a disability under the ADA, or whether the company had specific knowledge of an alleged disability, but rather, whether Hurtt had shown a good-faith request for reasonable accommodations. The Sixth Circuit found that he had.


The Sixth Circuit upheld the dismissal of a retaliation lawsuit brought by a pharmacist despite the fact that he claimed he had repeatedly reported and complained about racial discrimination by his supervisor. The court assumed that the pharmacist actually made the alleged complaints for purposes of its holding but determined that the employer had satisfied its duty to identify legitimate, nonretaliatory reasons for the pharmacist's termination with a well-documented history of disciplinary action taken against him.


In 2007, GM and the UAW negotiated a new collective bargaining agreement, agreeing for the first time that UAW-represented employees would be subject to different levels of wages. Beginning in the summer of 2008, GM hired the first employees at these lower wage levels, including employees at the Lordstown Assembly plant. Following their hire, a group of twenty-eight employees from the Lordstown plant who received the lower wage brought numerous claims against GM and their local union and the UAW, objecting to their classification and pay. The district court found that the unions did not breach their duty of fair representation and held that the alleged breaches of contract failed as a matter of law. On appeal, the Sixth Circuit sympathized with the workers and criticized the conduct of GM and the UAW; nevertheless, it affirmed the lower court's finding and held the workers did not show that the union failed to fairly represent them or that the union's actions with respect to representation were "wholly irrational."

Dr. Richard Slusher served as a temporary orthopedic surgeon for Heritage Medical Center pursuant to a one-year contract that could be terminated by either party for any reason with ninety days' notice. In the meantime, the hospital was searching for a permanent orthopedic surgeon. Before it could complete its search, Dr. Slusher was deployed to Iraq. A permanent surgeon was hired, and while Dr. Slusher was in Iraq, the hospital gave him three months' notice of the termination of his contract. Dr. Slusher claimed the hospital had violated his reemployment rights under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The court held that Dr. Slusher was not entitled to reemployment, because his contract was for a brief, nonrecurrent period, and he had no reasonable expectation that his employment would continue indefinitely or for a significant period.


Sara Jones-McNamara was the VP for Corporate Compliance for Holzer Health Systems. In May 2010, she began investigating conduct she believed violated the federal Anti-Kickback Statute ("AKS"). She was told to complete her investigation and submit her findings in writing; however, she sent a strongly-worded email about the alleged kickback violations. Jones-McNamara was terminated in June 2010 for lack of professionalism and interpersonal skills, and she sued for retaliatory discharge under the False Claims Act. The court held that while the employee believed she was reporting an AKS violation, her belief was not reasonable, as the purported kickbacks were token gestures of goodwill (free hot dogs, hamburgers, and a single embroidered jacket), and these infrequent kickbacks, which were provided by an ambulance service, were not the reason for the hospital's referral to the service.


In July 2013, between 300 and 500 employees of Vanderbilt University Medical Center were informed that they were being terminated. Tracy Morton filed this class action on behalf of herself and 193 of those employees who were terminated in July 2013. Because their class size was insufficient to constitute a mass layoff as defined under the Worker Adjustment and Retraining Notification Act ("WARN Act"), they relied on the aggregation provision, which allows for separate layoffs within a ninety-day period to be counted together in determining whether there has been a mass layoff, and cited a second group of 279 employees who were notified in September 2013 that their employment would be terminated sixty days later. The district court determined that
the second group had suffered an employment loss in September and held that the plaintiffs had been subjected to a mass layoff. The Sixth Circuit reversed, however, finding that no WARN Act violation occurred. The court reasoned that the second group of employees did not suffer their employment loss until November when they stopped receiving wages.

C. United States District Courts of Kentucky


Tammy Kastor and Lisa Nevitt worked at different locations for Cash Express. While on an approved FMLA leave, Kastor was terminated for a misdemeanor DUI conviction the company allegedly uncovered when conducting a random background check during her leave. Kastor's attorney sent the company a letter claiming that Kastor knew of one other person in the company who had a felony conviction and was still employed. Kastor ultimately revealed that this person was Nevitt. One day after the letter was sent, the company's president and a regional manager visited Nevitt at work to interview her for a job for which she had not applied and did not want. Less than two weeks later, she was terminated for having a felony conviction. Nevitt claimed she had disclosed the conviction before being hired and alleged that the company fired her to strengthen its position with Kastor's case. Both sued for FMLA retaliation; however, Nevitt's claim was for third-party retaliation. Neither the Sixth Circuit Court of Appeals nor the United States Supreme Court had addressed this issue. Two other federal district courts had addressed the matter but reached a different result. As such, in considering whether Nevitt could bring a third-party claim under the FMLA, the U.S. District Court for the Western District of Kentucky looked directly to the provisions of the Act and determined that Nevitt was not required to individually challenge an unlawful practice under the FMLA in order to properly claim that she was subject to retaliation. Provided she could show the company retaliated against others and that she was affected by that retaliation, she could make a third-party claim.


Andrea Gogel sued Kia, alleging it had discriminated against her by failing to promote her because of her race and gender. She further alleged that Kia later retaliated against her for filing certain complaints of discrimination. During the course of discovery, Gogel subpoenaed emails sent and received by her supervisor at Kia during the time he had worked at Toyota. Gogel had worked with this supervisor at Toyota and claimed the subpoenaed emails contained evidence of the supervisor's derogatory attitude towards women. In a separate action, the supervisor moved to quash the
subpoena, but the court ruled in favor of Gogel, finding that because she claimed the emails were illustrative of her supervisor's attitude towards women in the workplace, then they were reasonably calculated to lead to the discovery of admissible evidence. The court cautioned that the emails may not be admissible at trial but, nevertheless, determined they were discoverable.


Betheny Green and Richard Michaels sued the Woodhaven Country Club under the FMLA and the KCRA, claiming they were denied FMLA leave and the right to return to their jobs following their leave. The two also alleged disability discrimination. The employer asked the court to dismiss the claims, arguing that neither employee had properly requested FMLA leave and could not show they were actually disabled. The court refused to dismiss the FMLA claims, finding that an employee does not have to mention the FMLA or make a specific request for FMLA leave; an employee must only provide the employer enough information to put it on notice that FMLA leave is needed. With regard to the plaintiffs' KCRA claims, the court dismissed Green's claims, finding that the employer had presented a nondiscriminatory reason for termination. Michaels' claim of discrimination was allowed to proceed due to the existence of a factual dispute about whether he quit or was fired.


The United States Department of Labor brought an action against Off Duty Police Services, claiming it had misclassified its workers as independent contractors. After applying the six-factor economic realities test to analyze whether the workers were properly classified, the court determined that there were facts in dispute with regard to the six factors and declined to rule on whether the company had violated the FLSA. The court noted that the independent contractor agreements signed by the workers suggested an independent contractor relationship; however it agreed with the DOL that other facts suggested the workers were employees.


Joyce Son filed suit against her employer after she was terminated for walking off the job following a discussion about performance deficiencies. Son had epilepsy and left work following the discussion, as she was experiencing an "aura," which alerted her to a potential oncoming seizure. Because she
did not notify anyone that she was leaving work, her employment was terminated the next morning. Son claimed the hospital discriminated against her on the basis of her disability; however, the court rejected her claim and dismissed the case, as there was no evidence that the condition had affected her at work or that the person responsible for terminating her employment knew about her condition.


Brown Jordan International and other related entities filed a lawsuit against Christopher Carmicle alleging, in part, that he improperly accessed their computers and computer systems. The parties agreed to a computer forensic investigation protocol during discovery, which provided that Carmicle permit his electronic devices and storage sites to be examined. Based upon the review, the companies believed that the iPhone owned by Carmicle's spouse contained Brown Jordan email messages. Carmicle had also testified that he may have used his wife's phone. The companies subpoenaed the production of the spouse's iPhone, which she opposed, asserting that she had purchased her current phone one year after the date identified in the forensic report. The court did not find the purchase date to be dispositive, since it is common for a new iPhone to be backed up with information obtained prior to the date of purchase. The court also rejected the spouse's claims of privilege and inconvenience in having to relinquish her cell phone, because the forensic examination could occur within a minimum of four hours to a maximum of one night, and the court would allow the spouse to review the results for the purpose of asserting any applicable privilege.


James McCartt was laid off as the result of a corporate downsizing after Keebler Foods Company was acquired by Kellogg. McCartt was over sixty at the time of the layoff. He sued for age discrimination because his manager had commented that he was "too old and set in his ways" and that Kellogg and McCartt needed to move in different directions. The manager did not say this directly to McCartt, but said it about him during a performance review discussion with other managers approximately ten months prior to the layoff. McCartt learned about the comment from his former district manager who had told other employees about it. Kellogg filed a motion to dismiss, and the court ruled in favor of McCartt, finding that the manager's statements were direct evidence of potential age bias. The court determined that even though the manager was not the ultimate decision-maker with regard to the layoff, the human resources department relied upon
scores that the manager had given to McCartt when it selected him for layoff. The court also found that it was reasonable to expect that the manager would know the scores he gave McCartt could lead to an adverse employment decision.

D. Supreme Court of Kentucky

1. Pennyrile Allied Community Services, Inc. v. Rogers, 459 S.W.3d 339 (Ky. 2015).

An employee claimed she was terminated as a consumer educator coordinator after confronting her supervisor about his trespass upon her private property. The employee alleged a violation of KRS 61.101, the Kentucky Whistleblower Act. The employee in the case was fired one day after she confronted her supervisor at a staff meeting about his conduct in routinely checking up on employees by going to their homes to verify that they were actually working. On one occasion when the supervisor went to the employee’s home to see if she was working, he damaged her gravel driveway. The trial court dismissed the case on the basis that the employee's report did not touch on a matter of public concern. However, the Kentucky Court of Appeals and Kentucky Supreme Court both agreed that Kentucky's Whistleblower Act does not require the report to touch on a matter of public concern. Nevertheless, the Kentucky Supreme Court determined that the employee's actions were not protected by the Act.


ULAA hired Banker as an assistant track and field coach under a one year employment contract. Banker made complaints about sexist comments and gender discrimination within her department to various levels of supervisors. ULAA terminated Banker prior to the one-year expiration of her contract, and Banker filed suit alleging breach of contract, gender discrimination, and retaliatory discharge. At the conclusion of a jury trial, Banker was successful on the retaliatory discharge claim and was awarded damages for emotional distress and lost wages. On appeal, ULAA contended that all of the evidence at trial proved that Banker's supervisors planned to discharge her before she made any complaints. The Kentucky Supreme Court held that based upon the entire record, the jury reasonably inferred that ULAA was not contemplating terminating Banker's employment prior to her complaints and that therefore she had proved her prima facie case of retaliatory discharge and that there was sufficient evidence that ULAA’s stated reasons for discharging Banker were pretextual. In regard to damages, the Kentucky Supreme Court struck the award for lost wages because Banker had failed to put forth any proof that
she looked for work after being discharged or otherwise attempted to mitigate her damages.


An employee was fired because of her personal appearance. She had been morbidly obese throughout her employment. Under the Kentucky Civil Rights Act, a disability is defined as (1) a physical or mental impairment that limits one or more of the major life activities of the individual; (2) a record of such impairment; or (3) being regarded as having such an impairment. The Kentucky Supreme Court held that the employee could not prove that her obesity was the result of a physiological cause which was a prerequisite for a prima facie case of disability discrimination under the KCRA. Because the relevant facts of this case took place before the passage of the amendments to the Americans with Disabilities Amendments Act in 2008, the Kentucky Supreme Court may reach a different result in the future to the extent that the KCRA is interpreted consistent with the ADA and recent ADA decisions since the amendments to the ADA.

II. AGENCY ACTION

In many respects, actions by federal and state agencies have a greater immediate impact on employers than the courts. In the past year, the agencies have taken several actions that will have significant impact on employers.

A. National Labor Relations Board ("NLRB")

1. General Counsel's Memoranda.

a. GC 15-01 Calculation of Back Pay.

On January 30, 2015, Richard F. Griffin, Jr., General Counsel of the NLRB, issued GC 15-01 to furnish guidance in connection with calculating back pay in light of the Board's decision in Kentucky River Medical Center, 356 NLRB No. 356-6 (2010) (providing for daily compounded interest on make whole awards). The General Counsel directs the regions to affirmatively allege in their initial unfair labor practice complaints that search-for-work and work-related expenses are being sought regardless of whether they exceed interim earnings. The General Counsel states that discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. This includes the cost of tools or uniforms required by an interim employer; room and board for seeking employment and/or working away from home;
contractually required union dues and/or initiation fees, if not previously required for working for respondent; and/or the cost of moving if required to assume interim employment.

b. C 15-02 Guidelines for Deferral to Arbitral Awards.

On February 10, 2015, the General Counsel issued guidelines concerning deferral to arbitral awards, the arbitral process, and grievance settlements in Section 8(a)(1) and (3) cases. In 2014, the Board revisited its earlier holdings in Babcock & Wilcox Construction Co., 361 NLRB No. 132 (2014), which held that existing post-arbitral deferral standard did not adequately balance the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements.

The General Counsel directed the regions to submit to the Division of Advice any case where it seeks to issue complaint on the basis that an arbitral remedy is insufficient setting forth specific standards for the regions to follow.

The General Counsel further advised that the Board will no longer defer cases to the arbitral process unless the arbitrator is explicitly authorized to decide the statutory issue (either in the collective-bargaining agreement or by agreement of the parties in a particular case). The General Counsel directed the regions to take into account which standard would apply to the ultimate arbitration deciding whether to place the case on administrative deferral.

Finally, the General Counsel directed that regions may accept a charging party's request for withdrawal of a charge in cases with arguable merit, so long as the grievance settlement is satisfactory.

c. GC 15-03 Procedure for Addressing Immigration Issues.

On February 27, 2015, the General Counsel issued updated procedures in addressing immigration status issues that arise during unfair labor practice proceedings.

Regions should continue the current practice of explaining to witnesses, alleged discriminatees, and parties that an individual's immigration status is not relevant to the investigation of whether the Act has been violated. Similarly, the regions should make a merit determination without considering employees' immigration status.
d. GC 15-04 Guidelines for Employee Handbooks.

On March 18, 2015, the General Counsel released GC 15-04 that addresses recent developments in case law regarding employee handbook rules. In this very important document, the General Counsel opens its memorandum declaring "The law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act." The General Counsel further states that a rule will be found unlawful "...if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights."

i. Confidentiality rules.

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. An employee handbook rule that explicitly violates these rights is unlawful. Similarly, a well-intentioned, but broad confidentiality rule that prohibits the discussion of employee or personal information will also be found unlawful if it does not have some limiting language or other form of clarification.

ii. Conduct rules regarding the company and supervisors.

Employees have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Conduct rules that explicitly interfere with these rights, or could be reasonably interpreted to interfere with these rights, will be found unlawful. For instance, a rule that prohibits employees from engaging in disrespectful, negative, inappropriate, or rude conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful because such prohibition could be reasonably construed to interfere with employee's ability to criticize or protest. However, rules that require employees to refrain from acting in the same way towards customers or co-workers, but not management, will be found lawful because "employers have a legitimate business interest in having employees act professionally and
courteously in their dealings with co-workers, customers, employer business partners, and other third parties."

iii. Conduct rules regarding fellow employees.

Employees have the right to argue and debate with each other about unions, management, and their terms and conditions of employment. Because of this, when employers ban inappropriate or negative discussions amongst employees, it's reasonable for employees to consider their Section 7 rights to have been interfered with.

iv. Conduct rules regarding employees' interaction with third parties.

Employees have the right to communicate with the media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Any rule that explicitly interferes with this right, or could reasonably be interpreted to do so, is unlawful.

v. Conduct rules regarding the use of trademarks.

While employer-copyright holders have legitimate interest in protecting intellectual property, employers may not restrict their employees' fair use of said property.

vi. Conduct rules regarding photography and recording.

Employees have a Section 7 right to photograph and make recordings in furtherance of their protected activities; rules placing a total ban on such photographs or recordings, or other rights guaranteed under Section 7 are unlawful "where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time."

vii. Conduct rules regarding reporting to and leaving from work.

Rules that regulate when employees may come and go from work are unlawful if employees would reasonably interpret the rules to prohibit strikes and walkouts.
viii. **Conflict of interest rules.**

Section 7 protects employees' right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. If an employer's rule could reasonably be read to prohibit such activities, it is unlawful. However, where the rule clarifies that it applies only to legitimate business interests, the rule will be found lawful.

ix. **Summary.**

Employee handbook guidelines that restrict employee conduct must be specific in their restriction. Ideally, handbooks should also explicitly note that the restrictions are not intended to interfere with employees' rights under 29 U.S.C. §§57 & 58. Broad language should be avoided. If broad language is for some reason necessary, it should be tempered by some limiting language or extensive examples of situations to which the rule would apply, both of which should aid in showing the rules' limited scope. For a complete copy of the GC 15-04 see the following:


2. **"Ambush" election rules.**

On April 14, 2015, the NLRB adopted a final rule for what has become known as the "ambush election" rules, which will effectively shorten the time to ten-fourteen days in which a union election can be held. The proposed rules radically alter well established union representation election procedures that have worked in a highly efficient fashion for decades. While these rules contemplate many technical changes, the core result is that employers will have virtually no time to prepare a considered response to a representation petition or to help employees gather the information they need to make an informed decision.

The final rule went into effect on April 14, 2015, and includes the following:

a. Requires additional contact information (personal telephone numbers and email addresses) be included in voter lists that the employer gives to the NLRB, which in turn is then given to the union. These voter lists will now be given to the Board prior to any pre-election proceedings.
b. Permits parties to file election petitions and other documents, like the voter lists, electronically.

c. Eliminates an employer's right to challenge voter eligibility and other issues prior to the election being held.

d. Requires the employer to identify all objections regarding the election in its "Statement of Position" filed prior to the election and does not allow any new objections to be raised after the election is held.

e. Eliminates the Board's requirement to review every aspect of any post-election dispute. The Board now will only review disputes when one party has raised an objection prior to the election.

f. Forces parties to consolidate all election-related appeals to the Board into a single appeals process.

The main vehicle for most of this change is the pre-election hearing, which has historically been used to resolve legal disputes related to the union's petition. Under the new rules, pre-election hearings would only be conducted to determine the narrow issue of whether a question concerning representation exists. NLRB hearing officers will have authority to enforce that mandate by limiting the evidence employers can submit at the hearing. Accordingly, many issues of individual voter eligibility will be deferred to post-election procedures rather than determined prior to the vote.


A full-Board majority adopted the Regional Director's recommendation to overrule the Employer's objection alleging that it was improperly prohibited from holding a mass campaign meeting on the morning ballots were scheduled to be mailed in a mail ballot election. The Board majority overruled Oregon Washington Telephone Co., 123 NLRB 339 (1959), which held that the mass-meeting prohibition begins when the ballots are scheduled to be mailed by the Regional Office (as opposed to beginning twenty-four hours before). The Board majority found that prohibiting mass, captive-audience speeches by parties within the twenty-four-hour period prior to the mailing of the ballots would align the mail-ballot rule more closely with the manual-ballot rule established in Peerless Plywood Co., 107 NLRB 427, 429 (1953), in which the Board prohibited such speeches within the twenty-four-hour period prior to the start of a manual election. One member dissented, and would not overrule Oregon Washington Telephone and found that the rule adopted by the majority creates different standards – one applicable to mail-ballot elections, the other to manual elections—that cannot be reconciled with one

B. United States Department of Labor ("DOL")

1. On January 20, 2016, the DOL released an "Administrator's Interpretation" of the Fair Labor Standards Act ("FLSA") with respect to joint employment. On January 27, 2016, the DOL followed up with Fact Sheet #28N on the Family Medical Leave Act ("FMLA"). The DOL is putting all employers on notice that they may be liable as joint employers for workers they may have assumed weren't even their own.1

The FSLA and the FMLA specifically contemplate joint employers stating that a single worker can be an employee of two or more employers. It is possible for two or more employers to jointly employ a worker and therefore be responsible, simultaneously, for compliance with the Wage and Hour provisions.

a. Horizontal joint employment.

Where two or more technically separate but related or associated employers employ an employee and benefit from his or her work including when:

i. The employers have an arrangement to share the employee’s services (e.g. interchange the employee);

ii. One employer acts in the interest of the other in relation to the employees; or

iii. The employers share control of the employee, directly or indirectly, because one employer controls, or is controlled by, or is under the common control with the other employer.

iv. A farmworker works for two different growers who have an arrangement to share workers.

b. Vertical joint employment.

Where one employer provides labor to another employer and the workers are economically dependent on both employers.

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1 Information from this section was obtained from the following article written by Scott Prange, Attorney: https://www.linkedin.com/pulse/you-joint-employer-scott-prange.
Examples:

i. Franchise or franchisee.

ii. A staffing agency places a worker at a hotel to do housekeeping.

iii. A construction employee working for a subcontractor under a general contractor.

iv. A security company places security personnel with a retail establishment.

v. A private homecare agency places an aide in someone’s home.

vi. A farm worker working with a contractor for a grower.

c. Test for horizontal joint employment.

You may be liable as a joint employer if any of the following apply:

i. Both companies have common owners or both companies are partially owned by common owners;

ii. One company supervises the work of another company;

iii. Both companies share clients;

iv. Both companies have common management;

v. Both companies share control over operations (e.g. managing overhead, advertising, managing employees);

vi. Both companies’ operations are intermingled (e.g. for both companies, the same person supervises, schedules and pays employees, regardless of where they are working);

vii. Both companies have a shared pool of employees they can both draw from; or

viii. Both companies share supervision of the employees.
d. Test for vertical joint employment.

You may be liable for joint employment if any of the following apply:

i. You direct, control, or supervise (even indirectly), the employee's work;

ii. You have the power (even indirectly) to hire or fire the employee, change employment conditions, or determine the rate and method of pay;

iii. You have a permanent, long-term, or full-time relationship with the employee;

iv. You have an employee who performs repetitive work or work requiring little skill;

v. The employee's work is integral to your business;

vi. The employee is working on your premises;

vii. You perform functions for the employee typically performed by employers, such as handling payroll or providing tools, equipment, or workers' compensation insurance, or, in agriculture, providing housing or transportation.

2. "White-collar" exemption rule.

New rules for the "white-collar" overtime exemption:

a. Raise the weekly salary from $455 to $975 per week;

b. Raise the minimum salary for those covered under the "highly compensated employee" exemption from $100,000 in total compensation annually to $122,000-$148,000;

c. Imposes escalator provisions annually raising the salary level;

d. DOL may consider amending the "duties" rule for the administrator exemption;

e. Final rules are expected in July 2016.
C. Equal Employment Opportunity Commission ("EEOC")


On January 21, 2016, the EEOC announced that it had voted to seek input on its proposed enforcement guidance addressing retaliation and other related issues. The guidance would update the Compliance Manual on Retaliation issued in 1998 and will serve as a reference for EEOC staff who investigate charges of retaliation and other related issues. Retaliation is currently the most frequently alleged type of violation raised with the EEOC, and the agency is hopeful this guidance will strengthen its ability to help employers prevent retaliation and help employees understand their rights. The public comment period was open through February 24, 2016, and a final guidance will be issued after the EEOC has considered appropriate revisions.

The proposed guidance highlights the following:

a. Retaliation occurs when an employer unlawfully takes action against someone as punishment in exercising rights protected by EEO laws.

b. A retaliation claim has three elements: (1) The individual engaged in legally protected activity; (2) the individual suffered an adverse employment action; and (3) there is a causal connection between the legally protected activity and the adverse action.

c. Protected activity.

i. The protected activity must occur first and may be established by demonstrating that the individual either participated in EEO activity or opposed discrimination.

ii. There are two types of protected activity: participation and opposition.

iii. Participation includes any formal activity or assistance in any manner in an investigation, proceeding, or hearing under the EEO laws. Making an internal complaint, participating in an investigation, or filing an administrative charge are all examples of participation.

iv. Opposition is less formal and occurs when an individual communicates a belief that an activity violates EEO laws. Examples of opposition include refusing to carry out an order believed to be
discriminatory, resisting unwanted harassment, communicating that policies are discriminatory, or asking for reasonable accommodations.

d. Adverse action.

i. An adverse action is any action which would deter a reasonable person from engaging in protected activity.

ii. Examples:

a) Actions that have no connection to work but affect the employment relationship (i.e. the individual's supervisor comes by the person's house every night, rings the doorbell, and then runs away).

b) Portraying the employee in a negative light in social media or in conversations with other employees.

c) Overly scrutinizing work performance or attendance.

d) Slightly lower evaluation ratings.

e) Engaging in abusive verbal or physical behavior towards the employee.

f) Taking adverse action against the employee's family or significant other.

e. Causal connection.

To avoid a causal connection, adhere to the following guidelines:

i. Avoid actions that have suspicious timing (i.e. immediately following a complaint or an investigation of a complaint).

ii. Ensure the person recommending the action is objective and not involved in the underlying complaint.

iii. Do not base an adverse action on any basis that is not fully supported by objective evidence.

iv. Ensure that other similarly situated individuals have been treated the same.
2. Updated pregnancy discrimination guidance.

On June 25, 2015, the EEOC issued an update of its Enforcement Guidance on Pregnancy Discrimination and Related Issues ("Guidance") along with a question and answer document and a fact sheet for small businesses. For a complete copy of Guidance see the following:

http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

This Guidance addresses issues raised in Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (2015). The Guidance notes that, "changes to the definition of the term interior 'disability' resulting from enactment of the ADA Amendments Act of 2008 make it much easier for pregnant workers with disability-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA."

3. Workplace discrimination against individuals who are, or who are perceived to be Muslim or Middle Eastern.

On December 23, 2015, the EEOC released two resource documents, in question-and-answer format explaining federal laws prohibiting employment discrimination against individuals who are, or who are perceived to be, Muslim or Middle Eastern. These Qs and As are to assist employers and employees in understanding their rights and responsibilities under the federal laws enforced by the EEOC. For a complete copy of the resource documents see the following:

http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_2016.cfm

4. Guidance to employees with HIV.

On December 7, 2015, the EEOC issued a new Guidance, Living with HIV Infection: Your Legal Rights in the Workplace under the ADA and Helping Patients with HIV Infection Who Need Accommodations at Work. If an employee does not want the employer to know the specific diagnosis, it may be enough to provide documentation that describes the condition generally (by stating, for example, that you have an "immune disorder").

If an employer does find out that a worker is HIV positive, it must keep that information confidential, even from co-workers.

For a complete copy of the Guidance issued by the EEOC see the following:
D. Occupational Safe and Health Administration ("OSHA")

On June 1, 2015, OSHA issued a guide to restroom access for transgender workers.

OSHA describes best policies which employers may choose, but are not required to use, including:

1. Single-occupancy gender-neutral (unisex) facilities; and

2. Use of multi-occupant, gender-neutral restroom facilities with lockable single-occupancy stalls.

For a complete copy of the guide see the following:


III. HOT TOPICS

A. New FLSA Regulations

The Department of Labor recently delayed the release of its final rule on modifications to the FLSA's overtime pay exemptions. It has been projected by the agency to be released in July 2016. The anticipated release is expected to coincide with the upcoming Presidential election. Employers should begin preparing now, as they may have little time to comply once the final rule is announced.

B. Justice Scalia's Death and a New President

The death of Justice Scalia will most likely leave an empty seat on the Supreme Court for the remainder of the 2015 term. Decisions affecting labor unions, contraception under the ACA, and immigration, all of which could have a potential impact on employers, are now set to be heard by an evenly divided court unless re-arguments are ordered.

C. Political Firings

Since this is an election year, and all signs point to it being a record for voter turnout, employers should be mindful about political discussions in the workplace. While political affiliation discrimination is not prohibited in Kentucky, political discussions for this term could often lead to other protected areas, such as religion and national origin.
D. LGBT Rights

Given the continuing debate over gay marriage, employers should expect the EEOC to amplify its investigations of lesbian, gay, bisexual, and transgender discrimination issues. While there is no national law explicitly prohibiting workplace discrimination based on sexual orientation or gender identity, the EEOC broadly interprets Title VII’s prohibition on "sex" discrimination and accepts and investigates charges filed by LGBT individuals.

E. Gun Laws

In Kentucky, private employers may restrict guns in the workplace but cannot prevent employees from keeping guns in their vehicles in company-owned parking lots. Gun violence and workplace safety is a national topic of conversation, and it would not be surprising for the NRA and employees with conceal-carry permits to push for the right to carry weapons into the workplace.