2016 EMPLOYMENT LAW UPDATE

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Judiciary of Guam

DISCLAIMER

THE INFORMATION IN THIS PRESENTATION IS NOT INTENDED TO SERVE AS LEGAL ADVICE. IT IS PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE VOTE 2015

JUSTICE ANTONIN SCALIA (1936-2016)

Time on Bench:
September 26, 1986

Nominated by:
President Ronald Reagan

Vote: Conservative
ANTONIN SCALIA

- Described as intellectual anchor for the originalist and textualist position in the courts conservative wing

ORIGINALISTS:

- Examine what the Founders meant when writing the Constitution
- Constitution has a static meaning
- Believe that the meaning of the Constitution does not evolve over time

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Impact of Justice Scalia's Death on Cases

Cases Already Issued	Cases Argued But Not Yet Decided	Cases on Docket Not Yet Argued
No Impact	Possible outcomes • If 4-4 deadlock, lower court decision would stand • Set case aside for re-argument during next term	Possible outcomes • Hear argument; if 4-4 deadlock, lower court decision would stand • Set case aside for argument during next term
	Tie decision would lack precedential value	Tie decision would lack precedential value

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Nomination of Merrick Garland

- Chief Judge of the U.S. Court of Appeals for the D.C. Circuit
- Nominated to the D.C. Circuit Court by President Bill Clinton
- Judicial philosophy: Not clear; decisions all over the board and very fact-dependent
  - Has deferred to National Labor Relations Board in cases he authored (pro-Union)
  - Has a record of supporting civil rights plaintiffs in employment discrimination matters
  - Known to be tough on crime (prosecuted Oklahoma City bomber Timothy McVeigh)
- GOP-controlled Senate likely to refuse to confirm an Obama nominee

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SUPREME COURT REVIEW

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Mach Mining, LLC v. EEOC

Good-Faith Conciliation

Decided April 29, 2015

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Mach Mining, LLC v. EEOC

Facts

- 2008 discrimination charge filed with the EEOC against Mach Mining
- EEOC investigated
- Determined reasonable cause to believe that Mach Mining discriminated against females in its hiring process
- EEOC sent a letter inviting the Charging Party and Mach Mining to begin informal conciliation
- 1 year later, EEOC sent another letter to Mach stating that conciliation efforts had failed
- EEOC sued Mach on behalf of the Charging Party and a class of female applicants who had applied for non-office jobs

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Mach Mining, LLC v. EEOC

- Mach asserted an affirmative defense = EEOC failed to conciliate in good faith
- EEOC moved for summary judgment on the issue, arguing that the conciliation process is not subject to judicial review
- Federal District Court denied the EEOC's motion, holding that a court should review the EEOC's conciliation process to determine whether the EEOC made a "sincere and reasonable effort to negotiate"
- 7th Circuit reversed the District Court concluding that because the EEOC had pled on the face of its discrimination complaint that it had complied with all prerequisites to suit and because the two conciliation letters were "facially sufficient" to show that conciliation had occurred, its review of the conciliation process was satisfied

Mach Mining, LLC v. EEOC

Issue

- Whether and to what extent a court may enforce the EEOC's duty to conciliate discrimination claims before filing a lawsuit

Mach Mining, LLC v. EEOC

Ruling

- Supreme Court reversed the 7th Circuit in a unanimous 9-0 decision (opinion authored by Justice Kagan)
- Under Title VII:

> *If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.*

- Supreme Court = courts may review if EEOC has fulfilled its duty to conciliate discrimination claims before litigation
- Scope of the review = must be narrow

Mach Mining, LLC v. EEOC

Ruling (con't)

- The Supreme Court stated that a sworn affidavit from the EEOC stating that it has performed its obligations under Title VII prior to filing suit would be sufficient to show that it has met the conciliation requirement
- The Supreme Court also stated that if an employer provides credible evidence of its own, in the form of an affidavit or otherwise, that the EEOC did not attempt to engage in a discussion about conciliating a claim, a court must conduct the fact-finding necessary to decide that limited dispute
- If the court finds in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance

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Mach Mining, LLC v. EEOC

Practical Impact

- Employers should be aware of the EEOC's obligations to conciliate when reasonable cause is found
- Courts may step in and resolve disputes where an employer provides "credible evidence" that the EEOC did not fulfill its obligations under Title VII
- IOW, when the EEOC fails to fully notify the employer of any obligations against it and to engage in discussions aimed at conciliation
- Employers should push the EEOC to
  - (1) provide reasonable information about the alleged practice(s) that is or are the subject of the claim, and
  - (2) in class action cases, the number and identities of prospective class members

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Mach Mining, LLC v. EEOC

Practical Impact (con't)

- Obtaining this information will allow employers to better assess the value of a case and to make informed decisions about the potential benefits of early settlement (at the conciliation stage) versus litigation
- Document any alleged conciliation efforts (or lack thereof) so, if necessary, an employer can produce evidence indicating that the EEOC failed to provide the requisite information about the charge and/or failed to attempt to engage in a good faith conciliation discussion

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Abercrombie & Fitch v. EEOC

Religious Accommodation

Decided June 1, 2015

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Abercrombie & Fitch v. EEOC

Facts

- Abercrombie & Fitch requires its employees to comply with a "Look Policy" that reflects the store's style and forbids black clothing and caps, though the meaning of the term cap is not defined in the policy
- If a question arises about the Look Policy during the interview or an applicant requests a deviation, the interviewer is instructed to contact the corporate HR department, which will determine whether or not an accommodation will be granted

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Abercrombie & Fitch v. EEOC

Facts (cont.)

- In 2008, Samantha Elauf, a practicing Muslim, applied for a position at an Abercrombie store. She wore a headscarf, or hijab, in her interview. Elauf did not mention her headscarf during her interview and did not indicate that she would need an accommodation from the Look Policy
- Her interviewer likewise did not mention the headscarf, though she contacted her district manager, who told her to lower Elauf's rating on the appearance section of the application, which lowered her overall score and prevented her from being hired

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Abercrombie & Fitch v. EEOC

Facts (cont.)

- The EEOC sued Abercrombie on Elauf's behalf and claimed that the company had violated Title VII by refusing to hire Elauf because of her headscarf
- Abercrombie argued that Elauf had a duty to inform the interviewer that she required an accommodation from the Look Policy, and that the headscarf was not the expression of a sincerely-held religious belief

Abercrombie & Fitch v. EEOC

Facts (cont.)

- The federal district court granted summary judgment for the EEOC
- The 10th Circuit reversed and held that summary judgment should have been granted in favor of Abercrombie because there is no genuine issue of fact that Elauf did not notify her interviewer that she had a conflict with the Look Policy

Abercrombie & Fitch v. EEOC

Issue

- Whether an employer can be liable under Title VII for the refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee

Abercrombie & Fitch v. EEOC

Ruling

- Supreme Court reversed the 10th Circuit (opinion authored by Justice Scalia)
- Held that the rule for disparate treatment claims based on a failure to accommodate a religious practice is straightforward
- An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions
- To hold an employer liable under Title VII, an applicant must only show that his or her need for an accommodation was a motivating factor in the employer's decision not to hire the applicant
- An applicant is NOT required to show that an employer held knowledge of his or her need for an accommodation

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Abercrombie & Fitch v. EEOC

Practical Impact

- Based on this ruling, courts will be more willing to infer a discriminatory motive if the circumstances demonstrate the employer somehow "should have known" or had constructive knowledge of the applicant's need for an accommodation, i.e., applicant is wearing a hijab
- Because of this decision, an employer who has reason to believe, or even suspect, that accommodation may be necessary—from any source—will need to consider engaging in an interactive process with the applicant
- Depending on the circumstances, that process may entail explaining to the applicant the relevant work rule, inquiring as to whether the applicant could comply with the rule or would require an accommodation, and analyzing whether any required accommodation is reasonable or would impose an undue hardship

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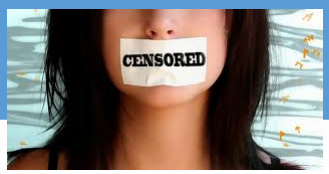
Heffernan v. City of Paterson

Free Speech (Public Employee)



Decided April 26, 2016

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Heffernan v. City of Paterson

Facts

- Heffernan claimed her was demoted by the City of Paterson in NJ from detective to patrol officer after his bosses assumed he was supporting a candidate for mayor that the police chief opposed
- He was seen carrying a yard sign for the mayoral candidate – but he was picking it up for his bedridden mother
- He did not support the candidate
- He sued claiming that his First Amendment right to free speech had been violated
- Lower courts ruled = claim would be actionable only if the City's decision had been prompted by actual, rather than perceived, exercise of his free speech rights
- Because he had not actually supported the candidate, his right to free speech had not been violated

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Heffernan v. City of Paterson

Issue

- Whether a public employer violates the First Amendment rights by penalizing an employee for perceived political association, even if the employee hasn't engaged in any protected speech or activity

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Heffernan v. City of Paterson

Ruling

- Supreme Court reversed in a 6-2 decision (opinion written by Justice Breyer)
- Holding = the employer's motive is what is relevant
- When considering a free speech retaliation claim under the First Amendment, the primary focus should be on the employer's motive and the facts as the employer reasonably understood them, not on the employee's actual activity
- The constitutional harm – discouraging employees from engaging in protected speech – is the same whether the employer's action is based upon a factual mistake or if the employer was correct in its assumption

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Heffernan v. City of Paterson

Ruling (con't)

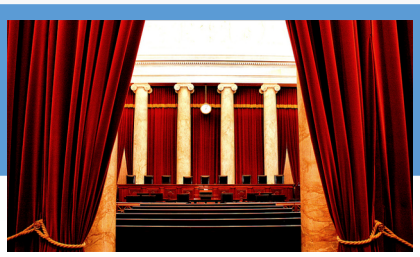
- Some evidence that the City may have demoted Heffernan because of a neutral policy prohibiting police officers from overt involvement in any political campaign
- Remanded to the lower courts to decide whether that neutral policy existed and, if yes, if it was followed and if such a policy is constitutional

Heffernan v. City of Paterson

Practical Impact

- Because employees of private employers do not have First Amendment protection from termination, the outcome of this specific case does not impact private workplaces
- Adds another layer of constitutional protection to public employees' political expression

SUPREME COURT PREVIEW



Green v. Brennan

Limitations Period

Appealed from 10th Circuit

Argued November 30, 2015

Green v. Brennan

Facts

- Green started working for US Postal Service in 1973
- 2008 = postmaster position opened in Boulder, CO; applied but did not receive the position
- Filed formal charge with the Postal Service's EEO Office based on race regarding the denial of his application; the charge was settled
- 2009 = filed an informal charge with the Postal Service's EEO Office and alleged his supervisor/supervisor's replacement harassed him in retaliation for his prior EEO activity
- After investigation completed, allowed to file formal charge but Green did not
- Throughout 2009, subject to internal Postal Service investigations including a threat of criminal prosecution

Green v. Brennan

Facts (con't)

- Ultimately signed an agreement that he would immediately give up his position and either retire or accept a much lower paying position 300 miles away
- Green chose to retire and later filed charges with the EEO Office, which dismissed his claim
- Green sued in District Court alleging, among other claims, that he had been constructively discharged
- Constructive discharge = An employee may assert a constructive discharge claim when the employer made working conditions so intolerable that a reasonable person would feel compelled to resign

Green v. Brennan

Facts (con't)

- Federal District Court held that Green's constructive discharge claim was barred because he waited too long to file his claim under a 45-day limitations applicable to federal-sector claims under Title VII
- Green initiated administrative proceedings 41 days after his resignation, but more than 3 months after the allegedly discriminatory conduct occurred
- 10th Circuit affirmed the District Court's ruling
- Circuit Courts split
  - 10th, D.C. and 7th = Title VII limitations period for a CD claim begins to run from the employer's alleged discriminatory act
  - 5 federal appeals courts = CD claim accrues when an employee actually resigns

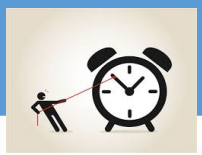
Green v. Brennan

Issue

- Whether the filing period for a constructive discharge claim begins to run when an employee resigns OR at the time of an employer's last allegedly discriminatory act giving rise to the resignation

Encino Motorcars, LLC v. Navarro

Exempt Status



Appealed from 9th Circuit

Argued April 20, 2016

Encino Motorcars, LLC v. Navarro

Facts

- Encino sells and services new and used Mercedes-Benz automobiles
- Employs service advisors who are exempt from OT pay under the Fair Labor Standards Act (FLSA)
- FLSA exempts "any salesman, partsman or mechanic primarily engaged in selling or servicing automobiles"
- Service advisors = meet and greet car owners; evaluate the service and/or repair needs; write up estimate for repairs; recommend additional work
- Paid on commission

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Encino Motorcars, LLC v. Navarro

Facts (con't)

- 2012 = 5 service advisors filed suit alleging Encino violated the FLSA by failing to pay OT
- Federal District Court dismissed the OT claim because the employees fell within the FLSA OT exemption
- Employees appealed & 9th Circuit reversed
- 9th Circuit = Because statutory definition was ambiguous, court defer to DOL's regs which limit the application of the exemption to salesmen, partsmen and mechanics
- 9th Circuit, service advisors do not fit into the 3 categories, so not exempt from OT
- 4th & 5th Circuits & several district courts interpret the exemption as including service advisors as they are engaged in "servicing automobiles"

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Encino Motorcars, LLC v. Navarro

Issue

- Whether service advisors employed at a car dealership are exempt from overtime compensation under the Fair Labor Standards Act

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WHEN CAN EMPLOYERS TERMINATE

EMPLOYEES WHO LEGALLY USE MARIJUANA

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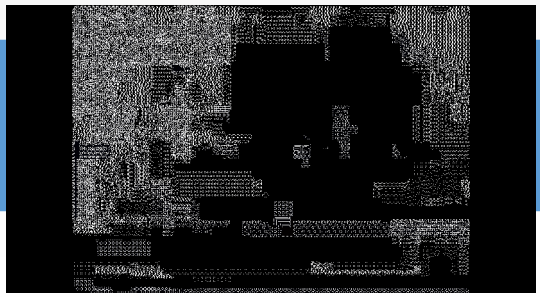

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IS MARIJUANA LEGAL?

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IS MARIJUANA LEGAL?

- Yes and No
  - Under federal law, all marijuana use is illegal
  - Some states have legalized certain uses of marijuana
- Under the federal Controlled Substances Act, 21 U.S.C.S. §§ 801-904, ("CSA"), Cannabis is on the Schedule I list of controlled substances
  - Schedule I drugs have a high potential for abuse and dependency, with no recognized medical use or value
  - Any possession, use, or distribution is a crime

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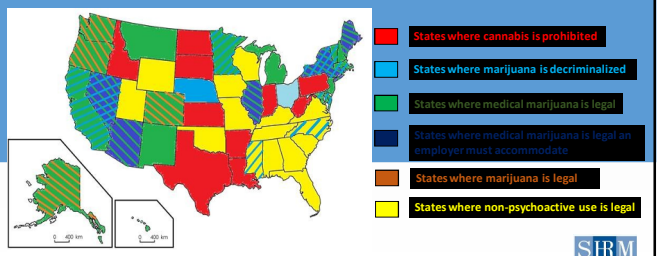
STATE LAW: IT'S COMPLICATED



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Marijuana is illegal under federal law. What does that mean if I work as an HR professional for the federal government?

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IS MARIJUANA LEGAL?

- Federal employees must follow federal law: all marijuana use is prohibited
- *Thompson v. Dep't of Army*, No. SF-0752-11-0551-I-2, 2013 WL 9678484, at *2 (M.S.P.B. June 12, 2013) (employee terminated for possession of marijuana while operating a government owned vehicle noting that although California has decriminalized marijuana, it is still illegal under federal law)

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EXECUTIVE ORDER 12564

Executive Order 12564, Drug-Free Federal Workplace, mandates:

(a) Federal employees are required to refrain from the use of illegal drugs;

(b) the use of illegal drugs by Federal employees, whether on or off duty, is contrary to the efficiency of the service;

(c) persons who use illegal drugs are not suitable for Federal employment

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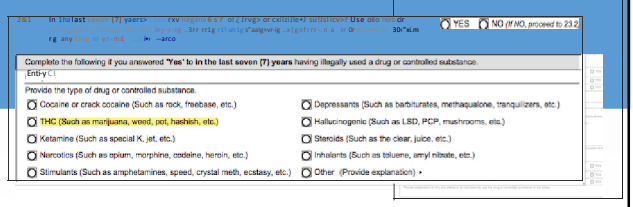
FEDERAL GOVERNMENT EMPLOYER

- An applicant for federal employment must disclose marijuana use.



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Is it true that the government isn't prosecuting marijuana offenses?

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FEDERAL GOVERNMENT NOT PROSECUTING?

- Yes, the federal government has exercised its discretion to not prosecute marijuana offenses
- DOJ August 29, 2013 Guidance Regarding Marijuana Enforcement: Based on assurances from states where marijuana is legalized, DOJ stated that it will defer its right to challenge their legalization laws at this time. "But if any of the stated harms do materialize—either despite a strict regulatory scheme or because of the lack of one—federal prosecutors will act aggressively to bring individual prosecutions focused on federal enforcement priorities and the Department may challenge the regulatory scheme themselves in these states."

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I work for an employer in a state where marijuana has been decriminalized. Can I fire someone for failing a drug test?

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DECRIMINALIZATION IMPLICATIONS

- Yes, even in states where marijuana has been decriminalized, an employee can be fired for failing a drug test. *Coats v. Dish Network, LLC,* 2015 CO 44, 350 P.3d 849 (Colo.2015)
- Courts have held that decriminalization is a defense to criminal prosecution and not an affirmative right to use

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GUAM PUBLIC LAW 32-237

- *The Joaquin (KC) Concepcion II Compassionate Cannabis Use Act of 2013*
- Proposal 14A approved by voters during November 4, 2014 General Election
- Assigned and designated as Public Law 32-237
- Signed into law by the Governor on February 16, 2015
- AG's Office recently completed its review of the proposed medicinal marijuana rules and regulations
- Rules become effective 90 days after filing with Legislative Secretary, subject to amendment or disapproval by the Legislature

10 GCA § 122402. Purpose of Act:

The purpose of this Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.

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GUAM PUBLIC LAW 32-237

10 GCA § 122404. Exemption from Criminal and Civil Penalties for the Medical Use of Cannabis.

(a) A qualified patient shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply. . . .

10 GCA § 122405. Prohibitions, Restrictions and Limitations on the Medical Use of Cannabis - Criminal Penalties.

(a) Participation in the medical use of cannabis by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from: . . .

(3) criminal prosecution or civil penalty for possession or use of cannabis:

(C) in the workplace of the qualified patient's or primary caregiver's employment . . . .

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What are drug testing best practices?

DRUG TESTING BEST PRACTICES

- Comply with federal and state/local law
- Have testing policy in writing, distribute to employees, and have them sign it
- Apply testing consistently
- Never take disciplinary action against an employee without confirming the result via a second test

How do I respond when an employee contests the legitimacy of a testing center?

THIRD PARTY DRUG TESTER

- Partnering with an experienced and reputable drug testing company will give you comfort that proper procedures have been followed, including:
  - Random testing
  - Chain of custody
  - Privacy
  - State and federal regulations
- Direct the employee to contact the third party testing provider about its practices

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I just received an accommodation request from an employee to use medical marijuana. Does medical marijuana have any medicinal benefits?

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ACCOMMODATION REQUEST

- Yes, many medical conditions such as glaucoma and epilepsy, are treatable with marijuana and also qualify as disabilities under the ADA
- Marijuana has proven effective to treat:
  - Muscle spasms caused by multiple sclerosis
  - Nausea from cancer chemotherapy
  - Poor appetite and weight loss caused by chronic illness, such as HIV, or nerve pain
  - Seizure disorders
  - Crohn's disease

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Does the Americans with Disabilities Act require me to accommodate an employee's use of medical marijuana?

AMERICANS WITH DISABILITIES ACT

- No, an employer is not required to accommodate an employee's use of medical marijuana
  - *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Ore. 2010).
  - *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012).
- ADA's protections do not extend to those currently engaged in the "illegal use of drugs."

AMERICANS WITH DISABILITIES ACT

- Medical marijuana laws in **Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, Rhode Island, Vermont and Washington** explicitly prohibit marijuana use at work, and/or provide that employers need not accommodate any form of marijuana use in the workplace
- For example, New Jersey, N.J. Stat. Ann. Section 24:6I-14 is explicit, stating that "nothing in this act shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace."

AMERICANS WITH DISABILITIES ACT

- State courts in **California, Colorado, Washington and Montana**, as well as the federal appellate courts for the Sixth and Ninth Circuits, all have held that state medical marijuana laws do not require employers to accommodate medical marijuana use in the workplace

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Are there states that require an accommodation for medical marijuana?

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STATES THAT REQUIRE AN ACCOMMODATION

- **Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York and Rhode Island** medical marijuana laws contain anti-discrimination and/or reasonable accommodation provisions addressed to employers

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SAMPLE STATE STATUTE

Del. Code Ann. Tit. 16, §4905A(a)(3). Unless a failure to do so would cause the employer to lose a monetary or licensing related benefit under federal law or federal regulations, **an employer may not discriminate** against a person in hiring, termination, **or any term or condition of employment, or otherwise penalize a person**, if the discrimination is based upon either of the following:

(a) the person's status as a cardholder; or,

(b) a registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

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Can I have a zero tolerance drug policy?

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ZERO TOLERANCE DRUG POLICY

- Employers are generally free to set their own drug policies, whether zero tolerance or otherwise
- But if you do business in a jurisdiction that requires an accommodation for medical marijuana, then you will need flexibility with your zero tolerance policy
- Unintended consequence: reduction in candidate pool?

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TIPS FOR AN EFFECTIVE DRUG POLICY

- Written policy acknowledged by employee
- Review legality and appropriateness of drug policy on an annual basis
- Apply your policy consistently
- Make sure drug testing policies comply with Guam and federal law
- Make sure your policy states that it applies to drugs that are illegal under "federal **OR** Guam law"

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What best practices can I institute today to protect my employer from liability?

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EMPLOYER BEST PRACTICES

- Make sure your policies clearly define illegal drug use to include all drugs made illegal under federal and/or Guam law
- Make clear that because marijuana is (still) illegal under federal law, it is considered an illegal drug under your policy
- Workplace testing policies may need updating to ensure that you reserve the right to take adverse action based on a verified positive marijuana test "to the fullest extent permitted by law."
- Revisit prescription medication policies
- Policies should prohibit all illegal drug use
- Be careful when your alcohol and drug policies are combined

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PREPARING FOR CHANGE . . . MAYBE

DOL's Proposed Final Overtime Regulations

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FAIR LABOR STANDARDS ACT

- Requires payment of the minimum wage for all hours worked and overtime at 1 ½ times an employee's regular rate for hours worked over 40 in a week
- Since it was passed in 1938, Section 13(a)(1) of the FLSA has exempted certain "white collar" employees
- The Secretary of Labor has broad authority to "define and delimit" the exemptions

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29 C.F.R. PART 541

- DOL has defined the "white collar" (or "EAP") exemptions in regulations at 29 C.F.R. Part 541
  - Executive
  - Administrative
  - Learned Professional
  - Creative Professional
  - Outside Sales
  - Computer

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THREE TESTS FOR EXEMPTION

- Salary Level (currently, paid at least $455 per week, or $23,660 per year)
- Salary Basis (employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis)
- Duties

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PROPOSED CHANGES

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MINIMUM SALARY LEVEL

Set the minimum salary at the 40th percentile of weekly earnings for full- time "non-hourly paid" employees

- Currently, $921/week or $47,892/year
- Expected to increase to $970/week or $50,400/year by the time a Final Rule is issued in 2016

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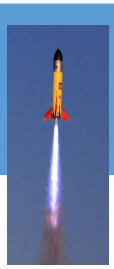
AUTOMATIC, ANNUAL INCREASES



DOL proposed to establish a mechanism for automatically increasing the salary levels annually based either on the percentile (40%) or inflation (CPI-U)

CHANGES TO THE DUTIES TESTS?

REDEFINING "PRIMARY DUTY"

Current Definition:

- The "principal, main, major or most important duty that the employee performs"

Possible Changes:

- Requiring employees to spend a certain amount of time performing work that is their exempt primary duty
- Adopting the "California rule" requiring that 50% of an employee's time be spent exclusively on work that is the employee's primary duty

ELIMINATION OF "CONCURRENT DUTIES"

Current Definition:

- Nonexempt work "does not disqualify" an employee from the executive exemption when the employee decides when to perform such non-exempt work and remains responsible for success/failure of the business

Possible Changes:

- Eliminated entirely
- Modifying the rule "to avoid sweeping nonexempt employees into the exemption"
- Limitation on the amount of nonexempt work that an exempt employee can perform

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RETURNING TO THE "LONG" AND "SHORT" TESTS

Current:

- In 2004, DOL eliminated the "long" and "short" duties test structure and adopted a single standard duties test for each exemption.

Possible Changes

- Return to a two-tier structure with additional duties requirements for employees at a lower salary level;
- Pre-2004 "long" tests included a 20% restriction on non-exempt work (40% in retail).

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COMMENTS TO PROPOSED CHANGES

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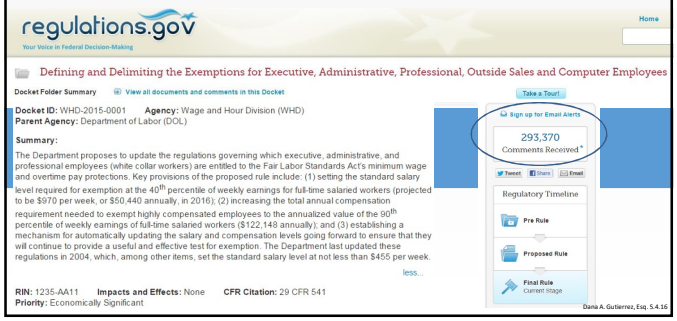
COMMENTS RECEIVED



SHRM COMMENTS

- While some increase to the salary level is justified, DOL's proposed increase is too high and fails to reflect geographical, industry and business size differences – including salary levels at non-profits
- Proposed salary level will negatively impact workplace flexibility and opportunities for career advancement
- DOL should consider implementing the salary increase in phases
- The salary level should not be automatically increased annually
- DOL's proposal to count bonuses towards salary level is too limited
- DOL should not make any changes to the duties test without notice and comment rulemaking

PREPARING FOR CHANGE

THE RULEMAKING PROCESS THUS FAR



- January 2014, State of the Union Address: President Obama indicates dealing with "stagnant wages" is a top priority
- March 2014, Memorandum: President Obama directs Secretary of Labor Perez to revise the overtime regulations
- Summer 2014, Listening Sessions: DOL Secretary Perez meets with stakeholders including (business associations, non-profit organizations, employee advocates, unions, state/local governments)
- July 2015, NPRM: Wage & Hour Administrator Weil issues proposed changes to the Part 541 regulations. The comment period closed September 4, 2015

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THE RULEMAKING PROCESS THUS FAR

- Predicted publication date of final rule around Labor Day
- March 14, 2016: DOL sent the final rule revising white collar OT exemption regs to the White House Office of Management and Budget (OMB)
- DOL's urgency to move rulemaking forward is likely due to election year politics
- March 17, 2016: House and Senate Republicans introduced "The Protecting Workplace Advancement and Opportunity Act"
- The proposed Act was referred to the Senate Committee on Health, Education, Labor and Pensions

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THE RULEMAKING PROCESS THUS FAR

- **The Protecting Workplace Advancement and Opportunity Act would:**
  - Nullify the proposed rule
  - Require DOL to first conduct a comprehensive economic analysis on the impact of mandatory OT expansion to small businesses, nonprofit orgs and public employers
  - Prohibit automatic increases in the salary threshold
  - Require that any future changes to the duties test must be subject to notice and comment

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THE RULEMAKING PROCESS THUS FAR

- OMB is the last step in the rulemaking process before publication of the Final Rule in the Federal Register
- Average review period is four to six weeks
- After publication of the final rule, Congress has a 60-day period to review under the Congressional Review Act
  - Congress can vote on a resolution of disapproval to try to nullify the regulation
  - President Obama can veto the resolution
- Congress can push forward The Protecting Workplace Advancement and Opportunity Act – which President Obama would likely veto

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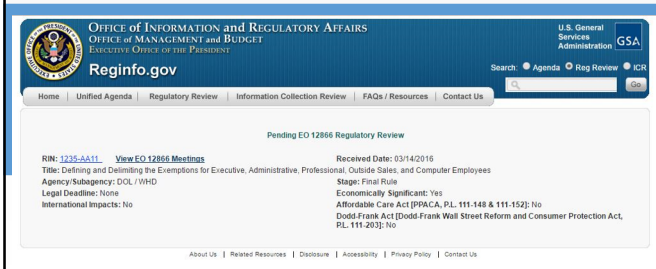
REGINFO.GOV



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WHAT IS LIKELY TO CHANGE?

- Salary Level
  - Although DOL may moderate down a bit, also unlikely to increase salary level above $50,440
  - Likely to implement automatic annual increases
  - Unlikely to allow bonuses to count towards the minimum salary level
- Duties Tests
  - Likely to move towards the California 50% primary duty rule, but not likely to bring back 80-20 rule under a long test
  - Likely to eliminate concurrent duties

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PREPARING FOR CHANGE

- Do *not* wait until DOL publishes its final rule to begin preparing for change
- DOL likely will provide employers only *two months* to comply with the Final Rule
- Determining who to reclassify and implementing reclassification can take months
- Business partners need to understand the possible budgetary impact of the salary level increase

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COMPLIANCE, STEP-BY-STEP

1. Identify employees who need to be reclassified
2. Develop new compensation plan for the reclassified employees
3. Review wage-hour policies and processes
4. Communicate the changes
5. Train the reclassified employees and their managers

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IDENTIFY JOBS FOR REVIEW

- Jobs paid below $60,000 annual salary
- Jobs in the lowest two or three pay grades
- Jobs with large numbers of incumbent employees
- Class action favorites
  - Accounting
  - Assistant managers
  - Sales and sales support
  - Help desk functions & other computer employees without programming duties
  - Customer service, Technicians

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SALARY INCREASE OR OVERTIME?

- Pull salary and incentive pay data
- Calculate the cost of increasing salary to $50,440
- Consider lowering incentive pay to offset salary increase
- Calculate the cost of overtime
- How many hours are exempt employees working?
- (Weekly salary / 40) * 1.5 * expected overtime hours

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JOB DUTY REVIEW

- Do you have employees who do not meet the duties requirements for exemption?
- Rare opportunity to correct classification issues with reduced risk of triggering litigation

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COMPENSATION PLAN REDESIGN

- Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
- Should we adjust the salary level downward or adopt an hourly rate that will minimize additional costs?
- How will we calculate overtime for salaried non-exempt employees?
  - Divide salary by 40
  - Divide salary by actual hours worked
  - Fluctuating workweek
- Will we continue to provide incentive compensation?
- Do we need to make changes to any benefits?

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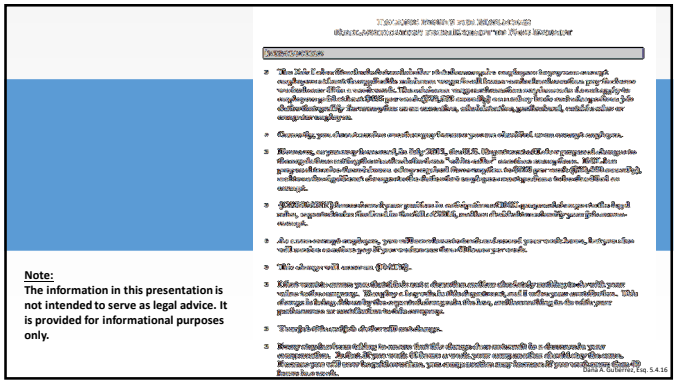
REVIEW POLICIES AND PROCESSES

- Processes
  - Timekeeping
  - Payroll changes
  - Controlling overtime hours
- Policies
  - Off-the-clock work
  - Meal and rest break
  - Travel time
  - Mobile device

COMMUNICATE THE CHANGES

- Need to communicate with senior management, managers of reclassified employees and the employees themselves
- Key decisions
  - Who will communicate
  - What will be communicated
  - How will change take place
  - When will the change occur
- Prepare talking points



Note:
The information in this presentation is not intended to serve as legal advice. It is provided for informational purposes only.

TRAINING

- Train the reclassified employees and their managers
  - Wage & hour policies
  - Timekeeping procedures
  - Activities that are compensable work

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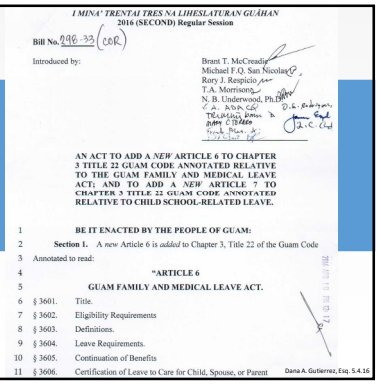
BILL 298-33:

Guam Family and Medical Leave Act &
Leave for Child School-Related Purposes



I MINA' TRENTAI TRES NA LIHESLATURAN GUÅHAN
2016 (SECOND) Regular Session

Bill No. 298-33 (COR)

Introduced by: Brant T. McCreadie
Michael F.Q. San Nicolas
Rory J. Respicio
T.A. Morrison
N. B. Underwood, Ph.D.

AN ACT TO ADD A *NEW* ARTICLE 6 TO CHAPTER 3 TITLE 22 GUAM CODE ANNOTATED RELATIVE TO THE GUAM FAMILY AND MEDICAL LEAVE ACT; AND TO ADD A *NEW* ARTICLE 7 TO CHAPTER 3 TITLE 22 GUAM CODE ANNOTATED RELATIVE TO CHILD SCHOOL-RELATED LEAVE.

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. A *new* Article 6 is *added* to Chapter 3, Title 22 of the Guam Code Annotated to read:

"ARTICLE 6
GUAM FAMILY AND MEDICAL LEAVE ACT.

§ 3601. Title.
§ 3602. Eligibility Requirements
§ 3603. Definitions.
§ 3604. Leave Requirements.
§ 3605. Continuation of Benefits
§ 3606. Certification of Leave to Care for Child, Spouse, or Parent

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PROPOSED GUAM FMLA

- Introduced by Senator Brant McCreadie
- Per Sen. McCreadie's office, 13 sponsors of the Bill; Speaker Won Pat and Sen. Aguon have committed to vote in favor of the Bill
- Per Press Release, by lowering the employer coverage to 25 and the minimum number of hours of service, more employees will be eligible for family and medical leave benefits than the federal FMLA
- Also allows for child school-related leave
- Public hearing held on Tuesday, May 3, 2016
- 10 days after hearing to provide written testimony

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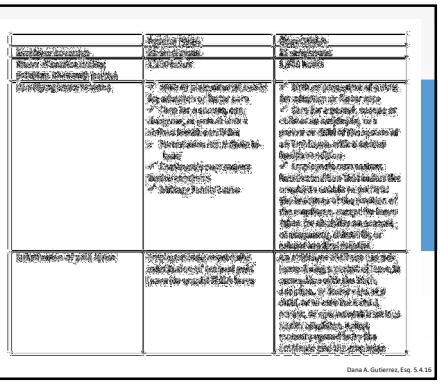
Highlights of Differences Between Federal FMLA & Guam FMLA



Leave for Child School-Related Purposes

- Allows "parents" to take off up to 40 hours each year for certain child-related activities
  - Covers parents of children who are in preschool, kindergarten or grades 1 – 12
  - Time off shall not exceed eight (8) hours in any calendar month of the year
  - To find, enroll, or reenroll a child in a school or with a licensed child care provider, or to participate in activities of the school or licensed child care provider, if the employee, prior to taking the time off, gives reasonable notice to the employer of the planned absence of the employee
  - To address a child care provider or school emergency, if the employee gives notice to the employer

Leave for Child School-Related Purposes

- Definition of "parent" includes grandparent
- If both parents work for the employer, first one to provide notice gets to go, the second only if the employer's approval is obtained
- Appears to require the use of "paid" time off = "employee shall utilize existing vacation, personal leave, or compensatory time off for purposes of the planned absence authorized by this section . . ."
  - "An employee may utilize time off without pay for this purpose, to the extent made available by [the] employer."
- Employer may request documentation as proof of attendance by the employee

Leave for Child School-Related Purposes

- Penalty: An employer who has been found in a grievance procedure, arbitration, or court proceeding to have violated this subsection shall be required, if applicable, to reinstate or promote the affected employee, and shall be liable to the affected employee for an amount equal to three times the employee's lost wages and work benefits, in addition to actual lost wages and benefits and other damages to which the employee may be entitled

Bill 312-33: Guam's Minimum Wage

- Introduced by Senator B.J. Cruz
- Effective January 1, 2017 = $9.20 per hour
- Effective January 1, 2018 = $10.10 per hour

Thank You!

DANA A. GUTIERREZ, ESQ.
JUDICIARY OF GUAM