



Labor and Employment Law Breakfast

FALL NEW DEVELOPMENT UPDATE

November 2013

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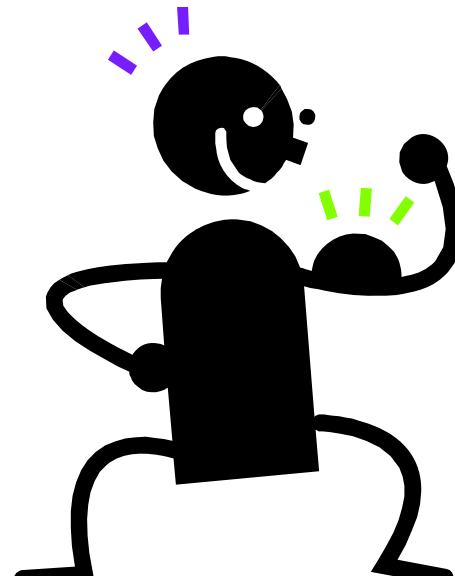
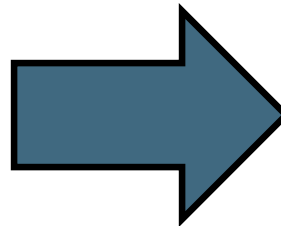
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2013 Labor & Employment Highlights

- Full-Strength NLRB
- Arbitration Agreements
- Affordable Care Act
- Supreme Court's Same-Sex Marriage Decisions & Employment
- Supreme Court Employment Decisions
- Unpaid Interns
- Wrongful Discharge in Violation of Public Policy
- Background Checks
- Social Media

What to Expect from the NLRB

Back to Full Strength and Ready to Take Action



So What Will the NLRB Do?

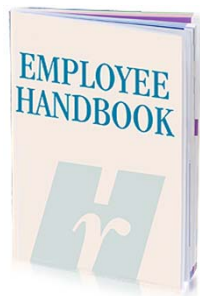
Support Union “Micro Units”



Resurrect “Quickie Election” Rules



Enforce Section 7 Rights



What Violates Section 7 Rights?

You Decide:

- Prohibiting trespassing on company property when off duty?
- Disciplining an employee for complaining about pay or benefits?
- Disciplining an employee for complaining about a supervisor?
- Prohibiting all employee solicitations during work hours or on company time?

YES!

Instructions on Workplace Investigations

- **DON'T**

- Have blanket policies requiring strict confidence of workplace investigations

CONFIDENTIAL



- **DO**

- Have policies that allow the company to reasonably impose confidentiality requirements

NLRB Advice Memorandum, Case 30-CA-089350 (Jan. 29, 2013).

Instructions on Workplace Investigations

An employer violates Section 8(a) (1) when it maintains a work rule that reasonably chills employees in the exercise of their Section 7

Thus, a blanket rule prohibiting employee discussions of ongoing investigations is invalid because it does not take into account the employer's burden to demonstrate a particularized need for confidentiality in any given situation.

whether in any investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, and there [was] a need to prevent a cover up." **Thus, a blanket rule prohibiting employee discussions of ongoing investigations is invalid because it does not take into account the employer's burden to demonstrate a particularized need for confidentiality in any given situation.**

NLRB Advice Memorandum, Case 30-CA-089350 (Jan. 29, 2013).

Instructions on Workplace Investigations

Take Aways

- Follow best practices
- Perform individualized analysis
- Okay to require confidentiality from supervisors/managers

Arbitration on the National Front



Arbitration on the National Front

We reject this argument because, and only because, it is not properly addressed to a court. Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was “arguably construing” the contract—which this one was—a court may not correct his mistakes under §10(a)(4). . . . The potential for those mistakes is the price of agreeing to arbitration. **As we have held before, we hold again: “It is the arbitrator's construction [of the contract] which was bargained**

As we have held before, we hold again: “It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”

Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013) (citation omitted).

Arbitration on the National Front

It Ain't About the Money



Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

Arbitration on the National Front

But the arbitration agreement can't be unconscionable



Chavarria v. Ralphs Grocery Co., No. 11-56673, 2013 WL 5779332 (9th Cir. Oct. 28, 2013).

Arbitration on the Washington Front

■ Unconscionable Provisions

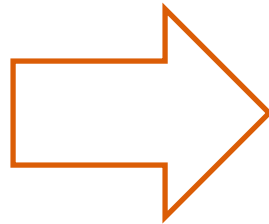
- Money – costs and back pay
- Time – shortened limitations periods
- Venue – distant or inconvenient location



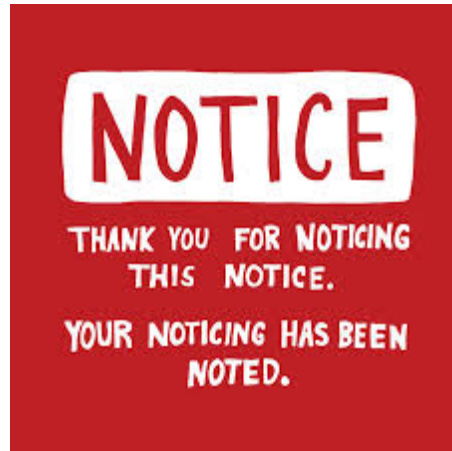
Arbitration on the Washington Front

Unconscionability = Gateway Dispute

Hill v. Garda CL Nw. Inc., 308 P.3d 635 (Wash. 2013).



Compliance with the ACA



October 1, 2013

January 1, 2015



January 1, 2014

Compliance with the ACA

Pay or Play



Same-Sex Marriage Decisions and Employment

Benefit Plans

HIPPA

COBRA

FMLA

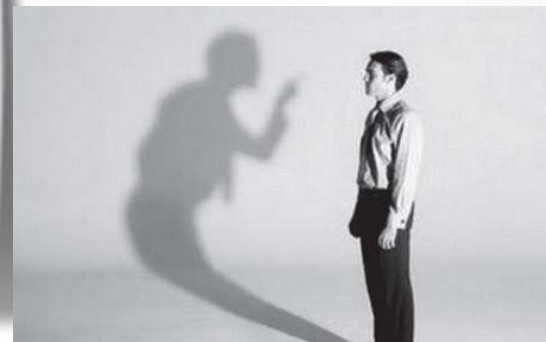
Taxes



Supreme Court Employment Decisions

Who is a supervisor under Title VII?

Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).



Supreme Court Employment Decisions

But-for cause standard applies to retaliation claims

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013)



Unpaid Interns



This class action brought to you by the unpaid intern



Washington's Social Media Law

Effective as of July 28, 2013



Wrongful Discharge in Violation of Public Policy



Broadly or Narrowly Construed?

EEOC Campaign Against Criminal Background Checks

- April 25, 2012 – EEOC Releases Guidance
- July 24, 2013 – Nine Attorneys General Send Letter
- August 29, 2013 – EEOC's Response Letter



EEOC Campaign Against Criminal Background Checks

Maryland federal court rejects EEOC's suit:

“Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks.”



EEOC v. Freeman, No. RWT 09cv2573, 2013 WL 4464553 (D. MD. Aug. 9, 2013).

Seattle's New Job Assistance Ordinance



**Have you ever been
arrested or convicted
of a crime?**

Questions?

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