EMPLOYMENT LAW
SEMINAR | 2021

WEDNESDAY, OCTOBER 6, 2021
11:30 a.m.-3:30 p.m.
Courtyard by Marriott - Mankato

TOPICS INCLUDE

COVID Vaccination Requirements in the Workplace:

- What employers can and can’t require
- What to consider before implementing a vaccination requirement
- Dealing with requests for accommodation
- Compliance with the National Labor Relations Act
- Discipline, terminations and the aftermath

While our discussion will be in the context of COVID vaccinations, the principles will be applicable any time an employer is considering implementing a policy with the potential for employee unrest and legal challenges.
Cory A. Genelin

Cory Genelin combines knowledge of the law with common sense and leadership experience. His practice includes civil litigation, labor and employment law, business and corporate law and finance and banking law.

Genelin serves as the Chair of Gislason & Hunter’s Employment, Labor and Benefits Practice Group. As the employment and general counsel for numerous Southern Minnesota businesses, he keeps operations running smoothly by producing policies, handbooks and checklists along with the training to implement them all.

In the area of finance and banking law, Genelin provides expert and efficient representation on foreclosures, debt collection and workout agreements to the lenders he represents.

His litigation experience ranges from trust disputes to employment discrimination in both jury trials and court trials. He has even litigated cases before Administrative Law Judges and Courts Martial.

For nearly 20 years, Genelin has served in the Air National Guard. He is the current Staff Judge Advocate for the 119th Wing in Fargo, North Dakota. Genelin is a decorated combat veteran of Operation Iraqi Freedom.

Genelin is a native and resident of Le Sueur, Minnesota. He enjoys coaching youth wrestling and football, fishing, hunting, hobby farming and spending time with his wife and four children.
Brittany R. King-Asamoa

Brittany King-Asamoa, a partner of Gislason & Hunter, focuses her practice on labor and employment law and civil litigation. She enjoys helping companies, agribusinesses and human resource professionals navigate the intricacies of employment law. King-Asamoa takes great pride in her work litigating employment claims and counseling employers on employment laws, compliance and best practices. She frequently presents and writes articles on new laws impacting businesses in the areas of employment, business and agriculture.

King-Asamoa received her Juris Doctor, *cum laude*, from the University of Arkansas School of Law. She received her Master of Business Administration and Bachelor of Science in Human Resources Management degrees from the Minnesota State University, Mankato.

Outside of her legal practice, King-Asamoa joyously spends her time chasing her two young children with her husband.
OUR FIRM

The law firm of Gislason & Hunter has a long history of building lasting relationships with the clients and communities we serve. For more than 80 years, our mission has been to deliver the very best in service and results. We enjoy a reputation as one of the premier civil litigation and corporate transaction firms in the upper midwest. Our accomplished attorneys bring substantial trial experience and industry-specific knowledge to our primary areas of practice.

Gislason & Hunter’s core clients are business owners, corporate executives, professionals, farmers and agribusinesses, banks and insurance companies with diverse and intertwined legal matters—from contract negotiations and business financing to employment issues, regulatory compliance and insurance defense. Gislason & Hunter assembles cross-discipline teams to provide comprehensive counsel and appropriate firepower. Our formidable courtroom abilities are tempered by a healthy measure of common sense; we first explore out-of-court resolutions and we are sensitive to helping clients contain costs and preserve key relationships.

Our talent and resources compare favorably with major Twin Cities firms, yet Gislason & Hunter is deeply rooted in traditional notions of hard work, fairness, integrity and personal attention. Most of our lawyers were born and raised in the midwest. With offices in New Ulm and Mankato, we are also deeply committed to the communities where we live and work. We value relationships with people and cornerstone employers, and we are proud that many individuals, families and corporate clients have been with our firm for decades.

Mission, Vision & Values

Our mission is to offer solutions that will achieve the client’s immediate goals in the most efficient way possible—consistent with the client’s long term objectives.

Our vision of the future today is the same as it has been throughout the 80 year history of Gislason & Hunter. The firm has always been focused completely on its clients and their needs. Gislason & Hunter has the personnel necessary to provide efficient, practical and effective representation to our clients and their growing needs.

Our values have also remained constant throughout the years. These values were instilled in the lawyers that were first hired by Sid Gislason and they, in turn, passed those values on to the lawyers that they hired. They include:

- Honesty
- CANDOR
- The Pursuit of Excellence
- FAIRNESS
- Communication
- TEAMWORK & COLLABORATION
- INNOVATION, Creativity & AGILITY

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AGRICULTURAL LAW & AGRIBUSINESS

Gislason & Hunter is recognized within Minnesota and throughout the Midwest for our knowledge and experience in the agricultural industry. Our lawyers represent local, regional and national agribusiness clients—grain farmers and livestock producers, packers and processing plants, agricultural co-ops, equipment manufacturers and input suppliers, agricultural lenders and other ag-related businesses—in all aspects of their operations.

Our agricultural law attorneys grew up on farms or in farming communities. We are attuned to the lifestyle and rural sensibilities. We also understand that modern agriculture is large-scale, sophisticated and competitive, requiring solid legal counsel and strategies.

Gislason & Hunter supports the business of production agriculture. Our clients range from family-owned farms of modest size to major agribusiness, including Christensen Farms and other pork producers, large dairy farms and creameries, sizable soybean and beet operations, John Deere Co. and implement dealerships, ethanol and energy co-ops, grain and food cooperatives, feed and fertilizer distributors and more.

Areas of Expertise

- Ag Financing & Debt Restructuring
- Ag Litigation
- Agribusiness Formation & Transactions
- Agriculture Contracts
- Employment Matters
- Environmental Regulation
- Estate & Succession Planning
- Food Safety & Animal Rights Controversies
- Intellectual Property Rights
- Planning, Zoning & Land Use
- Purchase & Leasing
- Water Rights & Wetland Mitigation
BUSINESS & CORPORATE LAW

Gislason & Hunter extends a full palette of legal services to emerging and established businesses in Minnesota and surrounding states. We provide startup assistance and general counsel to many local companies, boasting numerous longtime clients. At the same time, our business lawyers are known throughout the Midwest for their ability to negotiate structure and troubleshoot major corporate transactions.

We strive to deliver both sophistication and value to all of our clients, from entrepreneurs and employers based in surrounding communities to regional companies with large projects or ongoing interests in Minnesota.

Our clients span the spectrum from sole proprietors to multi-state and multi-national business enterprises. We offer industry-specific insights in the areas of farming and agribusinesses, construction, banking, food and beverage production, processing and distribution, high tech manufacturing, professional practices, healthcare, and other niche businesses. Whether you operate in online or bricks-and-mortar environments, we can help your enterprise get off the ground, stay in business, and address the inevitable legal conflicts.

In addition to sophisticated transactional work, we are known as aggressive and effective trial lawyers. We provide results-oriented representation in business and commercial litigation, including contract and employment disputes, shareholder derivative actions, shareholder disputes, directors and officers liability, partnership dissolution actions, and franchise and distributor litigation.

Areas of Expertise

- Business & Succession Planning
- Business Entity Law & Formation, including LLC’s, Partnerships and Corporations
- Commercial Real Estate
- Contracts
- Corporate & Business Tax
- Corporate Governance and Boards
- Creditors’ Rights
- Data Privacy & Security
- Distribution & Sales
- Employment & Human Resources
- Franchise & Distribution Law
- Healthcare
- Intellectual Property
- Investment Management
- Manufacturing
- Mergers & Acquisitions
- Partner & Shareholder Agreements
- Private Equity & Venture Capital
- Professional Services
- Public Benefit Corporations/Non-Profits
- Purchase of Sale of Business
- Start-ups
FAMILY LAW

Your family’s legal issues are unique. At Gislason & Hunter, we strive to develop customized strategies for your family’s particular legal needs and will help you prioritize your goals to efficiently achieve a favorable outcome. You will receive the full range of legal experience and expertise offered by a large, full-service law firm along with individualized attention to guide you through what for most is the most difficult time of your life and move your life forward.

Areas of Expertise

- Adoption
- Assisted Reproductive Technology
- Court Orders
- Custody, Parenting Time & Child Support
- Divorce
- Farm Ownership & Divorce
- Grandparent & Third-Party Visitation Custody Rights
- Order of Protection & Harassment Restraining Orders
- Prenuptial & Postnuptial Agreements

FINANCE & BANKING

Gislason & Hunter represents numerous financial institutions, from community banks in rural Minnesota to regional lenders in the Midwest. Thoroughly familiar with financial economic conditions and the ever-evolving regulatory environment, our Minnesota banking and finance attorneys provide legal guidance, practical solutions and litigation services.

Our banking law practice provides sophisticated counsel and experienced representation across the spectrum. We service banks engaged in real estate lending, agricultural lending and commercial lending.

We represent small to midsize banks in southwest Minnesota, statewide and beyond. We also provide comprehensive services to a number of regional banking clients such as Bank Midwest and AgriBank.

Areas of Expertise

- Bank Litigation
- Business Planning & Administration
- Collection Actions
- Commercial Lending
- Corporate Governance
- Employment & HR Consulting
- Loan Transactions
- Loan Workouts
- Mergers & Acquisitions
- Portfolio Management
- Regulatory Compliance
- Reorganization & Bankruptcy
GENERAL COUNSEL SERVICES

Empower your business with legal services custom-tailored to your needs. Gain the advantage of multiple talents and legal counsel on our Flexible & Predictable Fee Arrangement* that fits into your business’s annual budget. Submit a confidential inquiry here to begin the discussion on how Gislason & Hunter LLP’s General Counsel Services can best serve your business.

Our purpose is to provide cost-effective solutions for your legal concerns, whether you want additional support for your existing legal team or you have no in-house legal team and need outside general counsel. We focus on getting to know your business and take a proactive approach that diminishes risks and eliminates the issues that could lead to avoidable lawsuits.

Gislason & Hunter, LLP’s General Counsel Services are designed to deliver responsive service, by providing quick and efficient solutions to meet your business’s specific legal needs.

Areas of Expertise

- Corporate Governance
- Commercial Contracts
- Contract Compliance and Enforcement
- Micro Acquisitions and Divestitures (i.e., less than $10 million)
- Regulatory and Compliance
- Intellectual Property
- Insurance
- Financing
- Employment Law
- Immigration
- Litigation Readiness and Response
- Tax Matters
INTELLECTUAL PROPERTY

Your ideas are worth protecting. More than ever, businesses rise and fall on the strength of their intellectual property. At Gislason & Hunter, we can assist you plan your business strategy by securing trademark and copyright protection, help you leverage those great ideas in the marketplace and ensure that anyone who trades off your hard work and good name is stopped.

Areas of Expertise

- Copyrights
- Intellectual Property Litigation
- Licensing
- Patents
- Trade Secrets & Non Competes
- Trademarks

LABOR & EMPLOYMENT

Gislason & Hunter Labor and Employment attorneys provide employment and human resources consulting services to employers to help them establish policies, respond appropriately to complaints and comply with state and federal laws. We also counsel clients on how to handle specific terminations, disciplinary actions, layoffs, restrictive covenants and other employment matters without triggering lawsuits or investigations.

A swift and confidential resolution is often the best for all involved. We can advise clients on the merits and risks of settling versus defending the case. If we are unable to resolve employment disputes through administrative channels or out-of-court negotiations, our trial lawyers will vigorously defend the company and its officers in MDHR or EEOC proceedings or in state or federal court.

Areas of Expertise

- Affirmative Action & Labor Standards
- Corporate Transactions
- Disability & Accommodation
- Employment Agreements, Policies & Handbooks
- ERISA & Employee Benefits
- Labor Relations
- Litigation
- Trade Secrets & Unfair Competition
- Training, Investigations & Compliance
- Workplace Health & Safety
LITIGATION

Gislason & Hunter may be best known for its established and formidable litigation practice. Over the decades, our lawyers have tried thousands of cases to juries in state and federal courts. We can claim experience and success in virtually every area of civil litigation and appeals, with an emphasis on defending businesses in lawsuits and other disputes.

We represent diverse clients who seek powerful legal backing to protect their interests. We can nimbly assemble a focused team for whatever legal challenges are at hand.

Our capabilities are on par with any firm and our litigation practice is grounded in our clients’ values. We emphasize communication and lasting relationships with clients, and we try to be fee-sensitive. A lead attorney is assigned to each case, along with an appropriate supporting cast.

Our litigators are regularly called upon for complex conflicts involving millions of dollars, but we understand that any legal dispute can be urgent and high-stakes for our clients. We represent local and regional employers, insurance companies, banks, construction firms, corporate executives, licensed professionals and individuals.

Areas of Expertise

- Banking Litigation
- Business Torts Litigation
- Civil Appellate Law
- Commercial Litigation
- Construction Litigation
- Criminal Defense
- Employment Litigation
- Insurance Defense
- Intellectual Property Litigation
- Mediation & Arbitration
- Medical Malpractice Defense
- Ownership Disputes & Dissolutions
- Product Liability
- Property Disputes & Land Use
- Real Estate Litigation
- Regulatory Compliance & Defense
- Workers’ Compensation Defense
REAL ESTATE, ENVIRONMENTAL LAW & LAND USE

Gislason & Hunter represents large agricultural entities, family farms, developers, investors, lenders and businesses in all aspects of real estate including the acquisition of property, development projects, financing, sale and leasing of property. We are experienced in all current permitting, land use compliance issues, environmental regulations and property tax issues.

Title Resources LLC, a partner with Gislason & Hunter, is a full service title company that helps guide lenders, realtors, developers, builders, buyers and sellers through residential and commercial title transactions.

Areas of Expertise
- Brownfield & Redevelopment
- Compliance & Permitting
- Eminent Domain
- Environmental Litigation
- Financing
- Housing & Community Development
- Transactions & Due Diligence
- Utilities

TRUSTS & ESTATES

Proper estate planning is essential to ensuring the orderly transfer of family assets, including business assets. Wealth transfer can occur both before and after your death. The goal of a well-designed estate plan is to ensure that your assets pass to those whom you wish to receive them, in the manner in which you wish those persons to receive your assets, and at a minimum cost in terms of administration expenses, court costs, attorney’s fees and taxes.

If you create a trust during your lifetime, then the provisions of your trust will control the disposition of the assets held in the name of the trust or transferred to the trust upon your death pursuant to your will. In many estate plans a revocable trust is the core planning document. If properly structured and funded, a revocable trust plan may avoid the need for a probate proceeding.

Good estate planning requires expert advice about tax law, business succession, contingency planning and property law. If you or a loved one becomes incapacitated or dies unexpectedly you will have peace of mind knowing everything is in order.

Areas of Expertise
- Business Succession Planning
- Charitable Gift Planning
- Conservatorships
- Estate & Gift Tax
- Estate & Probate Litigation
- Estate Planning
- Farm Estate & Succession Planning
- Guardianships
- Health Care Directives & Living Wills
- Medicaid, Medicare, Nursing Home & Elder Law
- Probate
- Wills, Trusts, Codicils & Powers of Attorney
VACCINE MANDATES & ACCOMMODATION

Cory A. Genelin
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Welcome and Overview

- Agenda
  - COVID Vaccination and Related Issues
  - Case Law Update
  - Flexibility
  - Questions Welcome at Any Time
  - Technology
  - Survey
  - Cory’s Inspiring Employment Story
Vaccine Mandate Overview

- President’s September 9, 2021 COVID Action Plan
- Immediate Considerations
- Legal Challenges for OSHA
- Long Term Implementation Considerations
  - Including interaction with other statutes
- Questions Welcome Any Time

My perspective: I’m on all sides of this one . . . .

- I’ve taken lots of other questionable vaccines
- But I don’t like going first
- And I don’t like being told what to do
- Vaccinated against my wishes for National Guard
- Made and currently implementing plan to vaccinate or discharge others
- Representing ERs implementing plans, including with unions
- Get a call a week from an ER wishing to fight this

President’s COVID Action Plan, September 9, 2021

- Requires Federal EEs and Contractors to submit to vaccination
- Directs OSHA to issue a Temporary Emergency Standard
  - Requiring ERs with 100 or more EEs to require EEs to submit to vaccination or weekly tests.
- Centers for Medicare & Medicaid Services to issue special requirements for healthcare ERs:
  - Must require vaccination; testing alone not acceptable.
  - Must give EEs PTO to be vaccinated.
President’s COVID Action Plan, September 9, 2021

• President’s directive to make these rules is only directly effective on Executive Agencies.
• The Agencies will produce the rules we need to follow.
• So no legal consequence or guidance yet.

Federal Employees Must be Vaccinated
• Immediately effective
• Inherent authority as ER
• Same authority as private companies
• Any Federal ERs in the audience?
• Why is the Legislature exempt?

Federal Contractors Must Require EEs to Submit to Vaccination
• Executive Order already issued
• Established a “Safer Federal Workforce Task Force” which will issue further guidance by September 24, 2021
• Beginning October 15, 2021 all new contracts will have a clause saying contractors and subcontractors must require EEs to submit to vaccination.
• Inherent authority as a contracting party
• Private businesses could do this too, at least they could try.
President’s COVID Action Plan,
September 9, 2021
cont.

• Forthcoming OSHA mandate on 100+ EE ERs to require vaccination or testing
  • There are no public details beyond what President said (as of 1:00 on Monday).
  • Unanswered questions
    • How do we count the 100? Location? Joint ERs? Closely Related Entities?
    • Who pays for testing? ER? EE?
    • How does the “or” work? ER choice or EE choice?
    • Is testing time payable? (Probably, since “ER” will be “requiring” it.)
    • What will “require” mean? Any grace period? What documentation will suffice?
    • What test will suffice?
    • What proof of vaccination will suffice?

President’s COVID Action Plan,
September 9, 2021
cont.

• Enhanced Enforcement
  • September 25, 2021 Federal House of Representatives amendment the pending “reconciliation” bill:
    • Multiplies OSHA penalties by 10. If passed:
      • Max penalty for serious violations: $70K
      • Max penalty for repeat and willful violations: $700K

President’s COVID Action Plan,
September 9, 2021
cont.

• Forthcoming CM&MS Mandate on Healthcare ERs:
  • Will be issued by Centers for Medicare & Medicaid Services
  • Will include (ERs): hospitals, dialysis facilities, ambulatory surgical settings, home health agencies, nursing homes, and probably more.
  • Will include (EEs): all EEs, including those who are not involved in direct patient care.
    (So management, custodians, security, etc.)
  • Estimated to affect 17,000,000 healthcare workers
  • Authority is under Medicare and Medicaid statutes.
    • Basically, the Feds may determine what services they pay for and conditions for the delivery of these services.
    • Feds will withhold payment for non-compliance.
President's COVID Action Plan, September 9, 2021

• Immediate Considerations
  • Mantra: Litigation arises out of the delta between expectations and outcomes.
  • If you can, inform EEs of your policy now:
    • “We will do everything necessary to enforce OSHA policy”
    • “We will provide the maximum safety and flexibility to our employees within the legal constraints we are given.”
  • You may even need to inform them of the President’s plan.
  • More time to consider may embolden objectors, and give them time to plan mischief
  • But may allow time to calm down
  • Guard example

• For unionized ERs, start the conversation now.
  • May be rare opportunity to empathize with the union.
  • Will still need to show good faith negotiation.
  • But “good faith” will be constrained by law.

OSHA’s Legal Challenges (Section Overview)

• OSHA and it’s powers
• Rule making
• How certain is this?
• Case law on ETSs
What the heck is OSHA and what are its powers?

• Occupational Safety and Health Administration
• Established by the Occupational Safety and Health Act of 1970 (29 USC 651 et. seq.)
• Purpose is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”

OSHA’s Rule Making Authority

• Standard Rule Making Authority under the Administrative Procedure Act
  • Notice of terms of proposed rule
  • Comment
  • Hearing
  • Lengthy process means that ERs have lots time to consider proposed rule
  • Proposal rarely change significantly over course of rule making process.

OSHA’s Rule Making Authority

• OSHA Emergency Temporary Standards (29 USC 655(c))
  • (1) Secretary “shall” provide and ETS to take immediate effect if he determines
  • (A) EEs are exposed to “grave danger” from agents determined to be harmful or from new hazards, and
  • (B) that such ETS is necessary to protect EEs from such danger
  • (2) ETS is in effect until permanent standard is made
  • (3) Secretary shall immediately start permanent rule making which must be in place 6 months after the ETS is promulgated.
  • Takeaways
  • No notice, public comment, or ETS
  • Legal standard is “grave danger”
Is this really going to happen?

- General thoughts
  - It's been almost a month to produce a rule that will last 6 months; where's the rule?
  - OSHA has never mandated vaccines of any kind
  - OSHA does not typically differentiate by size
  - OSHA has only ever issued 10 ETSs
  - 5 of last 6 were invalidated by courts
  - We'll discuss these later
  - January 21, 2021 President ordered OSHA to issue a sweeping ETS in two weeks
  - Took 5 months and was much smaller; relating only to healthcare workers

Grave Danger?

- Most ETS cases turn on the existence of a grave danger
  - Always conflicting evidence about the danger?
  - As to COVID, we have conflicting and evolving data on
  - The danger of the disease
  - The effectiveness of the vaccine
- COVID has been with us for 20 months, no grave danger before?
  - Previous COVID ETS was issued
  - But is danger getting smaller or greater?
  - Vaccine offers new solution but does that impact the gravity of the danger?

1973 Organophosphorous Pesticides ETS—Struck Down

- ETS regulating worker exposure to organophosphorous pesticides in an attempt to limit their use as a substitute for the then-recently banned pesticide DDT.
- The ETS relied heavily on a Senate report addressing misuse of pesticides generally, but the court blocked the rule, finding that OSHA failed to provide enough scientific evidence that the specific pesticides in question presented a grave danger to workers.
- Similarity to COVID-19—danger of threat is questionable for working age adults.
- Differences from COVID-19—Pesticide case made no analysis of the effectiveness of the rule in reducing the danger.
1973 Carcinogens ETS—Struck Down

• ETS regulating exposure to potentially carcinogenic chemicals used in manufacturing dyes and pigments.
• Challenged by both manufacturers seeking to eliminate ETS and workers demanding stronger protections. The challenge from manufacturers focused on two chemicals that had been proven carcinogenic in lab tests involving rodents, but not in humans. Citing the lack of evidence that those chemicals presented a grave harm to workers, the court blocked the portions of the emergency rule relating to the two chemicals in question.
• Similarity to COVID-19: Focus on proof of harm.
• Differences from COVID-19: No analysis of effectiveness of rule.

1976 Diving Operations ETS—Struck Down

• ETS regulating diving safety standards was challenged by commercial diving companies that argued that it was prohibitively expensive or impossible for them to comply with many of the provisions. The court blocked the emergency rule, holding that, if the ETS were permitted to go into effect, commercial diving companies would likely be successful in challenging the substance of the regulation.
• Actual focus on the consequences and costs of the solution

1977 Benzene ETS—Struck Down

• ETS requiring a reduction in worker exposure to benzene was issued after the chemical was linked to higher instances of cancer. Manufacturers won their argument, with the court holding that OSHA failed to show the rule was reasonably necessary to protect workers from grave harm.
• Not subtle difference—“reasonably necessary” in this case versus “reasonably related” standard cited by OSHA.
• Here the focus was on the solution—availability of other means of mitigating risk.
1978 Acrylonitrile ETS—Upheld by Court

- ETS on Acrylonitrile, a chemical used in rubber manufacturing, after several studies linked exposure to the chemical with higher instances of cancer.
- Despite a challenge from a manufacturer, the court allowed the rule to go into effect.

1983 Asbestos ETS—Struck Down

- A second ETS regulating worker exposure to asbestos was issued well after the risks of lung cancer, mesothelioma, and gastrointestinal cancer associated with asbestos were widely known and accepted.
- This ETS was intended to further limit worker exposure while OSHA engaged in notice and comment rulemaking to establish a permanent standard. The court acknowledged that asbestos may present a grave danger to workers, but blocked the rule, stating that OSHA failed to show that it was necessary to alleviate a grave risk of worker deaths during its six-month applicability.
- Probably most similar to COVID.
  - There are existing standards.
  - OSHA may have trouble showing that the intervening 6 months will present significant harm.

Implementing the ETS

- Applies equally to implementing vaccine or testing programs initiated by ER in the absence of the ETS.
- Built mostly out of EEOC guidance on existing vaccination or testing programs.
- Provides lessons for other accommodation issues.
Federal Equal Employment Opportunity Commission

- Federal EEOC has been the leader in enforcing most accommodation statutes ("EEO Laws")
  - ADA
  - Rehabilitation Act
  - Title VII
  - Age Discrimination Act
  - GINA
- EEOC enforcement guidance is the best guide to navigating this area

EEOC

- EEOC has given wide latitude in letting COVID precautions trump non-discrimination issues, where there is ambiguity
  - "EEO laws continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19."
  - But how long will this last?
    - If there are ever definitive facts about risks of COVID and effectiveness of protective measures, I predict EEOC will tighten its outlook

EEOC cont.

- So when the ETS drops, you’ll probably be safe if you stick to the letter of the law . . . or . . . rule.
- My advice below should inform your actions at the margins of the ETS.
EEOC says you can do the following:

- Testing
  - Mandatory medical testing must be "job related and consistent with business necessity."
  - EEOC currently considers CDC guidance to fulfill the "business necessity" standard.
  - Will certainly consider compliance with an OSHA ETS to be a "business necessity."
  - Has said an antibody test may NOT be required because of CDC guidance.

- Vaccines
  - No EEOC guidance specific to this vaccine.
  - "Business necessity" will almost certainly be satisfied by OSHA requirement.

EEOC says you can’t do the following:

- Require antibody test.
- Ask about family member conditions.
  - GINA
  - But may ask about contacts in general but not specific to family.
- Ask a question or require testing of a specific employee
  - Unless "reasonable belief based on objective evidence."
- Deny any job offer based on anticipation of request for an accommodation.

What if an Employee Refuses Testing or Vaccine?

- EEOC say you may bar entry.
- Encourages education but does not require.
- Does not say you may terminate but strongly suggested. Unpaid LOA is certainly allowed.
- Must react to request for accommodation.
  - Need not initiate; and my advice is to not initiate.
Confidentiality Considerations

• All medical information must be stored separately from personnel files.
  • Fact of a test is not medical information. The results are.
  • Confidential and available on a need to know basis?
• So, what to do with a written discipline for not submitting to testing or vaccination?
  • Safest would be to store this in the medical records, but probably not necessary.
  • Never discipline for the results of a test (that’s medical status); discipline for not providing the results.
  • For vaccines, it’s a closer call. Discipline for “failure to provide proof of vaccination” rather than “failure to get vaccinated.”
  • Analogous to disciplining for failure to participate in ADA process.
• For any internal discussion of discipline, it’s “Jane refused to provide proof of vaccination” NEVER “Jane is not vaccinated.”

Hiring and Onboarding

• Unless the ETS says otherwise, the vaccine confirmation or testing will be one of the things that comes AFTER a conditional offer of employment.
  • Standard rule that must be done for all EEs.
  • You can and should state on your application and at initial interview that you are subject to the ETS.

Accommodations in the context of the coming ETS

• Unless the ETS says otherwise, the obligation to accommodate will continue.
  • Serious question as to whether OSHA could trump accommodation statutes.
  • Remember, this is the EE’s card to play.
  • Two main categories—medical and religious.
**Medical Accommodation**

- Standard ADA process
  - EE initiates
  - Needs medical evidence supporting both need and effectiveness of accommodation
  - EE bears the burden of proving disability. In this case, some evidence that the vaccine presents a risk or barrier to employment.
  - ADA process does allow for an independent medical opinion, but no case law on what it would take to overcome a treating doctor’s opinion.

**Medical Accommodation** cont.

- New ground
  - What if doctor note says “she had COVID, has good immune response, doesn’t need the vaccine”?
    - Probably insufficient. No statement regarding adverse affects of the policy.
    - Analogous to saying “patient has lightning reflexes and so doesn’t need the safety guard on her machine.”
  - To put in legal terms, no ADA protection because no evidence of disability.
  - Probably sufficient to trigger ADA if Dr. says “she had COVID, has good immune response, and risk of vaccine, while minor, is greater than the benefit of the vaccine.”
  - What if no documentation at all?
    - Lack of documentation is not an absolute bar to an accommodation claim
    - But in the context of the ETS, do not accommodate without documentation.

**Available Accommodations**

- Will depend on ETS
  - If remote workers are exempt, then you will need to consider work from home
- Will simple disregard for the ETS be an accommodation?
  - Analogous to fire response training
  - If enough other employees are protected then can we accommodate a few without the protection?
Religious Accommodation under Title VII

- This is “call your lawyer” time.
- After verification of qualification (sincerely held religious belief) accommodation process is the same as ADA.
- Undue hardship defense is much easier for an ER to prove under Title VII than ADA.
- EEOC guidance is basically that ER should take EEs statements of SHRB at face value.
- ER may ask for supporting information if ER “is aware of facts that provide an objective basis for questioning” the SHRB.
- You probably don’t have those facts, and don’t go looking for them.
- But EEs may talk.
- This can be an issue of many considerations, you probably don’t.
- May differentiate between (and need not accommodate) practical, personal, political, sociological, or philosophical beliefs.
- Conduct a thorough interview and document all reasons for refusal.
- Then call your lawyer again.

Pregnancy Accommodation under Title VII

- Again, use the ADA standards as the starting point.
- Additional legal standard to show that pregnant EEs are not treated differently than similarly situated EEs.
  - In this case, that means others refusing the vaccine.

Other Accommodation Considerations

- If the ETS allows for accommodation, what to do about unvaccinated in the workplace.
  - Determine need to know of vaccination status.
    - Is there any need for knowledge beyond HR professional checking status?
    - Remember, you don’t actually know non-vaccination status, you only know that an employee did not provide documentation.
    - Vaccination status is confidential medical information.
    - Counsel employee that they are free to share, but you’d really prefer that they didn’t.
    - May be hostility from those who got vaccine—harassment based on disability status is unlawful.
**Discipline and Terminations Specifically**

- Document refusal
  - To provide documentation, not to undergo procedure
- Written counseling prior to discipline
  - Document refusal
  - Don’t invite request for accommodation, but make an opportunity. “If there is any additional information you believe we need to know about your refusal, please bring it to our attention.”
- Discipline/Terminate based on failure to produce documentation, not on refusal of procedure
  - Specifically invoke your business necessity, in this case the ETS
  - Reference written counseling above

**In Summary**

- Now
  - Inform EEs of the forthcoming ETS
  - Formulate a position and communicate it to your employees and unions
  - Make a plan for tracking testing/vaccination status and storing data separately from personnel files
  - Think about who needs to know this information
  - Buff and polish your accommodation process and any guidelines you publish, consider training to managers

**In Summary (two summary slides!?)**

- When the rule hits
  - Inform EEs of the ETS and the fact that you must follow it
  - Read it thoroughly
  - Look for guidance from EEOC, public sources, and Gislason & Hunter/SMAHRA
  - Think accommodation opportunities first
  - Build a plan for collection of information and communicate the practicalities to EEs
  - For refusals, take course of action on Discipline and Terminations slide
  - Questions?
Thank you!

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Legislative Changes

- MN Women’s Economic Security Act
- MN Human Rights Acts

Accommodations: Nursing Mothers, Lactating Employees

Amendments to MN WESA

- Current Law
  - Nursing employees entitled to “unpaid break time” to express milk
  - Unless such would “unduly disrupt” operations
  - Reasonable efforts to provide private space, with outlet, not a bathroom
  - Unknowns / Clarifications Needed
    - How long these breaks are required after birth
    - Required duration of break & frequency

- Beginning January 1, 2022
  - Paid break times to express milk
  - Limited to 12-month period following birth
  - No reduction in compensation “for time used for the purpose of expressing milk”
  - Still limited by disruption to operations
  - Reasonable efforts still required for private area

Accommodations: Pregnant Employees

Amendments to MN WESA

- Current Law (Minn. Stat. 181.9414)
  - Employers with 21 or more employees at least 1 job site
  - Employees working (1) at least 12 months; and (2) averaging weekly hours = ½ FT position
  - Provide reasonable accommodations to pregnancy and childbirth-related conditions
  - No Advice/No Undue Hardship Accommodations
    - More bathroom, food, water breaks; seating; and lifting ≤20lbs.
  - Advice-based accommodations

- Beginning January 1, 2022
  - Employers with 15 or more employees
  - All employees – no length of service or average hour requirements

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Minnesota Human Rights Act
Amendments to Minn. Stat. § 363A.08, subd. 6
TOOK Effect on July 1, 2021

Terminology change: Job applicant or qualified employee with a disability
- No longer: qualified disabled person or job applicant

Interactive Process Required: “To determine the appropriate reasonable accommodation the employer . . . shall initiate an informal interactive process with the individual with a disability in need of the accommodation. This process should identify the limitations resulting from the disability and any potential reasonable accommodations that could overcome those limitations.” Minn. Stat. § 363A.08, subd. 6.

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Issue Presented:

Whether court erred in granting Allina summary judgment on whistleblower claim when employee questioned request to immediately terminate an employee based on potential patient safety issues and the termination stemmed from Allina’s evaluation of how employee handled the situation.

Metcalf supervised employees at 2 Allina hospitals
April – “Robert” tells Metcalf he was arrested & charged: domestic assault
- Metcalf reports to HR Foster same day
- HR Foster interpreted Allina’s policy = Robert stays until conviction
September – Metcalf tells Supervisor Cook Robert’s court date is coming up
- Supervisor Cook confirmed HR Foster’s instructions, wait for conviction
September 21 – Employees reported Robert was “creepy,” incompetent

Minnesota Human Rights Act
Amendments to Minn. Stat. § 363A.08, subd. 6
TOOK Effect on July 1, 2021

Amendment: Follows McIver v. Team Industries, Inc. 925 N.W.2d 222 (Minn. 2019)
- Employee alleged disability discrimination – demonstrated (in part) by failure to engage in interactive process
- Minn. Stat. § 363A.08, subd. 6(b)(5) required consulting with disabled person to determine whether accommodation caused undue hardship
- Consultation = interactive process
- MN Supreme Court disagreed
- Held interactive process not required by statute
- Even if consulting with disabled person under (b)(5), was equivalent to interactive process, only required when accommodation not provided because employer alleged undue hardship defense

Facts:
- September 24 – Anonymous employee reported
  - Watched porn on work computer
  - Explicit text message (outside of work)
  - Ex-girlfriend said Robert used meth
  - Doctor received patient complaint re: Robert being argumentative
- September 24 – Metcalf requested meeting with HR Foster; “not emergent, just troubling”
- September 26 – Metcalf meets with HR Foster; observed hyper behavior potentially energy drinks

Facts:
- September 26 – HR Foster instructs Metcalf to continue monitoring Robert’s performance; HR Foster emails summary to HR Dir. (1st notice)
  - HR Foster conveys to Metcalf
  - Robert training pulmonary rehab class; Patient issue - Can we delay?
  - HR Foster instructs Metcalf to contact HR Dir.: patients at risk; remove immediately
- October 4 – HR Dir. reports Metcalf handled Robert poorly

Facts:
- October 15 – HR Dir. Gives decision makers following investigation report
  - Gives different timeline of events
  - HR Foster’s recommendations/instructions to Metcalf not included
  - States HR Foster and HR Dir. “were stunned Robert was working”
  - Reason Metcalf requested delay of Robert’s removal: meetings, coverage for future shifts, and Robert was “fine”
  - Oct. 4 meeting, Metcalf couldn’t recall date she 1st discussed arrest with HR Foster
  - Metcalf’s characterization of circumstances 9/26 as “not emergent”
  - Metcalf allowed Robert to work 48 shifts after arrest
  - Terminated!

**Retaliation – Minnesota Whistleblower Act (MWA):**
Summary judgment standard—assuming facts in light most favorable to non-moving party, could any reasonable person find retaliation occurred.

**Metcalf Burden Prima Facie Case:**
- Engaged in protected activity and causal connection between activity and adverse employment action
- Protected Activity
  - Reporting violation of law
  - Refused employer's order to perform act that violates law
  - Reporting good faith belief situation health care services provided violated standards established by law or recognized in profession that places public at risk of harm
- Causal Connection (retaliatory intent inferred based on timing)
  - 2 of decision makers knew about Metcalf’s reports
  - HR Dir: Guided termination discussion & new about the reports

**Allina’s Reason**
Metcalf displayed poor judgment by allowing Robert to continue working after April, and resisting HR Dir. Instruction to remove Robert on Sept. 27

**Burden Shifts to Employer/Allina:** Legitimate, non-discriminatory reason or termination
- Supported by admissible evidence
- Justify ruling that employer’s actions were lawful
- Clear and reasonably specific for employee to rebut as pretextual


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**Burden Shifts to Employee/Metcalf:** Employer’s reason is pretextual
- Pretext can be shown “either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” Id. at 7.
- Metcalf’s Pretext Argument
  - Not worthy of credence because HR Dir. false & misleading report
  - Court agreed – “One of the most damning statements in the report”
    - Claim Metcalf waited 1 month to tell HR about arrest; and allowed Robert to work
    - Ignores HR Foster learned same day & instructed Metcalf on every occasion that Robert should keep working; including 9.26 as summarized in email to HR Dir.
- Reversed & remanded!
**Issue Presented:**

Whether trainers were employed and entitled to payment for travel time following acceptance of offer letter, when they did not prep or train during the travel and employment ends at end of travel session.

**Facts:**

Trainers travelled from FL & NY to MN – sought wages for travel time FLSA
Trainers hired on project-by-project basis
Offer letter for each project (not employment contract; no guarantee of continued employment after project)
All projects end at end of training session
No prep or training required during travel
Not displacing regular employees while traveling

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**Application to Your Business:**

- All managerial staff, especially HR should know company policies
- HR investigations and other documentation should report facts accurately
  - Don’t hide / sugar coat bad facts
  - If decision-makers were aware of the bad facts here, likely would have made a different decision

---


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**Burden Shifts to Employee/Metcalf: Employer’s reason is pretextual**

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- Ignores HR Foster learned same day & instructed Metcalf on every occasion that Robert should keep working; including 9.26 as summarized in email to HR Dir.

Reversed & remanded!
**Application to Your Business:**

- Be careful when drafting offer letters
- Analyze any travel expected of employees during employment
  - Is the travel compensable?
  - What determinations were used to determine whether payment is required?
Lopez v. Whirlpool Corp.,
989 F.3d 656 (8th Cir. 2021)

Issue Presented:

Whether employer is liable for sex discrimination and retaliation in violation of Title VII when:

- Non-manager touches, stares, and calls employee, “Baby;”
- No written complaint of harassment; and
- Alleged victim resigns shortly after complaining to HR

Facts continued:

August 11 – Lopez unqualified for assigned task
-Demands to see HR; Initially denied
-Discussion with Supervisor – uncomfortable, unqualified for task, and encouraged to seek position on Supervisor’s new production line
-No discussion / allegation of harassment

August 16 – Employees deny Lopez a shoulder brace

August 17 – Written Complaint
- Lopez refused to wear PPE
- Co-worker threatened termination (empty threat)
- Detailed August 11 & 16 events
- No claim of harassment, discrimination, or retaliation

August 22 – Co-worker stares at Lopez
- Verbal complaint to HR; Feels Co-worker “retaliating” against her
- Requested new position
- HR asked, “Are you sure you’re not overreacting?”

August 23 – Co-worker stares again; Lopez resigns

Question 1: Are there sufficient facts to establish a hostile work environment based on Co-worker’s alleged harassment?

Answer: No

Hostile Work Environment – Elements of Claim

1. Membership in protected class;
2. Subjected to unwelcome harassment because of membership in class;
3. Harassment severe and pervasive as to create objectively and subjectively hostile work environment; and
4. Employer knew or should have known about the harassment & failed to take proper remedial action

Lopez v. Whirlpool Corp.,
989 F.3d 656 (8th Cir. 2021) cont. . .

Facts:

Whirlpool granted summary judgment on Title VII* claims

Claims Co-worker (not supervisor)

- Approx. 4 months – touched her shoulder, arm, or back daily
- Stood to close - groin touched her
- Administered aid – blew on finger and called her “baby”

Lopez alleged Supervisor knew

- Lopez complained of Co-worker touching her; Not all incidents
- Lopez uncomfortable; Assumed Supervisor addressed Co-worker
Lopez v. Whirlpool Corp.,
989 F.3d 656 (8th Cir. 2021) cont. . .

Facts continued:
August 17 – Written Complaint
   • Lopez refused to wear PPE
   • Co-worker threatened termination (empty threat)
   • Detailed August 11 & 16 events
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Harassment must be severe and pervasive
   • Frequency and severity of conduct
   • Physically threatening, intimidating, humiliating
   • Unreasonably interferes with performance
Co-worker should be ashamed of actions
   • 8th Circuit – high bar requiring frequent, unwelcome touching
No evidence that Whirlpool knew or should have known
   • Acknowledged Supervisor addressed complaints
   • No harassment reports in August
   • Even if made verbally on August 17, HR didn’t have reasonable time to investigate

Question 2: Was Lopez constructively discharged?
Answer: No
Constructive discharge – employer intentionally acted to make work so intolerable that any reasonable person would quit
Employee “who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.”

Question 3: Could jury find Whirlpool liable for unlawful retaliation?
Answer: No
Retaliation requires (1) engagement in protected conduct; and (2) adverse employment action (material not trivial) casually connected to protected conduct.

No Protected Activity
   • August 11 – Demand to See HR; Discussion with Supervisor
   • August 17 - Written Complaint
No Adverse Employment Activity (even if Lopez made verbal report August 17)
   • Co-worker’s stares did not injurious or harmful
   • No authority to terminate Lopez; Viewed as empty threat

Facts continued:
August 11 – Lopez unqualified for assigned task
   • Demands to see HR; Initially denied
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EMPLOYMENT LAW
5/24/2021
Lopez v. Whirlpool Corp., 989 F.3d 656 (8th Cir. 2021) cont. . .

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Application to Your Business:

*Whirlpool was very lucky!*

Educate & Train Supervisors
- What to do when receiving a complaint of harassment?
- How to document a complaint?
- Proper responses to employer’s concerns of continued harassment?

Complete Thorough Investigation
- Written report from alleged victim
- Have standard questions (what, who, when, history, reports, witnesses, documents)
- Interview supervisors and witnesses
Hall v. City of Plainview, 954 N.W.2d 254 (Minn. 2021)

Issues Presented:

1. Whether employee handbook can form a contract with employee notwithstanding a no contract provision.

2. Whether Minn. Stat. §181.13(a) creates a substantive right to payment for unused PTO upon termination.

Facts:

Donald Hall earned 1,778.73 hours of PTO. City of Plainview terminated his employment, refused to pay unused PTO. Employee handbook introduction – No contract disclaimers

• Policies “should not be construed as contract terms.”
• “[W]e did not intend to create an express or implied contract of employment between the City of Plainview and an employee. City “may choose to follow” the grievance, discipline, and termination procedures. However, those policies are not intended to alter the relationship between the City as an employer, and an individual employee, as being one which is at will, terminable by either at any time for any reason.”

Procedural History:

Mr. Hall sued the City – breach of contract, unjust enrichment,* and violation of Minn. Stat. §181.13(a) demand for payment of PTO

City rejected demand – 14 days of resignation not given

District Court granted City’s motion to dismiss contract & statutory claims & and MN Court of Appeals affirmed

• No Contract Disclaimer prevented formation of contract
• Without contract, no entitlement to payment for PTO under Minn. Stat. §181.13(a)

MN Supreme Court granted Mr. Hall’s petition for review

Application to Your Business:

Whirlpool was very lucky!

Educate & Train Supervisors

• What to do when receiving a complaint of harassment?
• How to document a complaint?
• Proper responses to employee’s concerns of continued harassment?

Complete Thorough Investigation

• Written report from alleged victim
• Have standard questions (what, who, when, history, reports, witnesses, documents)
• Interview supervisors and witnesses

Questions:

1. Did the City’s general no contract disclaimer prevent formation of a contract?

Answer: NO

Unilateral employment contracts can form from employee handbooks

• Offer to provide something of value; and
• Acceptance & consideration is performance of act(s)

Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) - Contract forms when language is sufficiently clear for court to ascertain:

• Employer’s obligation / promise to employee; and
• Whether promise was fulfilled

Each policy viewed individually to determine intent of parties to form contract

City’s general no contract disclaimer

• Too general
• Address at-will status
• Application only to grievance, discipline, and termination policies

Issue Presented:

1. Whether employee handbook can form a contract with employee notwithstanding a no contract provision.

2. Whether Minn. Stat. §181.13(a) creates a substantive right to payment for unused PTO upon termination.

Facts continued:

City’s PTO Policy – outlined accrual, use, and payment

Max 500 PTO hours paid at termination “for any reason . . . unless the employee did not give sufficient notice as required by the policy.”

• Sufficient notice not defined in policy

Separate policy – Employees failing to provide 14-days’ notice of resignation may be denied leave benefits.

Mr. Hall made a Minn. Stat. §181.13(a) demand for payment of PTO

City rejected demand – 14 days of resignation not given
**Hall v. City of Plainview, 954 N.W.2d 254 (Minn. 2021), cont...**

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**Question 2: Was City’s PTO policy sufficiently clear to form a unilateral contract with Mr. Hall?**

**Answer: Yes**

Offer clear terms (accrual, use, and conditions for payment) on PTO in exchange for work performed; and

Mr. Hall’s accepted & provided consideration by working and continuing to work for City despite at-will status

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**Question 3: Did the PTO contract require City to pay Mr. Hall for all 1,778.73 PTO hours?**

**Answer: TBD on remand**

Fact finder must determine whether conditions for payment were met

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**Question 4: Notwithstanding the PTO policy conditions for payment, is PTO a wage that must be paid upon Minn. Stat. §181.13(a) demand?**

**Answer: The contract controls.**

Mr. Hall claimed PTO hours are wages under Minn. Stat. §181.13(a)

MN Supreme Court rejected Mr. Hall’s argument in part

PTO is creature of contract –
- Entitled to payment for unused PTO under contract = wages under Minn. Stat. §181.13(a)
- No entitlement to payment – Not wages under Minn. Stat. §181.13(a)

Minn. Stat. §181.13(a) claim remanded for determination of whether Mr. Hall met conditions for payment of unused PTO

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**Application to Your Business:**
Use specific no contract disclaimers in employee handbooks

Paid leave policies should identify:
- Conditions for payment
- Treatment at termination
- Treatment during leave of absence
- Accrual method (e.g. gradually / lump sum)

Include payment for unused PTO (when required) within 24 hours of Minn. Stat. §181.13(a) demand

Penalties and liability for attorney’s fees and costs

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Issues Presented:
1. Whether it is a violation of the Minnesota Whistleblower Act (MWA) to terminate an employee who lies to HR and ignores employer's directives, when the employee recently reported safety concerns.
2. Whether an inference of causation raised by termination of an employee 2 weeks after an OSHA complaint can be overcome by an intervening event, when the employee claims verbal reports of the safety concerns were made throughout employment.

Facts:
Slaughter custodian for school hired in 2014
- Summer 2014 – Reported colleague drunk; Colleague fired
- Fall 2014 – Emailed All Staff
  - Struggling to complete work; Eliminating daily vacuuming
    - Supervisor responded; Terminated next day
    - Employee reinstated and transferred to another school
- Employee transfers back in 2015; New issues in 2017
  - Slaughter leaves teachers notes (flush toilets, building issues)
- September 2017 – Principal's instructions to Slaughter
  - Stop leaving notes for teachers
  - Don't lock doors until 5pm
    - Slaughter ignores both; Locks doors at 4pm
    - Placed on administrative leave – Sept. 29th
- October 2017
  - Slaughter submits MN OSHA complaint to MN DOLI – Oct. 6th
    - Allegations water lead levels, air quality, and building safety/security
    - MN DOLI notifies School (Not Identifying Slaughter) – Oct. 9th

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Facts continued:
October 2017 – Slaughter’s Administrative Leave
  - Admits she ignored Principal’s orders
  - Intentionally hid vacuum from staff
  - Lied to HR about building keys before leave
  - Principal’s “title means nothing to me. I don’t care who you are.”
Terminated October 30, 2017
Slaughter sued School alleging retaliatory discharge in violation of MWA & MN OSHA; Summary Judgment for School
Question 2: Was Slaughter terminated in violation of MN OSHA?
Answer: No
MN OSHA - Unlawful to terminate employee for:
1. Filing complaint with MN DOLI
2. Refusing to perform assigned task (in good faith)
   • Reasonable belief working conditions posed imminent danger of death or serious physical harm (Employee's burden)
   • Employee requested correction of hazardous conditions; Not corrected
   • Terminated because employee refused to perform task
1. Refusing Order to Lock Doors at 5pm
   MWA – Not Protected Activity
   Alleged safety concern, unknown visitors
   Two incidents: (i) at 10pm; and (ii) individual had key
   Common law – landowner duty to use reasonable care
   MN OSHA – No Evidence of Hazardous Conditions
   No evidence locking doors at 4pm avoids the incidents
   Not reasonable to believe closing doors at 5pm posed imminent death or serious physical harm

2. Reporting Drunk Colleague
   MWA – Potentially Protected Activity; Unrelated
   Unlawful to have alcohol on certain elementary school grounds
   Report made in 2014 and colleague immediately terminated
   Slaughter relies solely on temporal proximity (infers causal connection)
   Intervening event – All staff email independently changing job duties

3. Water & Air Quality; Exterior Doors during School Hours
   MWA – Potentially Protected Activity; Unrelated
   Alleged reported throughout tenure
   Slaughter solely relies on temporal proximity (Sept. – Oct. 2017)
   Intervening event – October 25 Interview; Terminated 5 days later
   “Slaughter’s damaging admissions” and school’s “references to those admissions in its discharge letter, undermine any causal inference . . .”
Carrera v. EMD Sales, Inc.,
No. JKB-17-3066, 2021 WL 1060258 (D. Md. 2021)

Issues Presented:

Whether sales representatives working 60 hours per week driving to customers' stores to manage inventory, including restocking, replenishing, and replacing products are exempt from FLSA overtime as outside salesmen.


4. Filing MN OSHA Complaint

MN OSHA – Protected Activity: Unrelated

MN DOLI didn't identify Slaughter as complainant

No causal connection when employer unaware of the protected activity

Temporal proximity only (Oct. 9 – Oct. 30) – knowledge acquired because complaints consistent with concerns Slaughter raised

Intervening event – October 25 Interview; Terminated 5 days later

No reasonable person could find anything other than termination “because of her insubordination and deceit.”

Application to Your Business

Importance of Truthful Reason for Termination Letter

Performance Issues

• Document the issues (e.g. Supervisor’s email)

• Inquiry as to why issue occurred

• Slaughter’s admissions were the reason

School granted summary judgment

Document and Investigate All Complaints

• Minimize credibility of employee’s testimony that he always complained

• Document steps for investigating complaint


3. Water & Air Quality; Exterior Doors during School Hours

MWA – Potentially Protected Activity; Unrelated

Alleged reported throughout tenure

Slaughter solely relies on temporal proximity (Sept. – Oct. 2017)

Intervening event – October 25 Interview; Terminated 5 days later

“Slaughter’s damaging admissions” and school’s “references to those admissions in its discharge letter, undermine any causal inference . . .”

4. Filing MN OSHA Complaint

MN OSHA – Protected Activity; Unrelated

MN DOLI didn’t identify Slaughter as complainant

No causal connection when employer unaware of the protected activity

Temporal proximity only (Oct. 9 – Oct. 30) – knowledge acquired because complaints consistent with concerns Slaughter raised

Intervening event – October 25 Interview; Terminated 5 days later

No reasonable person could find anything other than termination “because of her insubordination and deceit.”

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Carrera v. EMD Sales, Inc.,
No. JKB-17-3066, 2021 WL 1060258 (D. Md. 2021)

Issues Presented:

Whether sales representatives working 60 hours per week driving to customers' stores to manage inventory, including restocking, replenishing, and replacing products are exempt from FLSA overtime as outside salesmen.
FLSA Outside Salesman Exemption

Employee’s primary duty is making sales and work is regularly performed off Employer’s premises. 29 CFR § 541.500(a).

Primary Duty – principal, main, most important task; 51% or more

- Time spent performing task
- Importance of task in relation to others
- Employer’s compensation v. compensation of other employees performing same nonexempt task

Promotion work – tasks performed incidental / conjunction with sales

29 CFR § 541.503(c) (emphasis added).

Issues Presented:

Whether sales representatives working 60 hours per week driving to customers’ stores to manage inventory, including restocking, replenishing, and replacing products are exempt from FLSA overtime as outside salesmen.

Facts:

EMD is a product distributor for grocery stores (e.g. Walmart, Safeway)

EMD management negotiates with stores corporate buyers on product purchases

- Discuss new products to add
- Placement of products; develop planogram

Limited (if any) authority to modify agreement at store level

Sales representatives

- Build rapport with customers
- Gain knowledge about customers to recommend additional products / shelf space

Sales representatives paid commission only (union CBA)

- Commission same for orders placed to refill products v. additional products
- Average 60 hours/week
- Main responsibility – inventory management (delivery, restocking, issue credits)
- Disciplined for failure to timely service store / manage inventory

EMD & CEO claimed FLSA Outside Salesman exemption

Burdens of Proof

Employee (1) employment; (2) worked over 40 hours; (3) reasonable inference of the amount of overtime worked

Employer’s burden to prove exemption applies: Clear & Convincing

Question 1: Were EMD’s sales representatives exempt from overtime under FLSA as outside salesmen?

Answer: No.

EMD’s management made the sales

Sales representatives primary duty – manage inventory for those sales

- Customer’s store management little to no authority to purchase additional items
- One-off independent chain sales – not primary duty
- Inputting orders for restocking – technicality; not a sale
- Disciplinary action for failure to service inventory – indicates key responsibility
Carrera v. EMD Sales, Inc.,
No. JKB-17-3066, 2021 WL 1060258 (D. Md. 2021) cont...

Question 2: What is the lookback period the sales representatives can recover for unpaid overtime?
Answer: 2 years; Employees failed to prove willful violations

- FLSA Statute of Limitations (2 years or 3 years)
  - Employee’s burden to show employer willfully or recklessly disregarded FLSA
    - Mere negligence or unreasonableness insufficient

- EMD testimony
  - CEO credible testimony - ignorance of FLSA’s application to the business
  - Reviewed DOL documentation
  - Relying on CBA (commission only)
  - Accountants' advice on FLSA’s application

Carrera v. EMD Sales, Inc.,
No. JKB-17-3066, 2021 WL 1060258 (D. Md. 2021) cont...

Question 3: Were EMD and CEO liable for liquidated damages for FLSA violations?
Answer: Yes, jointly and severally

- FLSA Liquidated Damages 29 USC § 216(b)
  - Penalty = amount of wages owed
  - Employer failing to pay overtime shall be liable for damages + unpaid overtime
    - Discretionary – good faith belief / reasonable grounds for believing compliance

- EMD’s burden
  - EMD’s evidence that actions were not willful or reckless
    - Ignorant of primary duties – cannot establish objective reasonable grounds for believing employees met outside salesman exemption

Carrera v. EMD Sales, Inc.,
No. JKB-17-3066, 2021 WL 1060258 (D. Md. 2021) cont...

Application to Your Business:
Analyze each position's tasks and (if applicable) compensation for FLSA exemption

- Review routinely; Position changes
- Document analysis and findings

Liability exposure for individuals

- FLSA employer – "any person acting directly or indirectly in the interest of an employer in relation to an employee" 29 USC § 203(d)
- MN FLSA – same employer definition (Minn. Stat. § 177.23, subd. 6)
- MN Wage Theft – violation of FLSA done with "intent to defraud" criminal act (Minn. Stat. § 609.52)
  - Imprisonment 1-20 years; and/or
  - Fined up to $100,000

Carrera v. EMD Sales, Inc.,
No. JKB-17-3066, 2021 WL 1060258 (D. Md. 2021) cont...

FLSA Outside Salesman Exemption – Drivers Who Sell
29 CFR § 541.504 - Guidance for Drivers Delivering Products
Drivers primarily making deliveries and performing activities intended to promote sales by customers (e.g. arranging merchandise, filling stock), do not meet the outside salesman exemption. "Unless such work is in furtherance of the driver's own sales efforts." 29 CFR § 541.504(d)(3).

Burdens of Proof
Employee (1) employment; (2) worked over 40 hours; (3) reasonable inference of the amount of overtime worked
Employer’s burden to prove exemption applies: Clear & Convincing

Carrera v. EMD Sales, Inc.,
No. JKB-17-3066, 2021 WL 1060258 (D. Md. 2021) cont...

Question 1: Were EMD's sales representatives exempt from overtime under FLSA as outside salesmen?
Answer: No.

- EMD’s management made the sales
  - Sales representatives primary duty – manage inventory for those sales
    - Customer’s store management little to no authority to purchase additional items
    - One-off independent chain sales – not primary duty
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    - Disciplinary action for failure to service inventory – indicates key responsibility

Carrera v. EMD Sales, Inc.,
No. JKB-17-3066, 2021 WL 1060258 (D. Md. 2021) cont...
**Issue Presented:**

Whether administrative assistant whose duties require approximately 3 to 5 out-of-state/week is entitled to overtime under FLSA when her employer operates only in Florida.
St. Elien v. All County Environmental Servs., Inc.,
991 F.3d 1197 (11th Cir. 2021) cont...

Facts:
• Assistant sued pest control company and its owners for unpaid overtime
• Company services only Florida properties
• Assistant averages 3 to 5 calls each week to
  • Snowbird customers – payments; access property
  • Vendors
• Company granted judgment as matter of law
• Neither Company nor Assistant covered by FLSA
• Assistant not engaged in commerce

Application to Your Business:
Evaluate Enterprise and Individual Coverage
• Review job duties regularly
  • Not every employee is tasked with the same duties for position (e.g. division of work)
Recordkeeping
• Do employees report all hours worked?
  • Employer’s burden to show workweeks employee individually covered by FLSA
  • Potential to segregate workweeks – eliminate inclusion of weeks employee did not engage in commerce
Overtime / More than 40 Hours Pre-Approval
• Consider implementing policy
  • Use requests for approval as reminder to reevaluate coverage
Thank you!

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THANK YOU

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