# Recent Employment Law Cases and Legislative Update


***Presented By***

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GISLASON & HUNTER LLP

# Overview

- Legal news, roughly in order of importance/time
- Means we'll end with a fizzle
- Ask questions at any time

# Key Themes (Excuses?)

- 8 SC Justices = not many opinions and often split
- But Trump changed everything, right?
  - Trump made America great again! (Republican version)
  - Trump defiled everything that is good on planet Earth! (Democrat version)
  - Reality
    - President Trump ordered a full stop to all rule making
    - Many agency "political appointees" are unchanged or vacant
    - And 99% of agency employees are NOT "political appointees" so they will not change overnight
      - 8 years of hiring has a lasting impact on culture

# Key Themes (Continued)

- Unmaking rules usually takes as much work as making rules
- Not automatic
  - Agency needs to build a basis for a change
  - If Agency just built a basis for the opposite action two years ago, it's very difficult to undo
  - (BTW, you don't get to vote for any of the people making or unmaking these rules)
- More flexibility in enforcement than rulemaking
  - But enforcers haven't changed
  - Will they increase enforcement in the absence of increased rules?
- Not much legislation in works, even R majority is not fully behind the President

# Key Themes (Continued)

- State Level
  - R legislature, D governor
  - Zero trust, very little common ground
- E Law attorneys starving/rioting in the streets!
  - Too much certainty!
  - Fear lack of lawsuits!!
  - Demand new laws NOW!!!

# Key Themes (Continued)

- Next few years actually might be a breather for HR professionals
- “Gridlock” in Washington and St. Paul could mean predictability and stability on main street

# Key Substantive Themes

- If you only remember one slide, remember this one
- “Inflexible” is bad
- Stick to the bona fide job functions
  - Hiring
  - Accommodation
  - Requests for information
- Transitive discrimination
  - Using seemingly objective process or data with illegal discrimination baked in

# EEOC Priorities: Strategic Enforcement Plan (2017-2021)

- 95% of Federal staffing unchanged since Obama
- Director for MN hasn't changed
- EEOC brags that more than ½ of its budget is funded by "monetary relief secured"

# EEOC Priorities: Strategic Enforcement Plan (2017-2021)

- "Eliminating Barriers in Recruitment and Hiring"
  - Arrest and Conviction Records
  - Funneling women out of "traditionally male" jobs
  - Disability
  - Age
- "Protecting Vulnerable Workers"
  - Immigrants
- "Emerging and Developing Issues"
  - Wellness programs
  - Inflexible leave programs
  - Pregnancy accommodation
  - Orientation
- Cases Illustrating these priorities:

# EEOC v. Mach Mining,

January 25, 2017 Consent Decree: $4.25M , and hiring goals expected to at 34 women

- MM had never hired a woman and had no woman's rest room
- Case filed in 2011
  - According to Chicago Dist. Dir. Julie Bowman "these cases were actually resolved fairly early in the litigation process. . . ." "No depositions have yet been taken in this case . . . ."
- Case tossed out for EEOC's failure to mediate (covered in previous SMAHRA Updates)
- 12 "affiliate" defendants added in December 2016
- Expansion of scope appears to be impetus to settle

# EEOC v. Texas Roadhouse,

## March 31, 2017 Consent Decree: $12M

- Also filed in 2011
- Allegations:
  - Defendant instructed its managers to hire younger job applicants
  - emphasized youth when training managers about hiring employees for its restaurants.
  - All of the images of employees in its training and employment manuals are of young people.
  - Told older applicants
    - "there are younger people here who can grow with the company;“
    - "you seem older to be applying for this job" "do you think you would fit in?"
    - "we are looking for people on the younger side... but you have a lot of experience;"
    - "how do you feel about working with younger people?“
- Is this a recession phenomenon?

# EEOC v. Orion,

April 5, 2017 Consent Decree: $100,000 and training

- Wellness program
  - Disability related questions
  - Financial consequences beyond the “safe-harbor” provision for voluntariness
- Litigated
- Court upheld the EEOC’s power to make the “safe-harbor” provision re: voluntariness of wellness programs

# EEOC v. Lowe's,

May 13, 2016 Consent Decree: $8.6M, hire consultant, revise policies

- Failed to consider extended leave as an accommodation after leave ran out.
- This is (was?) a common practice with small employers in these parts . . . Big ones too.
- "This settlement sends a clear message to employers that policies that limit the amount of leave may violate the ADA when they call for **automatic** firing of employees with a disability after they reach a **rigid**, **inflexible** leave limit . . ." EEOC General Counsel David Lopez

# Broader Point from EEOC v. Lowe's

- End of FMLA (or ER policy leave if no FMLA) can't = automatic firing
- Still must go through ADA process
- Additional leave is an accommodation which ER must *consider* (not nec. *provide*)
- If we've gotten this far, EE is probably covered by ADA so only remaining question is reasonableness/undue hardship of add'l leave
- Frame your response in those terms
- Smaller firms, 12 weeks of FMLA is probably hardship

# Legg v. Ulster County

SJ decision in EE's favor, 820 F.3d 67 (2d. Cir. April 6, 2016)

- In this section because EEOC forwarded
- Basically, the first application of Young v. UPS
- ER had blanket policy of only accommodating workplace injuries and ADA cases
- Twist:
  - After being denied an accommodation EE got revised note releasing her to work full time
  - EE worked up to delivery
  - This did not relieve ER
  - (But did she really need an accommodation? What was her true restriction?)
- Takeaway:
  - Again, inflexibility is bad
  - Discouragement = denial

# Final National Origin Enforcement Guidance (November 11, 2016)

- Remember what enforcement guidance is
- T VII prohibits NO discrimination
- NO = being from a certain place or having "the physical, cultural, or linguistic characteristics of a particular national origin group"
- Most of the guidance is pretty vanilla
  - "Don't punch people because of where they're from" (not actual quote)

# Final NO EG (Continued)

- Interesting guidance is on extreme or borderline cases
- Unfair treatment of foreign workers:  seizing passports, controlling movement, jobs not related to recruiting material, assignments by origin, etc.
- Any of the above by a vendor, with ER knowledge (actual or imputed)
- Discrimination to suit customers,
- Employee Sponsorship:  ER only hires if a current EE sponsors; inherently restricts pool to social network of current EEs

# Final NO EG (Continued)

- Accent discrimination (if no material interference)
  - But examples include the EEOC determining the materiality of the requirement and the severity of the accent
- Language discrimination (if not material interference)
- Super specific NO discrimination
  - Language discrimination example differentiates between Mexican immigrants of Spanish decent and “indigenous Mexican” immigrants.

# Final NO EG (Continued)

- ER liability for 3rd party HWE
  - Visitor to senior community abuses staff
  - Focus is on ER's power to control
  - Is this a hint for residents?
- English only rule to promote workplace harmony, not justified

Wage Theft Prohibition Bill

HF 1391 & SF 1329

***Still in committee at House and Senate***

# Key Changes (if Passed)

- Gross Misdemeanor
  - Failure to pay wages due to employee totaling ≥ $10,000
- Retaliation Prohibited
  - Employer has committed wage theft by retaliating against employee for seeking redress for violation of employment payment practices or threatening to seek redress, constitutes
- Earnings Statement per pay period must include
  - All rates of pay for respective pay period
  - Employer's contact info (main office address, mailing address, telephone #)
- Payment Schedule
  - @Least once every 16 days

# Notice Required at start of employment

## Amends Minn. Stat. § 181.032

(d)(1) the rate or rates of pay and basis thereof, including whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other method; . . .

(2) Allowances (meals, expenses, etc.)

**(3) paid vacation, sick time, or other paid time off accruals and terms of use**;

**(4) whether the employee is exempt from minimum wage, overtime, and other provisions of chapter 177, and on what basis**; . . .

(5) Deductions ER may take

(6) the dates on which the pay periods start and end and the regularly scheduled payday; . . .

(9) the telephone number of the employer.

# Notice Required at start of employment
## Amends Minn. Stat. § 181.032

- Notice must be provided in English AND employee's native language
- Notice must be executed by employee
- Changes to information provided must be provided in writing 7 days before effective date

# Wage Theft

- HF 1391 https://www.revisor.mn.gov/bills/text.php?number=HF1391&version=0&session_year=2017&session_number=0

- SF 1329 https://www.revisor.mn.gov/pages/doctypes/bills/text.php?number=SF1329&version=0&session_year=2017&session_number=0

Minneapolis Sick and Safe Time Ordinance

St. Paul Earned Sick and Safe Time Ordinance

Effective July 1, 2017*

# Sick and Safe Time Ordinances Effective July 1, 2017

- Requires employers to offer leave to employees
  - "Employer" – private employers with at least ONE employee
    - Minneapolis: 6+ employees – leave must be paid
    - St. Paul: leave must be paid
  - "Employee" – works at least 80 hrs/yr in Minneapolis for the employer
- Accrual
  - begin to earn 1st day of employment or July 1, 2017
  - 1 hr for every 30 hrs worked
  - Max of 48 hrs per year
  - Carry over earned but unused for max of 80 hrs

# Sick and Safe Time Ordinances Effective July 1, 2017

- Use of sick and safe time
  - After 90 days of employment
  - Employee's illness, injury, health condition, care or treatment thereof, or need to seek preventative care
  - Care for family member
  - Absence due to domestic abuse, sexual assault, or stalking of employee or family member
    - Seek medical attention
    - Obtain services from victim service org./counseling
    - Take legal action
    - Relocation
  - Closure of employer's business due to hazardous material or public health emergency
  - Employer's need to care for family member due to closure of school or daycare
    - Hazardous material or public health emergency
    - Bad weather, loss of power, heating, water, or other unexpected closure

# Sick and Safe Time Ordinances
# Effective July 1, 2017

- Administered by the Minneapolis Department of Civil Rights
  - (a) The director has broad authority to implement, administer and enforce this chapter. The director shall have broad authority to investigate possible violations of this chapter whenever it has cause to believe that any violation of this chapter has occurred, either on the basis of a report of a suspected violation or on the basis of any other credible information, including violations found during the course of an investigation.
  - (b) The director shall promulgate appropriate rules to implement, administer and enforce this chapter.
- St. Paul – Director of Human Rights and Equal Economic Opportunity

# Sick and Safe Time Ordinances
# Effective July 1, 2017

- Penalties - highlighted
  - Reinstatement & backpay
  - Payment of sick and safe time not previously credited plus monetary award of hourly pay for the accrued time x 2; or $250, whichever is greater
  - $1,500 (MSP) / $1,000 (SP) administrative fine paid to employee for retaliation and violation of confidentiality

# Hyperlinks: Sick and Safe Time Ordinances

- Minneapolis ordinance:
  http://www.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcmsp-180841.pdf

- St. Paul ordinance:
  https://www.stpaul.gov/sites/default/files/Media%20Root/Human%20Rights%20%26%20Equal%20Economic%20Opportunity/Saint%20Paul%20Legislative%20Code%20Title%20XXIII%2C%20Chapter%20233.01%20-%20233.21%20%282016%29%28Earned%20Sick%20and%20Safe%20Time%29.pdf

- Review each ordinance
  - Notice requirements
  - Record keeping

## Uniform State Labor Standards Act

Proposed – Passed Minnesota Senate

Governor said he'd consider but didn't sign or veto yet

# Uniform State Labor Standards Act

- Civics lesson re: origin of cities
- Leaving authority to develop labor standards to state (in the absence of federal law requiring more)
- Purpose to prevent ordinances
  - Sick and Safe Time
  - City-based minimum wages
  - Minneapolis Working Family Agenda
    - Prohibits local government from establishing ordinances regulating hours or the scheduling of work, except business hours
  - Requiring an employer to provide a particular benefit, term of employment, or working condition
- Retroactive to January 1, 2016

# FLSA "White Collar" Overtime Exemptions

June 30, 2017

# Overtime Rules – SQA Rule

- Exemption for Executive, Administrative, Professionals ("EAP" or "White Collar" exemption); Must meet all three:
  - 1) Salary Basis Test: EE must be paid on a salary with no variation based on quantity or quality of work performed.
  - 2) Salary Level Test: $23,660 annually ($455/wk)
  - 3) Duties Test: EE's duties must primarily involve executive, administrative, or professional duties
- Highly Compensated Employee ("HCE") Exemption:
  - $100,000 in compensation

# Overtime Rules – Changes (on hold)

- Exemption for Executive, Administrative, Professionals ("EAP" or "White Collar" exemption); Must meet all three:
  - 1) Salary Basis Test: No change.
  - 2) Salary Level Test: $47,476 annually.
  - 3) Duties Test: No change.
- Highly Compensated Employee ("HCE") Exemption
  - $134,004 annually

# Overtime Rules – Changes (on hold, continued)

- Re-evaluated every 3 years by DOL
  - 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (South)
  - 90th percentile of earnings of full-time salaried workers in US
  - First update expected January 1, 2020
- Incentive pay can make up to 10% of salary minimum, so long as paid on a quarterly basis
  - Bonuses
  - Commissions
  - This was a new provision—don't use to calculate current minimum

# Overtime Rules- Changes on Hold

- Change to the EAP exemption has been blocked nationwide by a Federal Court in Texas.
- Changes mandated for December 1, 2016 for EAP exemption are not required for now.
  - This is a temporary injunction by a trial court.
  - President Trump has criticized the new rule and his administration may no challenge the injunction.
  - Dep't of Justice brief for the appeal is due Monday, June 30, 2017, after third extension was granted.

# FLSA Exemptions Duties Test

- NOT Changed
- White Collar Exemption
  - Executive
    - Managing business or department, supervise at least 2 full-time employees, and have the authority or ability to recommend employment decisions
  - Administrative
    - Administrative (office) work re: general operations of business or involving customers and requires routine exercise of independent judgment
  - Professional
    - Intellectual work, consistent exercise of discretion and judgment, and advanced knowledge and education required
- Highly Compensated Employee

# Application to Your Business: Evaluate Now!

- Review job descriptions and employees' actual duties
  - Does the position fit another exemption?
  - Require approval for overtime
  - Restructure the position to qualify for an exemption
  - Will you raise the salary for a currently exempt position?
- Questions

*Hively v. Ivy Tech Comm. College of Indiana*

April 4, 2017

# *Hively v. Ivy Tech Comm. College of Indiana*, No. 15-1720, 2017 WL 1230393 (7th Cir. April 4, 2017)

- Whether refusing to promote an employee because of her sexual orientation is unlawful discrimination on the basis of sex.

- Kimberly Hively – lesbian
- Hired as part-time adjunct professor in 2000
- Applied for **six** full-time positions between 2009 and 2014
- Filed charge with EEOC December 2013; received right-to-sue letter
  - *Important* – EEOC began interpreting discrimination on the basis of sex to include sexual orientation discrimination in 2015
- Adjunct position not renewed in 2014
- Hively sued Ivy Tech alleging college discriminated against her because of her sexual orientation
  - Case dismissed in district court
  - Hively appealed

*Hively v. Ivy Tech Comm. College of Indiana* (April 4, 2017)

# Issue and Rule

- Title VII – unlawful employment practice "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex"
  - Discrimination on the basis of sexual orientation is discrimination on the basis of sex

# *Hively v. Ivy Tech Comm. College of Indiana* (7th Cir. April 4, 2017)

- Comparative method – "The discriminatory behavior does not exist without taking the victim's biological sex . . . into account."
  - *Price Waterhouse v. Hopkins* – gender stereotyping

- Associational theory – "a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."
  - *Parr v. Woodmen of the World Life Ins. Co.*
  - *Holcomb v. Iona College*

# *Hively v. Ivy Tech Comm. College of Indiana* (7th Cir. April 4, 2017)

- Judicial interpretive updating – Justice Posner's concurrence
  - *Missouri v. Holland* – When interpreting statute, "[w]e must consider what this country has become in deciding" what the law means. 252 US 416
  - "[C]ompelling social interest in protecting homosexuals . . . 'interpretation' of the word 'sex' in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute but that we are entitled to adopt in the light of . . .'what this country has become[.]"
- Definition of "homosexuality"
  - Justices Flaum & Ripple
    - "One cannot consider a person's homosexuality without also accounting for their sex"
  - "Of or relating to, or characterized by a tendency to direct sexual desire toward another of the same sex." Merriam-Webster
  - "Having a sexual propensity for persons of one's own sex." Oxford English

# *Hively v. Ivy Tech Comm. College of Indiana* (7th Cir. April 4, 2017)

- Decision - Court held that Hively set forth a recognizable claim and reversed the lower court's dismissal of her employment discrimination claim
- Your Business
  - Minnesota already prohibits discrimination on basis of sexual orientation and gender identity
  - Use methods outline in *Hively* as tools to double check motives of employment decisions

*Liles v. C.S. McCrossan, Inc.*

March 21, 2017

# *Liles v. C.S. McCrossan, Inc.* 851 F.3d 810 (8th Cir. 2017)

- Whether demotion and termination of an employee for poor work performance months after employee's complaints of sexual harassment is unlawful retaliation under Title VII or the Minnesota Human Rights Act.

# Facts

- Mandy Liles was hired as a project engineer
- Promoted to assistant project manager
- 2009 – Co-worker made romantic advances; Liles turned him down; Co-worker began harassing her & Liles reported the harassment
- 2010 – Liles complains she is not receiving sufficient training on equipment
- 2010-2011 – Co-worker's father also worked there but was not Liles supervisor; Father began making derogatory comments – Liles was "rotten" & "tuna fish"
- 2010 – 2nd Co-worker began harassing Liles
  - "Never worked with a female assistant project manager"
  - "Are you going to cry," "Are you aroused?"
  - "I like that shirt on you," "Those jeans look nice"

- March 2011
  - 2nd Co-worker informs Supervisor that Liles was crying on the job & appears to be “overwhelmed by the complexity of the job”
  - The company owner echoed these remarks
  - Liles reports 2nd Co-worker’s harassment, 1 month after he stops harassing her
- April 2011
  - Liles reassigned to field work to provide her field experience to develop skills necessary to perform the project manager role
- June 2011 - Liles receives a satisfactory performance review & action plan
- January 2012 – Liles was terminated
- Liles sues Employer alleging sex discrimination, harassment, and retaliation
  - Employer granted summary judgment

# Retaliation

- Title VII – Unlawful for employer to discriminate against employee that opposes an unlawful employment practice
  - To prove retaliation, employee must show opposition was the but-for cause of the adverse employment action
- MHRA – Suffice if employee presents evidence of a retaliatory motive
  - Ex. Evidence that "employer had actual or imputed knowledge of the protected activity and the adverse employment action occurred close in time"

*Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 327 (Minn. 1995)

# Retaliation

- Liles argues retaliation
  - 2010 complains she is not receiving adequate training; and March 2011 report of sexual harassment
  - 2011 given action plan & fired in 2012
- Retaliation claim fails because adverse employment actions were
  - 15 & 17 months after Complaint re: inadequate training
  - 8 & 10 months after 2011 sexual harassment report
- Retaliatory motive cannot be inferred based on this evidence or timeline
- Court characterized Liles's retaliation claim as Doomed
  - Lacked evidence of causation; and
  - Had a history of performance problems

# Gender discrimination

- Unlawful to discriminate against employee because of their sex
  - Employer presents legit, nondiscriminatory reason for termination
    - Need only prove employer in good faith believed employee was guilty of performing activity leading to the adverse employment action
  - Employee's burden to prove reason offered was pretextual
    - Showing did not perform prohibited activity is not enough
    - Employee must present evidence showing Employer did not actually believe employee performed the activity

# Gender Discrimination

- Liles argues terminated because she was female
- Employer's legitimate, nondiscriminatory reason for termination – inferior job performance
- Liles failed to prove this was not a good faith belief held by Employer

→ Liles's gender discrimination claim was dismissed

*Brunozzi v. Cable Communications, Inc.*,
851 F.3d 990 (9th Cir. 2017)

# *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990 (9th Cir. 2017) - March 21, 2017

- Matteo Brunozzi and Casey McCormick were Installation Technicians for Cable Communications, Inc.
- Compensation structure provided fixed rate for each installation/project completed plus production bonus
- Production bonus – OT premium paid
- Employees argued this violated FLSA by effectively reducing employees hourly rate when they are entitled to overtime pay

# *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990 (9th Cir. 2017)

## Issue and Rule

- Issue: Whether use of a piece-rate payment plan with diminishing overtime-based bonus structure violates the FLSA
  - Overtime pay = 1 ½ times the employee's "regular rate"
  - "Regular rate" must reflect all payments an employee receives regularly during the workweek, exclusive of OT payments
- Rule:
  - Determine what pay agreement is for regular workweek
  - Determine whether ER calculates overtime pay by dividing that value by total hours worked for the week to calculate "regular rate"

# *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990 (9th Cir. 2017) - March 21, 2017

- Employment contract – Compensation for non-overtime workweek is as follows:
  - Technician receives total value of piece-work tasks completed (Piece Rate Total)

    ***plus***
  - [(Piece Rate Total) * (1/6)] = Production Bonus
  - Where "bonus" is a portion of the regular wages the employee is entitled to receive (*i.e.* not reward for good work, gift, or addition to wages) it is not a bonus under FLSA
  - CCI violated FLSA by then miscalculate regular rate of pay for OT purposes
    - (Piece Rate Total + ((Production Bonus – OT paid))/# hours worked
- <u>Proper Calculation of Regular Rate for CCI</u>
  - (Piece Rate Total + (Production Bonus)) / # hours worked
  - Reversed summary judgment & remanded

**Brunozzi v. Cable Communications, Inc., 851 F.3d 990 (9th Cir. 2017)**

Application to Your Business

Do you know how to calculate overtime pay?

# Calculating of Overtime Pay

- Overtime is paid 1.5* regular rate
  - Regular rate – dependent on pay during given workweek

**Step 1: (Hourly rate * hours worked) + Commissions**

**Hours worked = Regular rate**

**Step 2: Regular rate * 1.5 = OT premium**

**Step 3: (Regular rate * Max hours before overtime (40)) + (OT premium * OT hours worked)**

# Calculating Overtime Pay

- Week 1 – 40 hours
- Week 2 – 42 hours
- Week 3 – 45 hours
- Week 4 – 50 hours

← **Pay day on Friday of Week 2**

  - Susie earns $40,000/yr. ($19.23/hr.)
  - Receives commissions based on sales success
  - Week 2 received $70 ($40 for week 1 sales & $30 for week 2 sales); Week 4 received $50 ($20 for week 3 sales & $30 for week 4 sales)

  - Calculate pay for Week 2, including OT premium:

Step 1: [($19.23 x 42 hours) + $30] / 42= $19.94/hr.

Step 2: $19.94 x 1.5 = $29.91/ OT hr.

Step 3: ($19.94 x 40 hours) + ($29.91 x 2 hours) = $857.42

  - Determined on per week basis; cannot borrow time in pay period

*Childs v. Fairview Health Servs.*

November 28, 2016

*review denied* February 22, 2017

# *Childs v. Fairview Health Servs.* No. A16-0849, 2016 WL 6923709

- Whether reports of violation of internal policies and procedures protected activity under the MN Whistleblower Act.
- Whether complaints to HR to protect oneself from potential personal liability is protected activity under the MN Whistleblower Act.

# Facts

- Julie Childs reviewed potential patient records and made recommendations re: their admission to Fairview's adolescent chemical dependency lodging program
- April 2014 – Childs cc'd upper level management on email to direct supervisor regarding concerns she had with a potential patient
  - Specifically noting, her fear of "potential personal liability if an unqualified patient was admitted."
- July 13, 2014 – Childs sent letter to HR complaining about her schedule change and the stress failure to follow Fairview internal policies caused her staff
  - Childs' supervisor's admission of inappropriate patients
  - Admission of unqualified patients could create unsafe
  - Caused increase stress and anxiety to her staff because they were not trained to handle such patients
- Fired August 26, 2014

- MN Whistleblower Act
  - Employer cannot retaliate against an employee because that employee in **good faith** reported a violation or planned violation of federal, state, or local law
- Prima Facie Case
  - Employee made a reported protected by MN Whistleblower Act;
  - Employer took an adverse employment action against employee; and
  - Causal connection between protected activity and adverse employment action

- Definition “Good faith” added in 2013
  - Conduct that is not knowingly false or in reckless disregard of the truth
- Determine by
  - Looking at report’s content; and
  - Employee’s motive when making the report

# Application by the Court

- Childs argued, legislature's definition of "good faith" changed the law re: what classified as a report
  - Rejected; Summary judgment granted in Employer's favor
  - Definition did not change Act
- Childs' reports were not protected under MN Whistleblower Act
  - Neither report exposed illegality
    - April email – expressed concern for personal liability
    - July letter – commented on violation of internal business practices and policies—not the law

# Application to Your Business

- Reports of violations of federal, state, local, or common laws are protected activity under MN Whistleblower Act

- CANNOT make adverse employment decisions based on the employee's act of reporting

*Clarke v. Northwest Respiratory Servs., LLC*

January 30, 2017

# *Clarke v. Northwest Respiratory Servs., LLC*, A16-0620, 2017 WL 393890 (Minn. App. Jan. 30, 2017).

- Whether employer can win at summary judgment stage with documented evidence of poor job performance in the face of employee's FMLA retaliation claims after termination 3 weeks after returning from FMLA leave and alleging supervisor identified "unpaid leave" as reason for termination

# Facts

- Clarke was a service technician for Northwest Respiratory Servs., LLC
- Delivered to and serviced products at customers' residences
- Clarke suffered from PTSD
- Received numerous complaints regarding Clarke's troubled driving while working for Employer
  - Drove "like a maniac," issues tailgating, driving on motorists' bumpers, cutting motorists off, failing to use blinkers, speeding, etc.
- Clarke received numerous written warnings informing him that future incidents/complaints could result in immediate termination

# Facts cont…

- Clarke took FMLA leave to receive inpatient treatment December 31, 2013 through March 5, 2014
- January 2014 – Customer requested that a different technician assist him because Clarke was rude, slammed his door, talked back to him, and made him uncomfortable
- March 2014 – Another customer complained and cancelled service with Employer because Clarke was “very rude” and also claimed Clarke reported that he delivered equipment he actually failed to deliver

# Facts cont…

- Clarke's supervisor learned of the complaint on March 27, 2014
- Terminated March 28, 2014 (approx. 3 weeks after returning from FMLA leave)
- Clarke alleges that his supervisor said Clarke's time off was the reason for his termination
- Clarke sued for disability discrimination under MHRA and retaliation under FMLA

# Application by the Court

- Clarke alleges FMLA retaliation because:
  - Took FMLA; Fired
  - There was a causal connection between his termination and his FMLA leave
    - Fired 3 weeks after taking leave
    - Supervisor's comment
- Employer argues – no causal connection
  - December 2013 – Clarke requested leave
  - March 28, 2014 – Clarke was terminated; not sufficiently close in time
    - *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012) – Eighth Circuit "looks to the date an employer knew of an employee's use (or planned use) of FMLA leave, not the date it ended" to determine temporal proximity.
    - *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917, 925 (8th Cir. 2014) – "[T]emporal proximity must be extremely close to establish the causal connection without other evidence of discriminatory animus."

- Summary Judgment standard
  - Allegations are reviewed in the most positive light for the party that does not seek summary judgment
- Clarke's allegation Supervisor identified FMLA leave as reason for termination, treated by the court as true for purposes of evaluating motion for summary judgment
- Court held:
  - 3 weeks between return from leave + Supervisor's statement = Prima facie case of unlawful retaliation

- Employer granted summary judgment
  - Legitimate & Nondiscriminatory reason for termination
    - Customer's decision to terminate service with Employer because of Clarke's poor customer service
  - Clarke failed to show reason was pretextual
    - Supervisor's statement "provides some weak evidence of discriminatory motive" in the face of the nondiscriminatory reason for termination provided
    - Clarke also failed to present evidence that other employees, that did not take FMLA, were treated differently

# Application to Your Business

- Document job performance accurately
- Develop a termination letters
  - Clearly and succinctly list the complete reason for termination
  - REMEMBER FMLA leave and disabilities are not lawful reasons for termination

*Diamond v. Hospice of Florida Keys, Inc.*

January 27, 2017

# *Diamond v. Hospice of Florida Keys, Inc.*,
No. 15-15716, 2017 WL 382310 (11th Cir. Jan. 27, 2017)

Issue

- Whether an employer's request for FMLA leave-related expense verification.

# Facts

- Ms. Diamond social worker for Hospice of Florida Keys, Inc.
- She was the only full-time social worker on staff
- Took intermittent FMLA leave to care parents
- Employer's policy required Diamond to exhaust PTO, run concurrently with FMLA
- April 2014 – Diamond took FMLA leave with little notice to employer

# Facts cont…

- HR Manager requested expense receipts from Diamond verifying she was where she said she would be for FMLA
  - *Food receipts in parents' city; hospital discharge papers; gas receipts in vicinity of parents' home*
- Email - "Your continued unpaid time away from the workplace compromises the quality of care we are able to provide as an organization."
  - … "These are document[ed] examples of quality of care" suffering due to repeated "emergent" leaves of absence."
- Fired 5 days later (2 weeks after latest intermittent leave) – reasons given included the "documented examples" of quality of care referenced in prior email

# Legal Issue

- Diamond sued alleging
  - Unlawful interference with FMLA leave
  - Retaliation
- Unlawful for employer “to interfere with . . . the exercise of or the attempt to exercise, any right provided under the FMLA.” 29 U.S.C. § 2615(a)(1)

# FMLA - Interference

- Employer's action that discourages employee from taking FMLA is unlawful interference
  - Vacated & remanded summary judgment in favor of ER
  - "Your continued unpaid time away from the workplace compromises the quality of care we are able to provide as an organization."
    - Jury could interpret that FMLA leave could place job in jeopardy
  - Expense verification
    - Beyond that required upon request for medical certification
    - No correlation to identifying whether condition qualified as serious health condition for purposes of FMLA
    - Jury could infer employer requested receipts to further discourage by making FMLA approval more difficult

# FMLA Retaliation

- Circumstantial evidence of retaliation for leave
  - Temporal proximity – Fired two weeks after returning from intermittent leave
  - Employer's comments
    - Emergent leaves caused quality of care to suffer
    - Continued unpaid leave compromises quality of care

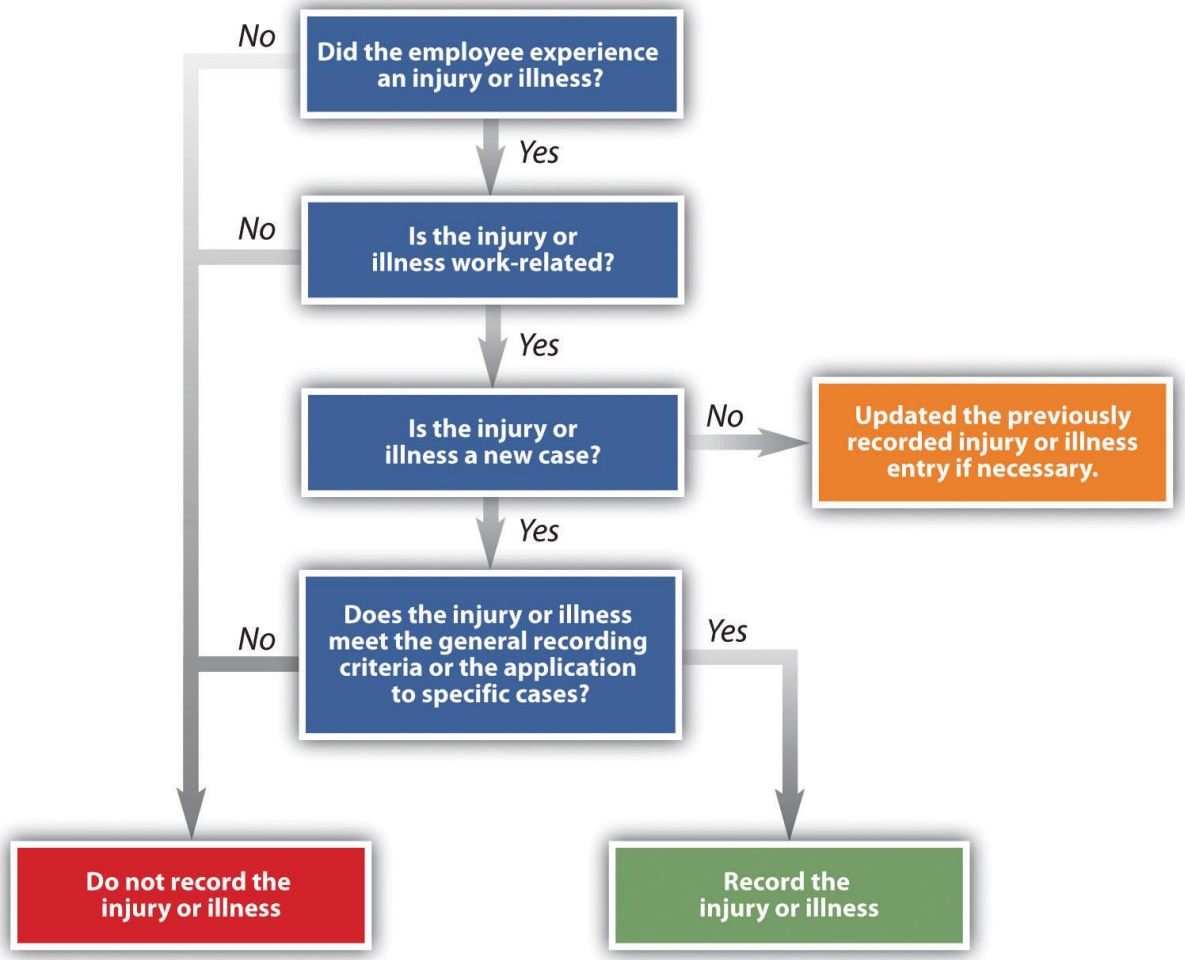
# Application to Your Business

- Be careful
  - Limit requests to medical certifications
  - Clearly identify the notice expected
  - Always, and especially in situations where employee has utilized FMLA leave, document performance issues
  - **REMEMBER** regardless of staffing needs, employment decisions affecting a current employee cannot be made based on FMLA (*i.e.* Cannot fire employee for taking FMLA leave)

OSHA – Final Rule Reporting Injury & Illness Data

# REPORTING DEADLINE JULY 1, 2017*
# INJUNCTION DENIED NOVEMBER 28, 2017

# OSHA Recording Standards



# OSHA Electronic Reporting

- Employers with 250/+ employees
  - July 1, 2017 (may be extended as electronic submissions are not currently accepted)
- High Risk industries – 20-249 employees
  - Form 300A reporting must be electronically submitted
  - Industries & corresponding NAICS codes available at https://www.osha.gov/recordkeeping/NAICScodesforelectronicsubmission.pdf
    - Ex – construction (23), department stores (4452), general freight trucking (4841), nursing care facilities (6231)
  - First form due July 1, 2018
- Publication
  - All information from submitted forms except names and other employee identifying information
  - OSHA's website

# OSHA – Reporting Policies

- Reporting of Workplace Injuries & Illnesses
  - Reasonable policy
  - Does not deter or discourage reporting
- Effect on Drug/Alcohol Testing
  - Invasion of privacy
  - Blanket post-incident testing policy, discourages reporting and is a violation of OSHA

# OSHA – Drug and Alcohol Testing

- Limit Post-Incident Testing
  - Drug or alcohol could have contributed to the accident
  - Drug or alcohol found near work station
  - Reasonable suspicion of drug or alcohol use
  - Employee violated safety protocol
  - Accident resulted in property damage only
    - These are not OSHA-reportable incidents

# Union Campaign "Persuader Activity Rule"

Issued March 24, 2016, effective July 1, 2016, permanent injunction November 16, 2016.

- March 24, 2016- Issued Rule
- June 27, 2016- Temporary Injunction Issued
- July 1, 2016- Contemplated Effective Date
- November 16, 2016- Permanent Injunction
  - Judge Sam Cummings of the Northern District of Texas
- Appeal?
  - Unlikely President Elect Trump's administration will pursue this.

# Union Campaign "Persuader Activity Rule,"

Issued March 24, 2016, effective July 1, 2016, permanent injunction November 16, 2016.

Any Questions?

## **EEOC Compensation Data Collection** ("Revision of EEO-1 Report") (Proposed Jan 29, 2016, Rule Issued September 29, 2016, Effective March 31, 2018)

- "First they came for the federal contractors, I was not a federal contractor, so I did not resist . . . ."
  - Previously, the EEOC requires federal contractors and some private ERs to complete an EEO-1 Report
- Now requires all ERs with 100 or more EEs file an EEO-1
- "This new data will assist the agency in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces."—EEOC
- But don't worry, Section 709(e) of Title VII, 42 U.S.C. Sec. 2000e-8(e), forbids the EEOC from publicizing EEO-1 data . . . until a Title VII proceeding is instituted that involves that information.
- *No action from President Trump on this issue yet.*

# **EEOC Compensation Data Collection** ("Revision of EEO-1 Report") (Proposed Jan 29, 2016, Issued September 29, 2016, Effective March 2018)

Any Questions?

# The End
# Questions???

# THANK YOU!

This program is not intended to be responsive to any individual situation or concerns as the contents of this presentation are intended for general informational purposes only. Participants are urged not to act upon the information contained in this presentation without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney or to the presenter of this session.