Federal Bar Association
Labor and Employment Law Section
Fall 2014

The Labouring Oar

Message from the Chair

By Karleen Green

It is hard to believe that this is my final message as Chair of the Labor and Employment Section. Where has the time gone? I have enjoyed representing this Section and meeting other FBA leaders over the past several months.

We are preparing for the 2014 Annual Meeting in Providence, Rhode Island. Please plan to attend *Cutting Edge Cases in Federal Employment Law Litigation: A View from the Bench and Bar* on Friday, September 5, 2014 at 8:45 a.m. This program is a collaboration between the Federal Litigation Section and the Labor and Employment Law Section, and it will focus on significant decisions in labor and employment and the impact on employers and employees. The program will feature four outstanding speakers—Chief Judge Gerald Rosen, United States District Court for the Eastern District of Michigan; Chief Judge Loretta Preska, United States District Court for the Southern District of New York; Joyce Kitchens, founding member of the law firm of Kitchens New Cleghorn LLC and past national president of the Federal Bar Association; and Katherine Gonzalez Valentin, Senior Member of the law firm of Ferraiuoli LLC and Vice President for the First Circuit of the Federal Bar Association. This program is sure to be informative for all labor law and employment practitioners.

Our Section will continue the tradition of holding its regular Board meeting in connection with Annual Meeting. The meeting will be on Friday, September 5th at 2:15 p.m. During the meeting, we will elect officers and present awards, including "Author of the Year," the "Chapter Recognition Award," and the Chair's Award. There will be a reception immediately after the meeting. All Section members are invited to attend.

We are also preparing for other events in the early fall. For our members in Minnesota, mark your calendars. Our Section will host a CLE program in Minneapolis on September 26, 2014. In addition, our Section, in collaboration with the Younger Lawyers Division, will present a webinar through the FBA Webinar Series on October 1st. Look for details about these upcoming programs and plan to participate.

Start planning for 2015. The Sixth Bi-Annual Labor and Employment Law Conference will be held in New Orleans on March 12-13, 2015. The agenda is almost finalized, and we are excited about the dynamic speakers who have already agreed to participate in this event. Look for details in the upcoming weeks. There are several sponsorship opportunities available. If your firm or company is interested in sponsoring this event, please e-mail me. We hope you plan to attend the conference. It is a great opportunity to earn continuing education credit while interacting with other Section members.

We are always looking for members who want to become more active. You may be interested in contributing to the *Circuit Updates,* writing an article for a publication, or serving on a committee. We also encourage you to share your ideas for ways we can provide value to you as Section members. If you are interested in becoming involved or have suggestions, please contact me or Craig Cowart, incoming Chair of the Section.

Thank you for the privilege of serving as Section Chair. I have enjoyed representing this very active Section. To my fellow Board and Committee members, I appreciate your hard work and support and look forward to working with you in other capacities.

See you in Providence! ■

A Look at What's Inside

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The Labor and Employment Law Section
of the Federal Bar Association announces the

6th Bi-annual Labor and Employment Law Conference

March 12–13, 2015

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Visit www.fedbar.org for more information. Registration will open in December 2014.

Executive Order Expands Federal Workplace Protections to LGBT Employees

By John Alvin Henderson

On July 21, 2014, President Obama expanded anti-discrimination protections to federal employees and federal contractors through an executive order that prohibits discrimination on the basis of sexual orientation or gender identity. Executive Order 13672[1] amends two civil rights era executive orders that form the basis of the modern day federal civil service anti-discrimination law. It alters Executive Order 11246,[2] which prohibits employment discrimination for federal contractors, and Executive Order 11478,[3] which prohibits employment discrimination for federal civil service workers. The EEOC and the Department of Labor have concurrent jurisdiction over federal contractors, and the EEOC is the primary judicial and rulemaking authority for the anti-discrimination laws with federal employees.[4] The recent executive order directs the Labor Department to create regulations within 90 days to implement the expanded prohibitions against gender identity and sexual orientation discrimination.[5] The EEOC is empowered to create regulations governing the federal workplace through Section 4 of Executive Order 11478.[6]

Executive Order 13672 follows a trend of increased EEOC protections for federal LGBT workers. In *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012),[7] the EEOC determined that a transgender woman who was denied employment because she was transgender created a cause of action under the federal workplace anti-discrimination laws. In *Macy*, the Commission cited *Price Waterhouse v. Hopkins*[8] in ruling that transgender discrimination is in violation of the law because the employer is "making a gender based evaluation" about whether the employee's gender conforms to their biological sex. *Macy* also approvingly cites several circuit courts which determined that transgender discrimination is actionable, including *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004);[9] *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011);[10] and *Schwenck v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).[11] The Commission also relied on Hopkins in permitting a claim of harassment on the basis of sexual orientation to proceed in *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011).[12] In that case, the Commission determined that the alleged harasser's comments about the victim's sexual orientation could be fairly read as implicating gender stereotypes about the sexual pre-dispositions of men. Finally, the EEOC's 2013-2016 Strategic Enforcement Plan[13] expressly includes a provision calling for the Commission to address emerging and developing issues, including the coverage of gay, lesbian, and transgender employees under Title VII.

Executive Order 13672 became effective immediately; however, the sections dealing with federal contractors will not become effective until the Department of Labor (DOL) finalizes its rules governing the implementation of the executive order. Even at that point, the LGBT protections for federal contractors would only apply to contracts entered into after the effective date of the DOL's new rules. So, while federal employees and applicants are protected immediately, the protections for federal contractors will not become effective until after the notice and comment period required for all final rules, likely by 2015.

The Department of Labor's Office of Federal Contract Compliance (OFCCP) will likely have responsibility for the enforcement of the expanded LGBT protections for federal contractors. Executive Order 11246 requires federal contractors to take affirmative steps to recruit and advance minorities, women, and persons with disabilities. One of the many open questions with the DOL's rulemaking is whether, and to what extent, the new rules will require federal contractors to include LGBT workers and applicants in their affirmative action plans. Currently, the OFCCP requires all contractors who employ more than 50 persons and receive more than $50,000 in contracts to have affirmative action plans (AAPs) which are intended to help identify the underutilization of women and minorities in their establishments.[14] The plans are required to be updated annually — presumably the plans would undergo extensive revision after the DOL issues its new regulations. The AAPs are required to contain the contractor's analyses of their workforce, analyses of their labor market and the business needs, and targeted goals for hiring or promotion of women and minorities.[15]

Of particular interest to many commentators are the issues in identifying LGBT persons for affirmative action plans. Unlike race, sex, and many physical disabilities, sexual orientation and gender identity are not apparent. Further, in light of the history of social stigma and violence against people who are gay, lesbian, or transgender, employees and applicants may be concerned about voluntarily disclosing this information to their employer. The DOL may resolve this issue in the same manner that it recently addressed collection of information about non-obvious employee disabilities. Perhaps in recognition of the fact that the most common types of disability claims are not evident — they include back impairments and mental disabilities — the DOL implemented a new affirmative action regulation in March of 2014 encouraging contractor employees and applicants to self-identify as persons with a disability.[16] The rules direct that contractors may encourage, but not require, applicants to self-identify as persons with disabilities at the pre-offer, post-offer, and employment stages. The offer to self-identify is extended to disabled employees during the first year of employment, and they are to be reminded that they may revisit their self-identification at various points during their employment. The paper records containing the employee's self-identification are to be kept separate from the job application, and the data shall be collected in a data analysis file separate from the employee's personnel file. To the extent the DOL incorporates LGBT persons in its affirmative action plans, it is likely that it will use the ADA self-identification regulations as a template for ensuring that contractors are in compliance with their affirmative action goals.

Executive Order 13672 came shortly after the Supreme

Court's decision in *Burwell v. Hobby Lobby*,[17] leading many to wonder if the executive order would contain an explicit provision providing for a religious exemption for government contractors, or instead if the Court's decision creates a pathway for such an exemption regardless of whether it was expressly provided for in the order. The executive order itself contains no such language providing for a religious exemption. Further, the Court's ruling forecloses an exemption to racial discrimination in violation of the workplace anti-discrimination laws on the basis of a sincerely held religious belief. The Court in essence states that Title VII met the standards for the Religious Freedom Restoration Act. There is a compelling government interest in prohibiting workplace discrimination, and there is no less restrictive means for accomplishing that goal.[18]

One of the most interesting and heated questions related to *Hobby Lobby* is whether the Court would parse the LGBT protections in Executive Order 13672 as separate from the standard bases of protections in the previous two executive orders, potentially determining that there is a compelling government interest in prohibiting race discrimination, for instance, but not in prohibiting discrimination on the basis of sexual orientation or gender identity. Arguably, Congress' failure to pass the Employment Nondiscrimination Act, despite passage in the Senate in 2013, reflects a lack of consensus among the national political leadership about the need for LGBT workplace protections. While the executive order only covers government employees and government contractors, the Court might consider the lack of legislative action in evaluating the compelling nature of the government's need to prohibit LGBT discrimination. Conversely, the Court may be swayed by the statistical evidence suggesting that sexual orientation discrimination is a pervasive workplace problem.[19]

While Executive Order 13672 does not contain explicit language providing for a religious exemption, a pre-existing executive order provides a limited exemption to government contractors who are also religious institutions. Executive Order 13279[20] signed by President George W. Bush in 2002, provides for an exemption for government contractors who are religious corporations, providing that they may hire persons in keeping with the religious tenets of that religious corporation. Further, to the extent they are making hiring decisions on the basis of religion, these religious corporations/government contractors are exempt from Section 202 of Executive Order 11246, which prohibits employment discrimination and which requires affirmative action to ensure that employees are not discriminated against on the basis of their race, sex, national origin, religion, sexual orientation, or gender identity.

It is important to remember, however, that in *Hobby Lobby*, the issue was not whether religious non-profit organizations could claim the religious exemption to a law of general application, but rather whether closely held, for-profit religious corporations may make use of the religious exemption.

Ultimately, it remains to be seen whether Congress will codify Executive Order 13672 into a broader law through passage of the Employment Nondiscrimination Act and what outcome the Court will finally reach on the issue of religious exemptions in LGBT civil rights/employment matters. ■

John Henderson is an Administrative Judge in the EEOC's Baltimore Field Office. Mr. Henderson graduated from Catholic University Columbus School of Law in 2006, and he received his Masters of Law from Georgetown University Law Center in 2014. The views expressed in this article do not represent the views of the Equal Employment Opportunity Commission or the U.S. Government.

Endnotes

[1]Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

[2]Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

[3]Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969).

[4]*See* Revised Memorandum of Understanding between U.S. Equal Employment Opportunity Commission and Department of Labor, www.eeoc.gov/laws/mous/eeoc_ofccp.cfm; *see also* EEOC Regulations on Federal Sector Employees, 29 C.F.R. § 1614.101, et. seq.

[5]Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

[6]Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969).

[7]EEOC Appeal No. 0120120821, (April 20, 2012), full text available at: www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt

[8]In the Supreme Court's landmark ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), the Court determined that, under Title VII, "an employer may not take gender into account in making an employment decision." *Hopkins*, 490 U.S. at 244.

[9]*Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.").

[10]*Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.").

[11]*Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.").

[12]*Castello v. U.S. Postal Service*, EEOC Request No.

0520110649 (Dec. 20, 2011), full text available at www.eeoc.gov/decisions/0520110649.txt

[13]U.S. Equal Employment Opportunity Commission, *Strategic Plan for Fiscal Years 2013-2016*, http://www.eeoc.gov/eeoc/plan/sep.cfm

[14]41 C.F.R. § 60-2.1.

[15]41 C.F.R. § 60-2.1(b).

[16]41 C.F.R. § 60-741.40-47.

[17]*Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 573 U.S. ___ (2014).

[18]*Id*. at 2783 ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See post, at 2804-2805. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

[19]*See, e.g.*, M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 Indus. & Lab. Rel. Rev. 726, 726-739 (1995); John M. Blandford, *The Nexus of Sexual Orientation And Gender in the Determination of Earnings*, 56 Indus. & Lab. Rel. Rev. 622, 622-642 (2003); Bruce Elmslie, Edinaldo Tebaldi, *Sexual Orientation and Labor Market Discrimination*, 28 J. Labor Res., 436, 436-453 (2007).

[20]Exec. Order No. 13,279, 67 Fed. Reg. 77,141(Dec. 12, 2002).

Reasonable Accommodations for Pregnant Employees under New EEOC Enforcement Guidance

By José R. González-Nogueras and Natalia Ramirez

On July 14, 2014, the U.S Equal Employment Opportunity Commission (EEOC) issued the Enforcement Guidance on Pregnancy Discrimination and Related Issues, which intends to provide guidance regarding the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 12101, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 2000, as they apply to pregnant workers. This Enforcement Guidance supersedes Section 626: Pregnancy, EEOC Compliance Manual, Volume II and the Policy Guidance on the Supreme Court Decision in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). The purpose of this article is to provide a brief summary of the guidance pertaining to reasonable accommodation to pregnant employees.

Based on the EEOC statistics, over the past decade, charges alleging pregnancy discrimination have been relatively consistent. The most common allegations include: discharges based on pregnancy, disparate terms and conditions of employment based on pregnancy (i.e., closer scrutiny, harsher discipline), suspensions pending receipt of medical releases, medical examinations that are not job related with business necessity, and forced leave.[1] The Enforcement Guidance makes reference to the PDA and the ADA. Under these non-discrimination statutes, employers are required to promote proactive employment measures and policies that may decrease complaints of unlawful discrimination and enhance employee productivity.

When the PDA was enacted, Congress pursued, as fundamental requirements, that "an employer cannot discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work."[2] Such actions are a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII), Pub. L. 88–352, 78 Stat. 24, as amended by the PDA.

In its guidance, the EEOC states that while pregnancy itself is not a disability under the ADA, the requirements of the PDA entitle all pregnant workers to a "reasonable accommodation," as defined by the ADA. Specifically, it says that an employer must treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees who are similarly unable to perform their jobs. This includes: providing modified tasks, alternative assignments, leave, or fringe benefits.[3] An employer may not refuse to treat a pregnant worker the same as other employees who are similarly situated in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations. As a result, the guidance requires employers to offer reasonable accommodations to pregnant workers with pregnancy related conditions that may be consistent with disabilities under the ADA.

The EEOC's guidance also impacts how employers apply light duty policies under the PDA. According to the guidance, if there is evidence that pregnancy-related animus motivated an employer's decision to deny a pregnant employee light duty, it is not necessary for the employee to show that another employee was treated more favorably than she was. In the absence of pregnancy-related statements evidencing animus, a pregnant worker may still establish a violation of the PDA by showing that she was denied light duty or other accommodations that were granted to other employees who are similar in their ability or inability to work. For example, an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similarly situated to the pregnant mothers.

In summary, based on the guidance, employers should consider the following suggestions:

- If the employer finds out an employee or candidate is pregnant and does not hire the person or terminates the employee, the EEOC will assume the employer discriminated. The EEOC uses an example in its guidance where the employer did not know that an employee was pregnant, and as a result, the guidance states, "there is no reasonable cause to believe that she was subjected to pregnancy discrimination." If the employer knows an employee is pregnant and takes adverse action, then there will be a presumption of "reasonable cause" to find discrimination.
- The guidance demonstrates that employer policies that are consistently applied will assist the employer to demonstrate non-discrimination. The guidance includes an example where the employer's policy permitted only four weeks leave for those working less than one year. In the example, the employee worked for the employer only six months and was discharged when she did not return to work after four weeks. The EEOC stated that the employer applied its leave policy uniformly, regardless of the medical condition, and therefore did not engage in unlawful discrimination.
- The guidance states that discrimination based on lactation and breastfeeding can implicate a violation to PDA. The EEOC states, "An employee must have the same freedom" to address "lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions."
- The EEOC states the PDA protects women from being terminated for having an abortion or contemplating having an abortion.
- Among other requirements applying to pregnant workers are: the Family Medical Leave Act (FMLA), the Executive Order 13152 Prohibiting Discrimination Based on Status as Parent for federal contractors, the reasonable Break Time for Nursing Mothers, and State or Territories Pregnancy Discrimination Laws. Employers need to make sure the employees are being afforded rights under each of these laws (and the Executive Order, if covered).
- Employers cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation.

Thus, for example, an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work. However, if an employer's light duty policy places certain types of restrictions on the availability of light duty positions, such limits on the number of light duty positions or the duration of light duty assignments, can be lawfully applied to pregnant workers, as long as they are also applied to other workers similar in their ability or inability to work.

- Employers must engage in the interactive process with pregnant workers with related medical conditions and provide the same accommodations to them as it does for medical conditions covered by the ADAAA.

In conclusion, the EEOC's guidance, although not a formal regulation, provides proactive measures that may assist employers to meet non-discrimination requirements. ■

Mr. González is a partner with the firm of Jiménez, Graffam & Lausell in San Juan, Puerto Rico. His practice focuses on Labor & Employment Law and Civil Litigation. Ms. Ramírez graduated from the Inter American University of Puerto Rico School of Law in March 2014. She is currently pursuing a Master in Law in International Human Rights Law at American University Washington College of Law in Washington, DC and participating in an internship program at the Center for Justice and International Law (CEJIL). She currently serves as a summer intern at the law firm of Jimenez, Graffam & Lausell.

Endnotes

[1]According to the EEOC Guidance, studies have shown how pregnant employees and applicants experience negative reactions in the workplace that can affect hiring, certain salary, and ability to manage subordinates. See Stephen Benard Cognitive Bias and the Motherhood Penalty, 59 HASTINGS L.J. 1359 (2008); see also Stephen Benard, Written Testimony of Dr. Stephen Benard, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, www.eeoc.gov/eeoc/meetings/2-15-12/benard.cfm (last visited April 29, 2014) (discussing studies examining how an identical woman would be treated when pregnant versus when not pregnant); Sharon Terman, Written Testimony of Sharon Terman, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm (last visited April 29, 2014); Joan Williams, Written Testimony of Joan Williams, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm (last visited July 28, 2014) (discussing the types of experiences reported by pregnant employees seeking assistance from advocacy groups).

[2]42 U.S.C. § 12101.

[3]*See* Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 app., Question 5 (1979).

Save the Date – Upcoming CLEs

September 5, 2014 – The L&E Section and the Federal Litigation Section will present a CLE entitled Cutting Edge Cases in Federal Employment Law Litigation: A View from the Bench and Bar. More information about this program, including the Registration Form, is available at www.fedbar.org by selecting Upcoming CLE Events under the CLE tab.

September 26, 2014 - The L&E Section and the Minnesota Chapter will present a live CLE in Minneapolis featuring three panels discussing: (1) ethical and strategic issues in mediations, (2) effective strategies for working with the EEOC and DOL, and (3) federal law clerks' tips for dispositive motions and trying employment cases. More information about this program, including the registration form, is available at www.fedbar.org/minnesota.html or by contacting Joel Schroeder at joel.schroeder@FaegreBD.com.

October 1, 2014 – The L&E Section and the YLD will present a webinar on impact of new technologies on employers and the legal implications associated with the use of various new technologies. More information about this program, including the Registration Form, will be available at www.fedbar.org.

March 12-13, 2015 – The L&E Section will hold its Sixth Bi-Annual Labor and Employment Law Conference in New Orleans, Louisiana. More information about this program, including the Registration Form, will be available at www.fedbar.org.

Supreme Court Issues Long-Awaited Decision in Noel Canning, Invalidating More Than 700 NLRB Decisions Including Significant Recent Social Media Cases

By Melanie L. Glickson

Employers' treatment of work-related posts on social media websites, such as Facebook, Twitter, or LinkedIn, continues to be a hot-button issue. Employers have been left with little guidance other than a series of unpredictable, subjective decisions addressing social media in the workplace issued by the National Labor Relations Board ("NLRB" or "Board") beginning in 2012. As if it hasn't been confusing enough to understand the Board's approach in these social media decisions, the plot has thickened since many of those cases are now invalid.

On June 26, 2014, the Supreme Court issued its long-awaited decision in *National Labor Relations Board v. Noel Canning*, 573 U.S. ___ (2014), upholding the D.C. Circuit and ruling that three of President Obama's appointments to the NLRB made in January 2012 without Senate confirmation (members Sharon Block, Terence Flynn, and Richard Griffin) were unconstitutional. Consequently, more than 700 decisions issued by the NLRB from January 4, 2012 through July 31, 2013 are now invalid because the Board lacked a three-member quorum to act during that period. This includes many significant decisions affecting both union and non-union employers, such as cases in which the Board limited the rights of employers to impose confidential obligations during workplace investigations; limited the scope of confidentiality agreements addressing employees' abilities to share information with third parties; limited company policies pertaining to off-duty access; and limited the ability of an employer to regulate employees' social media posts.

The High Court in *Noel Canning* unanimously ruled that the appointments at issue were unconstitutional (though there was a 5-4 divide as to the rationale). Generally, while the Constitution requires the President to obtain the advice and consent of the Senate before senior government officials and federal judges can take office (typically a confirmation hearing followed by a vote), an exception exists: the Recess Appointment Clause. Specifically, the President may act without the Senate's input to "[f]ill the vacancies that may happen during the recess of the Senate, by granting Commissions which shall expire at the end of the next Session." The Court ruled that the recess appointments were made during a three-day recess between "pro forma" sessions in which the Senate was technically in session but not conducting business. The Court held that the President must respect the Senate's own determination of when it is in session, and the three-day period in which the President made the appointments was too short to invoke the Recess Appointments Clause. The Court ruled that in the future, any recesses shorter than ten days will be insufficient to trigger the President's recess appointment power.

Among the most impactful decisions the Board can be expected to reconsider are its cases focused on social media issues affecting the workplace: particularly *Karl Knauz Motors* and *Hispanics United*. These cases reflect the Board's adoption of a broad definition of protected concerted activity when it comes to social media, as well as the Board's efforts to challenge seemingly neutral social media policies. As we wait and see whether and how the Board will readopt these decisions, it is important for us to be familiar with the Board's approach to these issues as we counsel our clients concerning (1) their social media policies at large; and (2) their response to a potentially injurious workplace social media posting.

Since 2012, in review guidance as well as decisions, the Board has cracked down on social media issues in the workplace, taking a broad view of what constitutes protected concerted activity under Section 7 of the National Labor Relations Act (the "Act"); and being quick to challenge social media policies for chilling the exercise of employees' Section 7 rights. Section 7 grants all employees, whether union or non-union, the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2012). Section 8 makes it unlawful for employers to retaliate against employees who engage in concerted activity under Section 7. 29 U.S.C. § 158 (2012). While the NLRA does not protect employee speech unless it is "concerted," the Board is adopting an expansive approach to this definition in the context of social media posts by employees.

The first NLRB decision to address a Facebook firing was *Karl Knauz Motors, Inc.*, 380 N.L.R.B. No. 164 (Sept. 28, 2012). In that case, which did not involve a union, a luxury car salesman was terminated after he posted several pictures and negative comments on his Facebook page concerning two workplace events: (1) a promotional event at a BMW dealership at which hot dogs and chips were served; and (2) a car accident at a related Land Rover dealership that occurred when a car dealer permitted a 13 year old to get behind the wheel. The ALJ and the NLRB found that the postings about the promotional event constituted protected, concerted activity, but the postings regarding the Land Rover accident were not protected and constituted an independent ground for termination. *Id.* at 11. Specifically, the Board determined that the postings about the hot dogs and chips were protected because the issue of what kind of food was being served at the party was previously discussed at an employee meeting, and the so-called lowbrow food could have resulted in decreased sales, which could have potentially impacted employee compensation. *Id.* at 10. In contrast, the Board found that the postings about the car accident at the Land Rover dealership had nothing to do with the terms and conditions of employment and were therefore unprotected. The Board further held that the employee was terminated solely for the car accident postings, and therefore reinstatement was not warranted. However, the Board found that the employer's rather unremarkable "Courtesy" rule in its employee handbook, pursuant to which the employee was terminated, could be construed as prohibiting employees' protected statements about working conditions and ordered the employer to rewrite the employee handbook rules to prevent a violation of the Act. *Id.* at 1.

In *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37

(Dec. 4, 2012), the NLRB held that an employer violated Section 8 of the Act by terminating five employees who posted a series of comments on Facebook. *See id.* at 11. The *Hispanics United* matter arose when an employee of a non-profit organization initiated an after-hours Facebook discussion after she learned that her coworker planned to tell management that certain employees were not performing. She posted as follows: "a coworker feels that we don't help our clients enough…I about had it! My fellow coworkers how do u feel?" In response, a number of comments were posted, including: "What the f…Try doing my job I have 5 programs;" "What the Hell, we don't have a life as is, What else can we do???;" "Tell her to come do mt [my] fucking job n c if I don't do enough, this is just dum;" and "Lol. I know! I think it is difficult for someone that is not at [Employer] 24-7 to really grasp and understand what we do…I will give her that. Clients will complain especially when they ask for services we don't provide, like washer, dryers stove and refrigerators; I'm proud to work at [Employer] and you all are my family and I see what you do and yes, some things may fall thru the cracks, but we are all human :) love ya guys." *Id.* at 7-8. The Board found that this Facebook activity was protected concerted activity, such that the employer was not justified in terminating the employees, and ordered reinstatement.

The Board has stated, and these cases make clear, that it examines social media postings no differently than workplace water cooler comments. But this analogy is troublesome. The proverbial "water cooler" chitchat consists of internal communications among, typically, just a handful of employees who know each other and can make credibility assessments about the information at issue. In contrast, social media postings can be widespread, are not limited to internal communications, and have the potential to cause significant damage to an employer's reputation. The whole point of social networking sites is to allow users to interact and share information with one another, so users can "retweet," "like," and "repost" comments such that they are shared with additional users in their own network. There is no opportunity for the reader to assess credibility since the original post can be outside of one's network. Although an employee's motivation for a posting is case-specific, and might in some circumstances invoke the mutual aid or protection concerns Section 7 was designed to protect, one can also imagine that employees with workplace frustrations might recklessly disregard the well-known fact that negative social media posts about their employer can significantly harm their employer's reputation.

As a practical matter, the Supreme Court's decision in *Noel Canning* probably will not significantly change the way we presently advise our clients. On August 4, 2014, the Board unanimously ratified all administrative, personnel and procurement matters taken by the Board during the period when the Board did not have a quorum, and further indicated that it will have to revisit cases from the time period at issue. Although the decisions are still presently invalid, there is no reason to believe that the Board will discontinue its efforts to extend its reach to non-union workplaces or change its course with respect to regulating employers' approach to social media in the workplace. As such, employers should not alter their workplace policies to disregard the Board's decisions from the January 4, 2012 – July 31, 2013 timeframe with the expectation that these decisions will remain invalid over time. Instead, employers should continue to monitor the Board's actions post *Noel Canning*. ■

Ms. Glickson has represented employers since 2001 in all aspects of employment litigation defense. Ms. Glickson worked at large law firms in Boston, MA and Baltimore, MD and defended the United States in employment suits and other civil matters as an Assistant U.S. Attorney. She recently opened a boutique employment firm in Baltimore, Glickson Law Firm LLC.

L&E Section Meeting – Friday, September 5th

All L&E Section Members are invited to attend the L&E Board's monthly meeting, which will be held during the Annual Meeting and Convention in Providence, Rhode Island. The L&E meeting will take place on Friday, September 5, 2014 at 2:15 pm. The meeting will include election of new officers for next year and the presentation of awards. L&E Section members will also enjoy refreshments and have the opportunity to network with others in our practice area.

2015 Federal Bar Association Calendar of Events

March 6

39th Annual
Tax Law Seminar

Washington, D.C.

March 12–13

6th Bi-Annual
Labor and Employment
Conference

New Orleans, La.

March 20

Fashion Law
Seminar

New York, N.Y.

March 26–27

18th Annual
Thurgood Marshall
Memorial Moot Court
Competition

Washington, D.C.

April 9–10

40th Annual
Indian Law Conference

Phoenix, Ariz.

May 28–29

27th Annual
Insurance Tax Seminar

Washington, D.C.

Summer

2nd Annual
Women in the Law
Conference

Washington, D.C.

September 10–12

Annual Meeting
and Convention

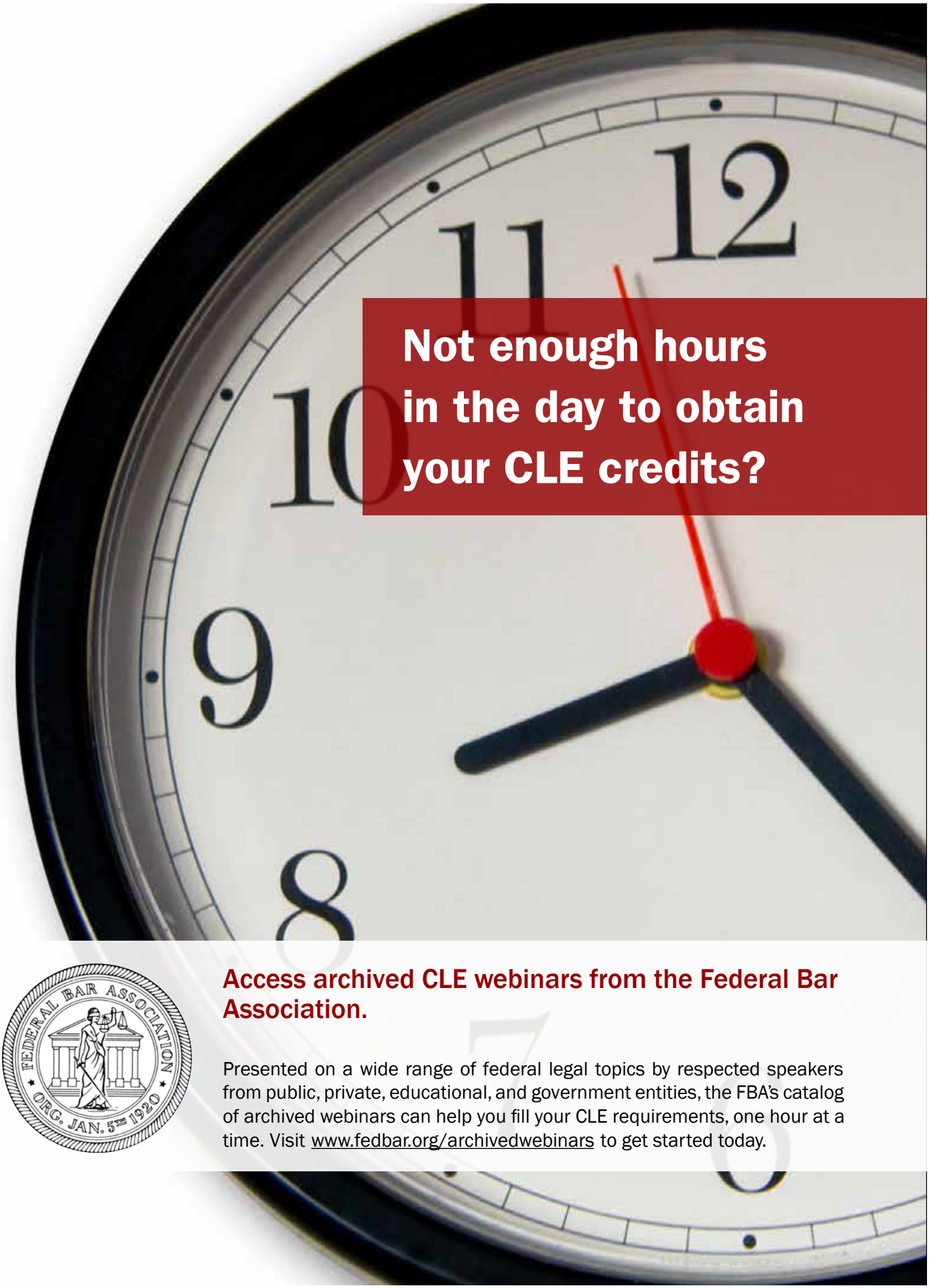
Salt Lake City, Utah

Fall

17th Annual
D.C. Indian Law
Conference

Washington, D.C.

For more information on each of these events, visit: www.fedbar.org/Calendar.aspx



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