



The Labouring Oar



Message from the Chair

By Donna Currault

With the excitement of the holidays now behind us, we look forward to a great and productive 2016. As we begin this new year, our L&E Section's work is well underway. We are thrilled that so many members have become more active in our Section, which allows us

to organize more events and provide more in-depth articles and discussions for members. In addition, we continue our efforts to work with other Chapters, Sections and Divisions. For instance, this Fall, we joined with the Military Law Section to present a My Law CLE on Nov. 6, 2015, entitled "Returning Our Warriors to Work: Employment Law Issues," which focused on USERRA, the ADA, and the FMLA.

We are very excited to kick off the first of our traveling CLE programs on Feb. 26, 2016. This 3-hour CLE is designed to address EEO and FLSA matters as well as state law non-competition agreements and timely wage payment obligations. If you happen to be in the New Orleans area on February 26th, please join us as we partner with the New Orleans Chapter to have national speakers address critical information for anyone faced with a client's employment issue. On behalf of the Section, I thank Brett Strand (3M office of General Counsel), Betsy Chestney (Cornell, Smith, Mierl, Brutocao)

and Steven Griffith, Jr. (Baker Donelson Bearman Caldwell & Berkowitz) in advance for working together to present what I know will be a valuable and informative program. After the program in New Orleans, we will present similar programs in other regions, so stay tuned for registration information for those programs later this year. And if your local Chapter is interested in partnering with our L&E Section to have speakers present this L&E Fundamentals program in your city, contact CTarara@seatonlaw.com.

Our L&E Section has also started planning for the 7th Biennial Conference. We plan to hold the conference in San Antonio on March 9-10, 2017. Unlike our traveling CLE, the Biennial Conference is designed to address more advanced and developing issues faced by L&E practitioners, rather than the basics of the L&E practice. If you have any suggestions for topics or speakers that you believe will be of interest to our membership, please send that information to CTarara@seatonlaw.com. And be sure to mark this date on your calendar because you won't want to miss this spectacular conference!

And of course, we continue to keep our members abreast of recent events and interesting developments in the L&E arena through our regular publications in the Federal Lawyer, our quarterly Labouring Oar newsletter, and our Monthly Circuit Updates. The Circuit Updates are particularly useful in keep-

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Labor and Employment Law Section Receives Awards at FBA Annual Meeting and Convention

In September, the Federal Bar Association held its 2015 Annual Meeting and Convention in Salt Lake City, Utah. The Labor and Employment Law Section was well-represented throughout the meeting and convention and also hosted its monthly Section meeting in conjunction with the convention.

Matt Moreland, the outgoing National President, visited during the Section's monthly meeting and commended the Section for its work, programs, and support of the mission of the Federal Bar Association. The Federal Bar Association encourages Sections to provide programming, publications, continuing education, and networking opportunities through activities throughout the year. The Labor and Employment Law Section works hard to carry out the mission of the FBA to strengthen the federal judicial system by serving the needs of the federal practitioner, the judiciary, and the public they serve. Mr. Moreland expressed National's gratitude and appreciation for the Section's efforts, characterizing us as a "model section." Mr. Moreland also introduced President-Elect Mark Vincent to the Section, who encouraged the Section to continue its good work.

The Labor and Employment Law Section also brought home awards and recognition for its work and achievements during the past year. The Section was recognized for the quality of its newsletter, *The Labouring Oar*, which is provided quarterly to Section members. In recognition of the work of the authors, contributors, organizers, and editors in providing an outstanding newsletter, the Labor and Employment Law Section received the "Outstanding Newsletter Award." Special thanks goes to Corie Tarara for her hard work and dedication in coordinating and editing the Section newsletters during the past

year (with great assistance from Brian Rochel) and to Kathryn Knight and Publication Committee Members Brian Rochel, Adam Courtin, and Sebastian Miller as they continue the tradition of excellence this year. ■



"Outstanding Newsletter Award plaque"

Ms. Tarara, Mr. Cowart, and Mr. Rochel receiving award from FBA Board Member Elizabeth Kronk Warner



Labor and Employment Law Section Awards Outstanding Contributors

During the FBA Annual Meeting and Convention in Salt Lake City, the Labor and Employment Law Section recognized several outstanding contributors to the work of the Section.

The Labor and Employment Law Section takes pride in the quality of its publications provided to Section members throughout the year. Circuit Updates provide cutting-edge information about decisions of the U.S. Courts of Appeals that impact the practice of labor and employment law. Additionally, this newsletter, *The Labouring Oar*, provides Section members with in-depth analysis of timely topics important to the practice. In recognition of his outstanding job during the past year assisting with both writing the monthly Circuit Updates and preparing them for publication to the Section, Brian Rochel was presented the “Author of the Year” award by outgoing Section President Craig Cowart.

The Section also seeks to collaborate with other FBA Chapters to support members and the mission of the organization. Mr. Cowart awarded the “Chapter Recognition Award”

to the Minnesota Chapter of the Federal Bar Association, for the exemplary half-day seminar geared toward labor and employment practitioners that it has presented for the past two years. Mr. Cowart specifically thanked Corie Tarara, Joel Schroeder, Brian Rochel, and other members of the Minnesota Chapter present at the Section meeting for their work in furtherance of the FBA’s objectives and mission.

In addition, each year, the outgoing Section Chair recognizes the work of a Section member in support of the Section during the past year. This year, outgoing Chair Craig Cowart selected incoming Chair Donna Currault to receive the “Chair’s Award.” Mr. Cowart commended Ms. Currault for the incredible job she did in connection with the Section’s 2015 Biennial Conference in New Orleans, Louisiana.

Finally, Ms. Currault presented special thanks to Mr. Cowart for his many years of service to the Section. For more than six years, Mr. Cowart has been an active Section member, serving on every committee, holding every position on the Section’s Board, and performing well every task undertaken in furtherance of the Section’s work. In appreciation, the Section presented Mr. Cowart with an FBA chair, inscribed “with thanks for your dedication and services.” ■



Brian Rochel accepting “Author of the Year” award from Mr. Cowart



Donna Currault accepting “Chair’s Award” from Mr. Cowart



Minnesota Chapter members accepting “Chapter Recognition Award”

Who Do You Work for? How the NLRB is Expanding Employer Liability Under the Joint-Employer Standard

By Erik Mosvick and Richard Sharp

There is little doubt the National Labor Relations Board's ("NLRB") decision in *Browning-Ferris Industries of California, Inc.* ("*Browning-Ferris*") has changed the joint-employer landscape by overturning decades-old law for a new joint-employer standard.¹ Employers have since wondered just how this will affect business relationships. However, some early guidance from the NLRB has come quickly. First, just two months after *Browning-Ferris* was decided, NLRB Region 5 Regional Director revisited the issue of joint-employer liability in *Green JobsWorks/ACECO, LLC*.² Second, the NLRB General Counsel has offered advice for franchisor/franchisee liability, by applying NLRB General Counsel's proposed standard in *Browning-Ferris* in determining whether a franchisor is a joint employer with its franchisees in *Nutritionality, Inc. d/b/a Freshii*.³ This article will tackle *Browning-Ferris* and the new joint-employer standard articulated therein, as well as how *Green JobsWorks/ACECO, LLC* recently treated the standard. Finally, the proposed franchisor/franchisee standard and its potential implications upon the labor industry are reviewed.

The joint-employer standard before *Browning-Ferris*

The origin of the NLRB's joint-employer standard can be traced back to its decision in *Greyhound Corp.*⁴ In *Greyhound*, the NLRB found two statutory employers to be joint employers because they shared or codetermined matters governing essential employment terms.⁵ Over the next 30 years, the NLRB narrowed the formula by focusing on the putative employer's actual exercise of control instead of focusing on an employer's right to control workers.

In *TLI*, the NLRB found irrelevant a contract provision between the putative employer and user employer, which would normally be probative evidence of joint-employer status.⁶ The NLRB instead focused on the putative employer's actual control. In the same year as *TLI*, the NLRB, in *Laacro Transportation & Warehouse*, narrowed the standard further by stating, "to establish joint-employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."⁷

In *Airborne Express*, the NLRB concluded an "essential element in [the joint employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."⁸ The NLRB later affirmed this approach in *AM Property*.⁹ In *AM Property*, the NLRB determined a contract provision to be insufficient evidence of joint-employer status, stating that "in assessing whether a joint-employer relationship exists, the NLRB does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."¹⁰

Facts of *Browning-Ferris*

Browning-Ferris owns and operates a recycling facility in California.¹¹ *Browning-Ferris* employed its own 60 employees and subcontracted with Leadpoint, a staffing agency, to provide

temporary workers at the facility. Most of *Browning-Ferris*' own employees worked outside the recycling facility. *Browning-Ferris* employees were part of an existing bargaining unit represented by the International Brotherhood of Teamsters ("Teamsters").

Browning-Ferris had a temporary labor agreement ("Agreement") with Leadpoint. Either party could terminate the Agreement with 30 days' notice. *Browning-Ferris* and Leadpoint employed separate supervisors and lead workers at the recycling facility. Each company also maintained separate human resource departments.

By the terms of the Agreement, Leadpoint retained sole responsibility in hiring, firing, and disciplining employees assigned to *Browning-Ferris*. However, the Agreement also provided that *Browning-Ferris* could reject Leadpoint personnel for any or no reason. *Browning-Ferris* managers testified that they were never involved in any disciplinary decision for Leadpoint employees. However, the record indicated two incidents where discipline of Leadpoint employees was prompted by *Browning-Ferris* action.

The Agreement stated that Leadpoint would solely determine the pay rates of its personnel, provided that it would not, without *Browning-Ferris*' approval, pay a higher wage than that earned by a full-time *Browning-Ferris* employee. A rate schedule required *Browning-Ferris* to compensate Leadpoint for each worker's wage plus a specified percentage mark-up. When it came to scheduling and hours, *Browning-Ferris* established the facility schedule of working hours and controlled the productivity of the facility. Leadpoint determined which employees would work shifts, but had no input on shift schedules. *Browning-Ferris* dictated Leadpoint employee breaks. The Agreement also required Leadpoint employees to submit to Leadpoint a summary of their hours worked, which a *Browning-Ferris* representative confirmed. If the summary was not signed, *Browning-Ferris* could refuse to pay a Leadpoint employee.

Browning-Ferris retained control over which jobs would run each day and the requisite Leadpoint employees assigned to each. *Browning-Ferris* managers set productivity standards for each job, and *Browning-Ferris* had sole authority to set the speed of the jobs. As for training and safety, Leadpoint employees received orientation and job training from Leadpoint supervisors. However, they also received training and counseling from *Browning-Ferris* managers. The Agreement provided that Leadpoint employees had to comply with *Browning-Ferris*' safety policies, procedures, and training requirements. In certain safety-sensitive positions, Leadpoint employees were required to obtain written acknowledgment that they had read, understood, and agreed with *Browning-Ferris*' safety policies. *Browning-Ferris* retained the right to enforce its safety policy.

On July 22, 2013, the Teamsters filed a petition seeking to represent employees employed by Leadpoint and *Browning-Ferris* as joint employers.¹² Under the old standard, the Regional Director found that *Browning-Ferris* and Leadpoint were not joint employers because *Browning-Ferris* and Leadpoint employees did not "share or codetermine those matters governing the essential terms and conditions of employment."¹³ The Regional Director's determination was based on the facts that Leadpoint set employee pay and benefits, retained sole control over recruitment, hiring, counseling, discipline, and termination, and controlled daily work assignments.¹⁴ On Aug. 27, 2015, the NLRB

reversed and articulated a new standard in determining joint-employer status.¹⁵

The joint-employer standard after *Browning-Ferris*

In a five-to-two decision, the NLRB reversed the Regional Director and issued a new joint-employer standard.¹⁶ Under the new standard, the NLRB may find that two or more entities are joint employers of a single work force if (1) they are both employers within the meaning of the common law, and (2) they share or codetermine those matters governing the essential terms and conditions of employment.¹⁷ Essential terms and conditions of employment include hiring, firing, discipline, supervision, and direction; number of workers needed; scheduling; seniority and overtime; and work assignment.¹⁸

Under the new standard, a company can be considered a joint employer even if it has only indirect control over working conditions.¹⁹ However, the NLRB will not find joint-employer status where the putative joint employer could not engage in meaningful collective bargaining.²⁰ The NLRB no longer requires joint employers to exercise authority directly and immediately. Rather, the right to control is merely probative of joint-employer status.²¹

Revisiting the new joint-employer standard in *Green JobWorks/ACECO*

The Regional Director of NLRB Region 5 recently had a chance to apply the new joint-employer standard in *Green JobWorks*.²² *Green JobWorks* is a staffing company that provides demolition and asbestos abatement laborers to ACECO and other construction companies.²³ *Green JobWorks* has pre-established wages. When looking at possibly increasing wages, neither ACECO nor other construction companies were involved in *Green JobWorks*' wage determination process. *Green JobWorks* employees were required to sign in with a *Green JobWorks* lead worker every day. While ACECO was able to request particular employees, *Green JobWorks* was not obligated to comply with the request. The labor agreement gave ACECO the right to direct *Green JobWorks* management to dismiss *Green JobWorks* employees from the job site for safety issues or other reasonable objections.

In evaluating *Green JobWorks* and ACECO's relationship under the *Browning-Ferris* standard, the Regional Director reasoned that the union did not meet its burden of introducing specific, detailed, and relevant evidence into the record.²⁴ The Regional Director found that *Green JobWorks* was under no obligation to provide requested workers to ACECO, even when ACECO asked for them.²⁵ Moreover, since ACECO could not dismiss *Green JobWorks* employees for "any reason," like in *Browning-Ferris*, ACECO's right to remove *Green JobWorks* employees for safety or other reasonable means did not rise to the level of *Browning-Ferris* control.²⁶ As for wages, the Regional Director found that ACECO exercised limited influence.²⁷ The agreement between the two companies did not prohibit *Green JobWorks* from paying its employees more than ACECO's employees.²⁸ The Regional Director also found that *Green JobWorks* was responsible for sending its employees home, setting the work schedules, and informing the employees of their next client project.²⁹ While the outcome of this decision is favorable to employers, it is unclear at this point whether the NLRB will adopt the Regional Director's findings.

Franchise liability—other ways the NLRB is expanding employer liability

While *Browning-Ferris* and *Green JobWorks* dealt with temporary staffing workers, the NLRB's decision in *Browning-Ferris* could have far-reaching effects on other legal relationships, such as franchises. Indeed, in July 2014, the NLRB's General Counsel issued an opinion authorizing franchisor McDonald's USA, LLC, to be named a "joint employer" in almost 300 charges filed with the NLRB involving many of its McDonald's franchisees.³⁰

Browning-Ferris addressed this, specifying that none of the "particularized features" of a franchisor/franchisee relationship were present.³¹ This leaves open the possibility that the NLRB will fully adopt the standard proposed by the General Counsel in an amicus brief in *Browning-Ferris*. There, the General Counsel urged that the NLRB "should continue to exempt franchisors from joint-employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand."³²

In accord with this view, in an advice memorandum for *Nutritionality, Inc.*, the General Counsel evaluated a franchise relationship consistent with *Browning-Ferris*.³³ Freshii is a franchisor of health-minded, counter-serve restaurants. Freshii provided its franchisees with an operations manual that contained mandatory and suggested specifications, standards, operating procedures and rules, known as system standards, which Freshii prescribes when operating a restaurant.³⁴ These system standards could regulate any aspect of the operation and maintenance of the restaurant but did not include any personnel policies or procedures. A franchisee alone would determine those policies. Specifically, franchisees were exclusively responsible for hiring their staff, setting employee wage and benefits, and disciplining and discharging their employees. Freshii provided guidance on human resources matters and personnel policies but did not require the franchisee to follow them. Job applicants could apply online to franchisees through Freshii's website.

Freshii also provided a development agent to new franchisees. The development agent helped with the real estate development, design, and procurement of third-party product lines such as snacks. There was no contractual relationship between the development agent and the franchisees. After the store became operational, development agents would perform monthly evaluations for all franchisees to help ensure brand image and quality. No evidence was shown that Freshii attempted to end the franchisee agreement with *Nutritionality* for failing to meet brand standards.

The General Counsel found franchisor Freshii's requirements regarding food preparation, recipes, menu, uniforms, décor, store hours, and initial employee training prior to a franchise opening to be evidence of Freshii's legitimate interest in protecting the quality of its product and brand image, but not indicative of control over labor conditions.³⁵ Even though the General Counsel advised that *Nutritionality* and Freshii were not joint employers, the facts of the memorandum clearly suggest that franchisors should not significantly influence the working conditions of franchisees' employees, such as hiring,

firing, discipline, supervision, and setting wages.³⁶ Instead, a franchisor should focus on protecting the quality of its product and brand image.³⁷

Conclusion

The NLRB drastically changed the joint-employer standard in *Browning-Ferris*. Because Browning-Ferris cannot immediately appeal the decision under NLRB law, the only way to petition a court for its review is by refusing to bargain with the Teamsters and asserting its position defensively in an unfair labor practice proceeding—a drawn-out process.³⁸ This is just what Browning-Ferris is alleged to have done. As of writing this article, the NLRB has issued an unfair labor practice charge against Browning-Ferris for refusing to bargain with the Teamsters following the Aug. 27, 2015 decision.³⁹

Further, the NLRB's interest in franchise situations is important for employers and their counsel because if a company is deemed a joint employer under the NLRA several liabilities arise. Most notably, all employers in a joint-employer relationship will be jointly liable for personnel policies and any charges of unfair labor practices brought against any of the employers. In the bargaining context, each employer has a duty to bargain with the union over terms and conditions of employment.

Based on the expanding employer liability, employers should review their current agreements and relationships with other companies that involve shared workers, as well as any franchise employer. Since indirect control is now probative on finding joint-employer status, employers' exercise of indirect control through contract provisions is noteworthy. Accordingly, employers and counsel should be cautious moving forward. ■



Erik Mosvick is an attorney with Seaton, Peters & Revnew in Minneapolis, Minnesota, practicing in the areas of labor and employment law litigation and counseling. Mr.

Mosvick may be reached at emosvick@seatonlaw.com. Richard Sharp is a third year law student at the University of Minnesota Law.

Endnotes

¹362 NLRB No. 186 (Aug. 27, 2015).

²05-RC-154596 (Oct. 21, 2015).

³*Subject: Nutritionality, Inc. d/b/a Freshii*, Cases 13-CA-134294, 13-CA-138293, and 13-CA-142297, 2015 WL 2357682 (Apr. 28, 2015).

⁴153 N.L.R.B. 1488 (1965)

⁵*Id.*

⁶271 N.L.R.B. 798 (1984).

⁷269 N.L.R.B. 324, 325 (1984).

⁸338 NLRB 597, 597 fn. 1 (2002).

⁹*Am Prop. Holding Corp., 350 N.L.R.B. 998* (2007).

¹⁰*Id.* at 1000.

¹¹For facts, see generally 362 NLRB No. 186 at 2-6.

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵362 NLRB No. 186.

¹⁶*Id.*

¹⁷*Id.* at 15.

¹⁸*Id.*

¹⁹*Id.* at 15-6.

²⁰*Id.* at 16.

²¹*Id.*

²²05-RC-154596 (Oct. 21, 2015).

²³For facts, see generally *id.* at 3-8.

²⁴*Id.* at 8.

²⁵*Id.* at 10.

²⁶*Id.* at 10-11.

²⁷*Id.* at 11-12.

²⁸*Id.*

²⁹*Id.* at 10.

³⁰McDonald's USA, LLC, a joint employer, et al. 02-CA-093893 (charge filed Nov. 29, 2012).

³¹*Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 at 17 n.94.

³²Brief for the NLRB as Amicus Curiae, 362 NLRB No. 186.

³³*Nutritionality*, 2015 WL 2357682.

³⁴See generally *id.* at 1-5.

³⁵*Id.* at 5

³⁶*Id.* at 6.

³⁷*Id.*

³⁸See *NLRB v. Kentucky River*, 532 U.S. 706 (2001).

³⁹32-CA-160759 (Sept. 25, 2015).

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ing abreast of developing and often divergent circuit views on cutting-edge issues. And the articles in the Labouring Oar allow us to delve a little more deeply into developing topics. Indeed, you will no doubt enjoy this issue's discussion of the NLRB's approach to expanding employer liability through the Joint Employer doctrine as well as the EEOC "New Age of Advocacy." This issue also includes helpful practice tips for drafting Employee Handbooks and litigating in federal court. We thank our authors, Robert Baror,

Eric Mosvick, Richard Sharp, Dena Sokolow and R. Scott Oswald, for their contributions to this issue and for sharing their insight and views on these interesting topics.

It's not too late to get involved in the L&E Section. Contact me at dcurrault@gordonarata.com if you would like to explore opportunities within the FBA and our L&E Section. ■

EEOC—Trailblazers or Enforcers? A New Age of Advocacy by the Commission

By Dena H. Sokolow

In recent years, the Equal Employment Opportunity Commission (EEOC) has a renewed fervor and focus, and its increased activity—whether in the form of decisions, rule-making, lawsuits or guidance/opinions—has changed the landscape of employment law. Typically, employment practitioners would look to the latest court cases when analyzing or writing about trends in employment law. The federal bench has always been active in this area, and in recent years, the Supreme Court has granted certiorari and ruled on some pivotal employment law questions. This past year, however, the news reports have centered more on governmental agency mandates, decisions and actions in the employment law arena. Rather than adhering to their intended role as the employment law enforcement agency, the EEOC has become an advocate and attempted lawmaker. Consequently, practitioners must pay close attention to this governmental action if we are going to be able to plan for and predict future trends in employment law. It is no longer sufficient to look to just the courts to determine trends and precedents. This article will discuss just some of the employment law areas where the EEOC was most active in the last year: pregnancy discrimination, LGBT rights in the workplace, wellness plans, and severance agreements.

EEOC Lawmaking in 2015 and Beyond

Pregnancy Discrimination

In 2014, EEOC Chairwoman Jacqueline A. Berrien issued a [press release](#) that an “update” to the EEOC enforcement guidance on pregnancy discrimination was desperately needed due to the prevalence of such charges: “Despite much progress, we continue to see a significant number of charges¹ alleging pregnancy discrimination, and our investigations have revealed the persistence of overt pregnancy discrimination, as well as the emergence of more subtle discriminatory practices.” On July 14, 2014, over the vocal dissent of two of the five commissioners, the EEOC published [new enforcement guidance on the Pregnancy Discrimination Act](#).² The guidance included a number of controversial positions and interpretations that generated a storm of commentary and criticism, including a requirement that employers offer light-duty re-assignments to pregnant employees if re-assignment was available to non-pregnant employees similar in their ability or inability to work.

Two Commissioners publicly asserted that the guidance overstepped legal precedents and was a dramatic departure from existing law. [Commissioner Constance Barker called the guidance](#) “a novel interpretation of the PDA for which there is no legal basis”³—an assessment that would be confirmed later by the Supreme Court. To the surprise of many, the EEOC published its enforcement guidance after the United States Supreme Court granted certiorari in *Young v. United Parcel Services, Inc.*,⁴ poised to be a pivotal pregnancy discrimination case addressing the issue of light-duty reassignment to pregnant workers, but before the Court had actually heard and ruled on the case. The EEOC chose not to wait for a decision

from the Supreme Court and, instead, issued its own interpretation of the law. During the *Young* oral arguments, the Solicitor General argued that the EEOC’s new guidance deserved special, or perhaps controlling, weight. The Supreme Court strongly disagreed. The Court found the enforcement guidance to be poorly timed, lacking in “consistency” and “‘thoroughness’ of ‘consideration[,]’” and not worthy of a “special power to persuade.”⁵ According to the majority:

[I]t is fair to say that the EEOC’s current guidelines take a position about which the EEOC’s previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated ... Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status [for pregnant employees]? Why has it now taken a position contrary to the litigation position the Government previously took?⁶

The Court refused to accept the interpretation advocated by the employee and stated that “as long as ‘an employer accommodates only a subset of workers with disabling conditions,’ ‘pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other non-pregnant workers do not receive accommodations.’” Such an interpretation would grant pregnancy a “most-favored-nation” status not contemplated by the Act. The Court then outlined the manner in which a plaintiff could prove her *prima facie* case for disparate treatment under the Pregnancy Discrimination Act, including in failure to accommodate cases, and overturned the lower court’s decision granting summary judgment to the employer based on the evidence presented. After the ruling, the [EEOC updated its pregnancy discrimination guidance](#)⁸ to coincide with the *Young* ruling.⁹

LGBT Rights

One of the EEOC’s 2013-2016 Strategic Enforcement Plan’s objectives was to address “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.” This past year, we saw the EEOC deviate from numerous well-established cases excluding sexual orientation discrimination as a basis for relief under Title VII, and arguing that sexual orientation discrimination *is* sex discrimination under the law.¹⁰ Discrimination based upon *gender stereotypes* has been the legal standard for decades.¹¹ If a man was discriminated against for being too effeminate or a woman for being too masculine, the Courts deemed this prohibited sex stereotyping in violation of Title VII.¹² Undeterred by Congress’ repeated failed efforts to adopt the Employment Non-Discrimination Act (ENDA) which would amend Title VII to add sexual orientation as a protected status,¹³ the EEOC has been transparent in its agenda to move the needle forward on this issue—perhaps emboldened by the Supreme Court’s *Obergefell v. Hodges* decision which legalized same-sex marriage.¹⁴ On the heels of the *Obergefell* case, the EEOC issued its own groundbreaking decision that held, in clear and unequivocal language, that “an allegation of discrimination on the basis of sexual orientation is necessarily an allegation of sex discrimi-

nation.”¹⁵ While the *Baldwin* case aligns with the EEOC’s stated objective regarding the expansion of LGBT rights, the decision is nonetheless controversial. Courts and Congress have not yet extended Title VII’s definition of “sex” to include sexual orientation. Again, this appears to be part of an activist agenda by the Commission.

The EEOC has also taken the position (in line with OSHA’s opinion on this matter) that transgender individuals have the right to use the restroom of their choice regardless of whether they have surgically transitioned to a different sex.

The EEOC will continue to pursue LGBT rights. Earlier this year, the EEOC brought its first cases alleging sex discrimination against transgender employees. One of the lawsuits against a Florida eye clinic settled for \$150,000.¹⁶ Practitioners should expect to see continued activity from the EEOC on this front.

Severance Agreements

The EEOC has also taken aim at severance agreements, background checks and wellness programs. The EEOC claims that severance agreements unlawfully limit access to the legal system by prohibiting employees from filing charges or providing information to assist in the investigation or prosecution of claims of unlawful discrimination. In 2014, the EEOC brought two separate lawsuits alleging that the separation agreements at issue violated anti-discrimination laws. The first lawsuit was against CVS.¹⁷ The CVS “run of the mill” severance agreement contained several provisions that the EEOC claimed violated Title VII, including:

- A general release of claims against CVS, including a release of any claim of unlawful discrimination of any kind;
- A “no pending actions” provision in which the employee represents that he or she has not filed or initiated any complaint or lawsuit of any kind against CVS.
- A “cooperation” provision requiring employees to notify CVS’s general counsel whenever the employee receives an inquiry from an investigator regarding an investigation of CVS; and,
- A “non-disparagement” agreement preventing employees from making statements that disparage the business or reputation of CVS.¹⁸

But the EEOC’s real target was a covenant not to sue, in which the employee agreed not to sue CVS and to reimburse CVS’s legal fees if the employee did. The EEOC said that this covenant violated Title VII even though it also contained language stating “nothing in the covenant is intended to or shall interfere with Employee’s right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws...” The Court granted CVS summary judgment¹⁹ but never reached the merits of the case. The Court dismissed on the grounds that the EEOC failed to conciliate.²⁰ The Court noted in *dicta*, however, that the agency had failed to show actual discrimination or retaliation, and that the carve-out provision allowing an employee to participate and cooperate with administrative proceedings and/or investigations included the right to file a charge. In addition, the Court stated that if the agreement had attempted to ban the filing of

a charge, which it did not, then that provision would be unenforceable.

Both the EEOC and the NLRB have taken the position that certain language in severance agreements can discourage employees from filing charges, participating in investigations, and otherwise engaging in legally-protected activities. Practitioners should take note.

Wellness Programs

Wellness programs have been under the EEOC’s microscope for some time. Wellness programs are a product of the Health Insurance Portability and Accountability Act (HIPAA), which allowed group health plans to offer incentives to employees for participation, or penalties for nonparticipation, in wellness programs that met certain requirements. The Affordable Care Act (ACA) expanded wellness programs by increasing the size of incentives or penalties that employers could offer or impose. With the growing prevalence of wellness programs has come the question of whether they are compliant with the Americans with Disabilities Act (ADA), as well as other laws such as the Genetic Information Nondiscrimination Act (GINA).

The ADA requires that any collection of medical information be “voluntary” unless the collection is used in conjunction with a bona fide medical plan. Over the past few years, the EEOC has targeted employer-sponsored wellness programs, especially the programs that offer financial incentives to encourage participation and/or penalties for those who do not. The EEOC’s position is that the practice of incentivizing individuals to participate in wellness programs violates the “voluntary” aspect of the collection of medical information in compliance with the ADA.

The EEOC brought lawsuits in 2014 and 2015 against employer-sponsored wellness programs, claiming violations of both the ADA and/or GINA. In each of the lawsuits, the agency claimed that the wellness programs were not truly voluntary either because of the “dire consequences” the programs imposed on workers who chose not to participate or because the program’s health assessments weren’t “job-related and consistent with business necessity” and thus violated the ADA’s rules regarding employee medical exams and inquiries. In the 2015 case against Honeywell,²¹ the EEOC sought to enjoin Honeywell from implementing its wellness program which asked employees to consent to having their blood drawn to test their cholesterol, glucose and nicotine use, and to measure their body mass index and blood pressure. If the employee refused, the employee would be subject to a surcharge on their health insurance and could lose out on employer contributions to the employee’s health savings account. The EEOC argued that medical testing must be voluntary under the ADA and that Honeywell’s penalties rendered the program involuntary. The district court denied the EEOC’s request for a temporary restraining order and preliminary injunction, based upon a finding that Honeywell’s program did not pose “irreparable harm” to participants. The court, however, did not address the EEOC’s likelihood of success in the litigation, and the suit is poised to go forward.

On the heels of these lawsuits, the EEOC issued proposed rules under both the ADA (in April 2015) and GINA (in October 2015) in an attempt to define for employers the parameters of

a permissible wellness program. The proposed ADA rule warns employers that wellness programs must be voluntary, "reasonably designed" to improve health and not a "subterfuge for violating ... laws prohibiting employment discrimination." It also would permit financial incentives for employee participation in employer wellness programs so long as they remain at or below 30 percent of the total cost of employee-only coverage. The proposed GINA rule would allow employers who offer wellness programs as part of a group health plan to offer financial incentives to employees' spouses in exchange for information about the spouses' current or past health status.

Supreme Court Cases

There were only a few employment law cases before the United States Supreme Court this year, and nearly all of them involved the EEOC as party or active participant. The cases that were decided include *EEOC v. Abercrombie and Fitch* (a religious discrimination case brought by the EEOC on behalf of a teenage girl);²² *Young v. United Parcel Services, Inc.*²³ (the previously discussed pregnancy discrimination case where the EEOC got "bench slapped" for prematurely publishing enforcement guidance that did not comport with existing law); and *Mach Mining LLC v. EEOC* (a case analyzing the court's ability to review the EEOC's conciliation efforts, or lack thereof).²⁴ The EEOC appears to be using every tool in its arsenal to shape the legal landscape, even if some of its advocacy is in contravention of established legal principles.

This advocacy and activism by the EEOC will likely continue. Sexual orientation and pregnancy discrimination, the limits of a wellness program incentives and the continued use of severance agreements are all legal issues that have been expanded and refined. There likely will be more of the same in 2016.

Key Takeaways for Practitioners

- Pay attention to action by governmental agencies in terms of labor and employment laws. Rather than relying exclusively on applicable case law and regulations, counsel must be cognizant of what the executive agencies are doing in the employment law area, what their opinion is of various employment law issues, and what kinds of cases they are bringing—even in jurisdictions where you might not be practicing.
- The EEOC is looking to push the boundaries of existing jurisprudence on issues like pregnancy discrimination, sexual orientation discrimination, severance agreements, background checks and wellness programs. All practitioners should be mindful of the EEOC's priorities so they can properly advise clients when faced with issues that have been prioritized by the EEOC.
- If you practice on the employer side, conduct employment law audits for your clients. In 2016, employers will be (or should be) asking their attorneys for more prophylactic advice to help them prepare for upcoming changes and better understand how to comply with the law (as interpreted by all branches of the government). You can play an integral role in assisting your client in anticipating, rather than simply reacting to, changes in the law and provide a valuable service to your client. ■



Endnotes

¹It is interesting to note that according to the statistics published by the EEOC (http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy_new.cfm), the number of pregnancy discrimination charges has steadily decreased. In FY 2014, there were 3,400 pregnancy discrimination charges, while in FY 2013 there were 3,541 charges, and in FY 2012 there were 3,745. Even more compelling is that in FY 2014, the EEOC found "no reasonable cause" to believe that discrimination occurred for 59% (1,899) of the pregnancy charges filed with the agency. Meanwhile, in only 3.8% (121) charges did the agency find discrimination.

²www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

³www.workplaceclassaction.com/files/2014/07/Commissioner-Barker-Public-Statement-July-14-2014.pdf.

⁴*Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015).

⁵*Id.* at 1352.

⁶*Id.*

⁷*Id.* at 1349.

⁸www1.eeoc.gov/eeoc/newsroom/release/6-25-15.cfm.

⁹The new EEOC enforcement guidance, published on June 25, 2015, clarifies whom the pregnancy discrimination law covers, who an appropriate comparator within the workplace is when analyzing discrimination claims, and the EEOC's position on light duty work. The 2015 guidance does not contain an express requirement that employers provide light duty work; rather, the guidance states that a reasonable accommodation might include allowing a pregnant worker to take more frequent breaks, keep a water bottle at a work station, use a stool, or be assigned to a light-duty position.

¹⁰*Baldwin v. Foxx, U.S. Equal Employment Opportunity Commission*, Appeal No. 0120133080,

Agency No. 2012-24738-FAA-03 (July 15, 2015).

¹¹*See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (both recognizing a right of action where the discrimination was based on gender stereotypes, but not for discrimination based on LGBT status directly).

¹²*Id.*

¹³ENDA is a bill to prohibit employment discrimination on the basis of sexual orientation or gender identity, and has been introduced in every Congress (except one) since 1994. It passed the Senate on November 7, 2013, but died in the House. In 2014, it was again rejected by the House.

¹⁴*Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

¹⁵*Baldwin v. Foxx, U.S. Equal Employment Opportunity Commission*, Appeal No. 0120133080,

Agency No. 2012-24738-FAA-03 (July 15, 2015).

¹⁶www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm.

¹⁷www.eeoc.gov/eeoc/newsroom/release/2-7-14.cfm.

¹⁸www.employmentandlaborinsider.com/wp-content/uploads/sites/328/2015/10/Opinion-and-Order-EEOC-v.-CVS-District-Court.pdf.

¹⁹*Id.*

²⁰*Id.* The second anti-severance agreement case against CollegeAmerica was similarly dismissed on failure to conciliate.

²¹www.benefitslawadvisor.com/wp-content/uploads/sites/172/2014/10/EEOCsHoneywellPetition-3.pdf.

²²*Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015). In *Abercrombie*, Samantha Elauf, a Muslim teenager, wore a headscarf (hijab) to an interview for a position with *Abercrombie* in Tulsa, Oklahoma. She was interviewed by the store's assistant manager who rated Elauf as qualified to be hired but was concerned that her headscarf would violate *Abercrombie's* "Look Policy." Elauf did not disclose during the interview that she was Muslim, and the assistant manager sought guidance by upper management on whether a headscarf would violate the Look Policy. After the district manager told the assistant manager that any headwear, whether religious or otherwise, would violate the policy, Elauf was not hired for the position. The EEOC sued on Elauf's behalf, and

the issue before the United States Supreme Court was whether Title VII's prohibition on refusing to hire an applicant in order to avoid accommodating a religious practice applies even when an applicant has not informed the employer of his/her need for an accommodation. In other words, does an applicant need to ask for an accommodation to be covered under the statute? The Supreme Court answered in the negative: an applicant need not confirm his or her need for a religious practice accommodation, and an employer can violate the statute if it refuses to hire an applicant because of a motivation to avoid the need to accommodate a religious practice, even if an accommodation has not been requested. *Id.* at 2032-2034.

²³*Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015).

²⁴*Mach Mining LLC v. Equal Employment Opportunity Commission*, 1135 S.Ct. 1635 (2015).

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UPCOMING EVENTS

As part of the Federal Bar Association's MyLAW CLE webinar series, the Labor and Employment Law Section will be presenting an FLSA MyLAW CLE in early May and a Government Relations MyLAW CLE at a later date, to be determined. Further details will become available at federalbarcle.org/?product_cat=federal-bar-association-live-cle&paged=1. Recently, the Section presented "HIPAA and Health-Related Claims for Employment Litigators," which currently is available for purchase and viewing through the FBA's on-demand library. ■

The Labor and Employment Law Section is implementing a traveling CLE series, which will be presented at four locations throughout the year. The series is intended to pres-

ent employment law basics in a nutshell. The first program, which is being presented in conjunction with the New Orleans Chapter of the FBA, will take place in New Orleans, Louisiana on February 26, 2016. The three-hour CLE will address EEO and FLSA matters, as well as state law non-competition agreements and timely wage payment obligations. Featured speakers include Brett Strand, Labor & Employment Counsel, 3M Office of General Counsel, St. Paul, Minnesota; Betsy Chestney, Cornell, Smith, Mierl, Brutocao, Austin, Texas; Steven F. Griffith, Jr., Baker Donelson Bearman Caldwell & Berkowitz, PC, New Orleans, Louisiana. To register, please call the New Orleans Chapter of the FBA at (504) 589-7990, email CC Kahr at cckahr@nofba.org, or download the registration form at nofba.org/wp-content/uploads/Flyer-20161.pdf.

Future installments of the traveling CLE series are on dates and in locations to be determined. ■

Highlights of the Amendments to the Federal Rules of Civil Procedure Effective December 1, 2015

By R. Scott Oswald

On Dec. 1, 2015, amendments to the Federal Rules of Civil Procedure (“Rules”) became effective. These amendments have been in the works since May 2010 and are intended to reduce the costs of litigation. After five years, the amendments have been finalized. Below is an overview of some of the most important changes to the Rules.

Early Stages of Discovery have Been Expedited

The amendments to the Rules speed up many pretrial proceedings, including service of process and some aspects of discovery. First, the complaint itself must be served sooner: the amendments to Rule 4 reduce the time by which the plaintiff must serve the defendant from 120 days to 90 days. Next, the amendment to Rule 16 requires the judge to issue the scheduling order sooner: within the earlier of 90 days (previously 120 days) after any defendant has been served or 60 days (previously 90 days) after any defendant has appeared.

The amendments also allow parties to serve discovery requests sooner. Under the old Rule 26(d), discovery was generally stayed until the Rule 26(f) conference. Under the amended rule, Requests for Production of Documents may be served much earlier: 21 days after service of the complaint and summons even if the parties have not yet had a 26(f) conference. Parties responding to the earlier service have extra time to prepare and respond to the requests as the deadline to respond only begins to run at the 26(f) conference. This amendment will likely allow the 26(f) conference to be more productive as parties can discuss any issues with discovery requests and responses.

Judge may Include More Requirements in the Scheduling Order

Rule 16(3) suggests that the judge include additional information in the scheduling order. First, the judge may include directions regarding the preservation of electronically stored information. The scheduling order can also include an agreement reached under Federal Rule of Evidence 502, which controls disclosure of attorney-client privileged information. Finally, and perhaps most importantly, Rule 16(3) suggests that the judge may require parties to request a conference with the court prior to filing a discovery motion.

Proportionality Appears to be of Greater Importance

The amendments to Rule 26 are significant. Rule 26(1) now explicitly states that the scope of discovery must be “proportional to the needs of the case,” and the list of factors to consider when determining whether discovery is proportional has been reordered and edited. In addition, when determining proportionality, the judge is now directed to consider “the parties’ relative access to relevant information” and “whether the burden or expense of the proposed discovery outweighs its likely benefit.”

Further, the often-cited phrase “relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence” has been deleted and replaced with “[i]nformation within this scope of

discovery need not be admissible in evidence to be discoverable.”

The Committee Note explained this revision, stating, “The discovery of inadmissible evidence should not extend beyond the permissible scope of discovery simply because it is ‘reasonably calculated’ to lead to the discovery of admissible evidence.” This revision will undoubtedly change how parties argue discovery motions. Some will argue that this revision heightens the admissibility requirement of discoverable information. In contrast, others will argue that the revision and advisory comments make an unnecessary distinction—that “reasonably calculated” was never used to extend discovery beyond its permissible scope. Case law will ultimately determine the impact of this revision.

Similarly, courts will decide the significance, if any, in the removal and addition of language and reordering of the proportionality factors. For example, parties may argue that the judge should assign significance to the reordering and that the “importance of the issues at stake”—which is now the first proportionality factor listed in the Rule—should be the most important proportionality consideration. In certain civil rights cases, such as a lawsuit to desegregate, the amount of money in controversy may be low, but the importance of the issue at stake is high. In such cases, even costly discovery may be necessary because of the importance of the issues at stake. One might argue that the reordering of the factors is significant, and the “importance of the issues at stake” should be the paramount proportionality factor considered by the court when adjudicating a discovery dispute.

Objections to Discovery Requests Must be More Specific

Amended Rule 34 adds specific requirements for objecting to discovery requests. First, the responding party must “state with specificity the grounds for objecting to the request.” Could this mean that blanket objections are a thing of the past? Second, objections to a discovery request “must state whether any responsive materials are being withheld on the basis of that objection.” Therefore, the opposing party will know if responsive documents exist but are being withheld on the basis of an objection.

Increased Consequences for Failing to Preserve Electronically Stored Information

The amendments to Rule 37 enumerate specific penalties if electronically stored information that should have been preserved is lost or destroyed. The court may “instruct the jury that it may or must presume the information [that was lost or destroyed] was unfavorable to the party.” Or, the court may “dismiss the action or enter a default judgment.” The penalties for failing to preserve electronically stored information are now explicitly described and, if enforced, highly prejudicial. Therefore, counsel should take care to have policies in place to ensure that their clients suspend document destruction protocols upon notice of a claim.

These amendments are effective Dec. 1, 2015. Some changes, such as the discovery objections, will likely take time for parties and judges to adapt and implement, while others, such as the compressed timing, will be implemented immediately. Practitioners should review the changes carefully, so as to not be on the wrong end of a procedural motion. ■

**Summary of Certain Amendments to the Federal Rules of Civil Procedure, Effective December 1, 2015
[with emphasis added to denote changes]**

Old Rule v. New Rule	Commentary
<p><u>Rule 16. Pretrial Conferences; Scheduling; Management</u> (b) Scheduling. (1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order; (A) after receiving the parties' report under Rule 26(f); or (B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference by telephone, mail, or other means. (2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event [unless the judge finds good cause for delay, the judge must issue it] within the earlier of 120 [90] days after any defendant has been served with the complaint or 90</p>	<p>[60] days after any defendant has appeared. (3) Contents of the Order. (B) Permitted Contents. The scheduling order may: (iii) provide for disclosure[,] or discovery[,] or preservation of electronically stored information; (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced[,] including agreements reached under Federal Rule of Evidence 502;] [(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;] (v [vi]) set dates for pretrial conferences and for trial and (vi [vii]) include other appropriate matters.</p> <p>Amendments to Rule 16 reduce the time to issue the scheduling order to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared.</p> <p>The amendments also add “preservation of electronically stored information” to something the judge may include in the scheduling order.</p> <p>The judge may require parties to request a conference prior to filing a discovery motion.</p>
<p><u>Rule 26. Duty to Disclose; General Provisions; Governing Discovery</u> (b) Discovery Scope and Limits. (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense [and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.] Including the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the actions. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C). (2) Limitations on Frequency and Extent. (C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (iii) the burden or expense of the proposed discovery [is outside the scope permitted by Rule 26(b)(1)] outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. (c) Protective Orders.</p>	<p>(1) In General * * * (B) specifying terms, including time and place [or the allocation of expenses], for the disclosure or discovery; (d) Timing and Sequence of Discovery. [(2) Early Rule 34 Requests. (A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: (i) to that party by any other party, and (ii) by that party to any plaintiff or to any other party that has been served. (B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.] (2) [3] Sequence. Unless, on motion, [the parties stipulate or] the court orders otherwise for the parties' and witnesses' conveniences and in the interest of justice: (A) Methods of discovery may be used in any sequence; and (B) discovery by one party does not require any other party to delay its discovery. (f) Conference of the Parties; Planning for Discovery. (3) Discovery Plan. A discovery plan must state the parties' views and proposals on: (C) any issues and disclosure[,] or discovery[,] or preservation of electronically stored information, including the form or forms in which it should be produced; (D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on procedure to assert these claims after production – whether to ask the court to include their agreement in an order [under Federal Rule of Evidence 502]...</p>

**Summary of Certain Amendments to the Federal Rules of Civil Procedure, Effective December 1, 2015
[with emphasis added to denote changes]**

Old Rule v. New Rule	Commentary	
<p><u>Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes</u></p> <p>(b) Procedure. (2) Responses and Objections. (A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served [or- if the request was delivered under Rule 26(d)(2) - within 30 days after the parties' first Rule 26(f) conference]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. (B) Responding to Each Item. For each item or cat-</p>	<p>egory, the response must either state that inspection and related activities will be permitted as requested or state an objection [with specificity the grounds for objecting] to the request, including the reasons. [The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.] (C) Objections. [An objection must state whether any responsive materials are being withheld on the basis of that objection.] An objection to part of a request must specify the party and permit inspection of the rest.</p>	<p>Amended Rule 34 adds specific requirements for objecting to discovery requests. First, the responding party must "state with specificity the grounds for objecting to the request." Could this mean that blanket objections are a thing of the past? Second, objections to a discovery request "must state whether any responsive materials are being withheld on the basis of that objection." Therefore, the opposing party will know if certain documents are available, but being withheld on the basis of an objection.</p>
<p><u>Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions</u></p> <p>(a) Motion for an Order Compelling Disclosure or Discovery. (3) Specific Motions. (B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: (iv) a party [fails to produce documents or] fails to respond that inspection will be permitted- or fails to permit inspection - as requested under Rule 34. (e) Failure to Provide [Preserve] Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. [If electronically stored information that should have been preserved in the anticipation or conduct of litigation</p>	<p>is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.]</p>	<p>The amendments to Rule 37 allow specific penalties if electronically stored information that should have been preserved is lost or destroyed. The court may "instruct the jury that it may or must presume the information [that was lost or destroyed] was unfavorable to the party." Or, the court may "dismiss the action or enter a default judgment." The penalties for failing to preserve electronically stored information are now explicitly described and, if enforced, highly prejudicial. Therefore, counsel should take care to have policies in place to ensure that their clients suspend document destruction protocols upon notice of a claim.</p>



R. Scott Oswald is the Managing Principal of The Employment Law Group in Washington, D.C. where he litigates employment and whistleblower actions nationwide. He is an accomplished trial lawyer who has brought

nearly fifty trials to verdict. He is honored as a Top 100 Trial Lawyer by The National Trial Lawyers and is a graduate of the Trial Lawyers College.

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Employer Policies and the NLRA: How Handbook Provisions Can Violate Employee Rights

By Robert Baror

Telling employees to “be respectful” is illegal. That’s right. According to the National Labor Relations Board (NLRB), an employer policy stating “be respectful to the company, other employees, customers, partners, and competitors” is illegal. See *NLRB Memorandum GC 15 – 04, Report of the General Counsel Concerning Employer Rules*, March 18, 2015. This is because the NLRB General Counsel found that “employees reasonably would construe” this policy “to ban protected criticism or protests regarding their supervisors, management, or the employer in general.”

The specific “protected criticism” to which the General Counsel is referring is protected “concerted activity” under Section 7 of the National Labor Relations Act (NLRA). Section 7 applies to most private employers, whether unionized or not, with an annual inflow or outflow of over \$50,000. 29 C.F.R. 104.204. Under Section 7, “Employees shall have the right to ... engage in ... concerted activities for the purpose of collectively bargaining or other mutual aid or protection.” While the term “concerted activity” is not defined in the NLRA, “it clearly enough embraces the activities of employees who have joined together in order to achieve common goals.” *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 211 (4th Cir. 2005). Moreover, “[a]n individual employee may be engaged in concerted activity when he acts alone if the purpose of his acts [is] to enforce a collective bargaining agreement, seeking to induce group action, or acting on behalf of a group.” *Id.* Section 7 of the NLRA is enforced through Section 8(1)(a) of the NLRA, which makes it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of ‘employees’ section 7 right to ‘engage in ... concerted activities.’” *Healthbridge Management, LLC v. NLRB*, 798 F.3d 1059, 1067 (quoting 29 U.S.C. §§ 157, 158(a)(1)).

Many employers may not realize it, but their policies meant to enforce civility in the workplace or control how their employees depict them could easily run afoul of Section 7 of the NLRA. This is because “[w]here a rule is likely to have a chilling effect on Section 7 rights, the Board may conclude that its maintenance is an unfair labor practice.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 655 (2004). The logic behind invalidating handbook rules concerning respectfulness is that these policies could have a chilling effect on criticism of management or the company, which may fall under Section 7 concerted activity, and the NLRB.

The NLRB General Counsel’s March 18, 2015 memorandum concerning employer rules, which was meant to clarify the NLRB’s positions, specifically addressed eight categories of employer rules: (1) rules regarding confidentiality; (2) rules regarding employee conduct toward the company and supervisors; (3) rules regulating conduct toward fellow employees; (4) rules regarding regulating third-party communications; (5) rules restricting the use of company logos,

copyrights, and trademarks; (6) rules restricting photography and recording; (7) rules restricting employees from leaving work; and (8) employer conflict of interest rules.

Confidentiality Rules: Employers Cannot Generally Restrict the Sharing of Employee Information

Many employers believe that it is their right to restrict employees from discussing their compensation with co-workers or from sharing other basic information about the workplace. This is wrong. For instance, the NLRB found that the following policy was illegal: “Do not discuss ‘customer or employee information’ outside of work, including ‘phone numbers [and] addresses.’” *Memorandum GC 15-04* at 4 (brackets in original). The rationale for finding this policy illegal was that “the blanket ban on discussing employee contact information, without regard for how employees obtain that information is ... facially unlawful.” *Id.* The underlying concern is that for employees to engage in “concerted activity,” working together, they may need to share their contact information or other “employee information” (presumably such as salary data) with one another.

However, the NLRB has not taken the position that employers may not impose any restrictions on the confidentiality of their information. For instance, the NLRB found that a policy banning the “unauthorized disclosure of ‘business secrets’ or other confidential information” was sufficiently narrow to pass muster. *Id.* at 6. Moreover, the NLRB has stated that “even when a confidentiality policy contains overly broad language, the rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7-protected activity.” *Id.* For instance, where a prohibition on the “disclosure of all ‘information acquired in the course of one’s work’” was “nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws,” this was found to be acceptable because “employees would reasonably understand the information described as encompassing customer credit cards, contracts, and trade secrets, and not Section 7-protected activity.” *Id.*

Imposing “Respect” toward Supervisors Could Chill Protected Activity

The NLRB General Counsel opined that a policy stating “Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or competitors” would be illegal because employees might reasonably construe this rule to “ban protected criticism or protests regarding their supervisors, management, or the employer in general.” *Id.* at 7. The basic thrust that the NLRB seems to come back to again and again is that employees have a right to work together to advance their interests in the workplace, even if in advancing those interests they may do some “harm” to the employer—for instance, by making negative statements about the company through criticisms of management. These rights do not extend just to private instances of employees collaborating to advance their collective interests, but they also extend to a “public forum.” See *Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014).

The NLRB's stance against employer civility rules seems to put employers in a quandary, because an employee's rude behavior can cost the employer precious business. Accordingly, the NLRB has carved out space for employers to enforce certain requirements for courteous behavior. For example, it is lawful for an employer to implement a policy prohibiting "rudeness or unprofessional behavior toward a customer, or anyone in contact with the company." *Memorandum GC 15-04* at 9. The distinction is that a rule regarding conduct toward a customer would not have a "chilling effect," because it does not handcuff employees in how they can speak about management, which is the NLRB's true concern.

Employees Have a Right to "Pick Fights"

The NLRB has found that a policy stating "don't pick fights online" is unlawful. *Id.* at 10. Of course, this does not mean that physical assault is acceptable, but it does mean that attempts to prevent employee conflict, even if well-intentioned, are prohibited "because debate about unionization and other protected concerted activity is often contentious and controversial." *Id.* at 10. However, policies designed to protect employee welfare, as opposed to simply stifling dissent among employees, are acceptable, such as a policy stating that "threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors" is not allowed. *Id.* at 11.

Employers Cannot Prohibit Employee Communications with the Media, Etc.

"Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment." *Id.* at 12. *See Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009). Therefore, employers may have less control over how their business is portrayed than they would like. While employers can control who makes "official statements for the company," they cannot stop unauthorized employees from commenting to the media on company actions, etc. While this might prove unsettling to employers, again the fact that they must accept is that the NLRB is aggressively setting out to protect employees' rights to speak ill of their employers in order that they may engage in "concerted activity" to advance their interests in the workplace. Therefore, employers will have to be very cautious in promulgating policies or disciplining employees for negative statements, even when their conduct directly harms the employer. Clearly, now the "duty of loyalty" does not extend to employee speech.

Company Logos—Not Just for the Use of the Employer

While the NLRB has recognized that "copyright holders have a clear interest in protecting their intellectual property," it also opined that "employees have a right to use the name and logo on picket signs, leaflets and other protest material." *Id.* at 14. Accordingly, company policies, such as those stating that "Company logos and trademarks may not be used without written consent," are not lawful. *Id.* at 15.

Employees' protected use of company logos extends to social media as well. *Id.* at 14. Therefore, read in conjunction with other sections of the General Counsel's Memorandum, an employee has the legal right to take an employer's logo, post it on Facebook, and say that the company is an exploitative and discriminatory enterprise. This can be viewed as a boon for employee rights or a damaging blow to employers which severely curtails their ability to manage their branding, but either way, it is the paradigm that now exists.

Employee Electronic Equipment—Employers Would Be Unwise to Ban Cellphones

Companies faced with the proliferation of electronic devices, which can distract employees from their duties, may wish to restrict employees from bringing these devices to work. This would be illegal. While an employer can restrict use of electronic devices during worktime, it cannot impose blanket restrictions on the use of these devices while an employee is on company property "while on breaks or other non-work time." *Id.* at 16. This is because employees have the right to use a camera or video recorder (now standard components of cell phones) for collective action purposes, such as documenting "health and safety violations." *Id.*

Despite the illegality of blanket prohibitions on electronic devices, when policies on electronic devices are "instituted in response to a breach of ... privacy" or where the employer has a well-understood strong interest in protecting privacy, such as regarding patient medical information, the Board has found that employees would not reasonably understand a no-photography rule to have the purpose of chilling concerted action. *Id.* at 16. *See Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), *enforced in relevant part*, 715 F.3d 928 (D.C. Cir. 2013). Thus, when crafting electronic-device policies, it is important for employers to clearly articulate the purpose of the policy and to tailor it to be as narrow as possible to accomplish the legitimate aims of the policy.

Employees Have a Right to Walk off the Job

Policies that state that "walking off the job is prohibited" are facially overbroad. *Memorandum GC 15-04*, at 17. This is because, whether unionized or not, employees have the right to strike or walk out, and a blanket ban on "walk offs" could be interpreted to interfere with this right. "If, however, such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions,' or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity, and the rule will be found lawful." *Id.*; *see also 2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011). As is a recurrent theme, the NLRB has emphasized that policies must be analyzed within the context in which they are promulgated. For instance, even a policy that specifically prohibits "walking off shift" could be acceptable—although it seems facially invalid—when viewed in the context that it applies to employees "directly responsible for patient care ... [and] is reasonably read as ensuring that patients are not left without adequate care, not as a complete ban on strikes." *Memorandum GC 15-04* at 18.

Conflict of Interest Rules—“Conflict” Needs to be Clearly Defined

The NLRB has taken the reasonable position that employees’ financial conflicts with their employers can be prohibited. For example, an employer can adopt a rule that prevents employees from engaging in a competing business. *Id.* at 19. However, broad provisions, such as one stating “Employees may not engage in ‘any action’ that is ‘not in the best interest of [the Employer],’” would be illegal. *Id.* at 18 (brackets in original). This is a commonsense approach that allows employers to restrain employees from taking financial positions adverse to their companies, but it still gives employees ample latitude to take “collective action,” even if this action might contravene what the employer views as its “best interests,” which may not be those of the employees.

Conclusion

From even a quick scan of the General Counsel’s Memorandum, it is evident that the main current of the NLRB’s position is that employees have broad “concerted activity” rights that must be protected. These rights can be circumscribed if prohibitory rules are not phrased as “blan-

ket” restrictions, but are instead rather narrowly tailored to protect legitimate interests that do not relate to “chilling” employees’ ability to band together to advance their interests in the workplace. Therefore, careful drafting of handbook provisions and other policies and procedures can rescue employers from potential liability while preserving some of their rights to regulate the workplace and defend their legitimate interests. Ultimately, the NLRB has created a balancing act between aiding employees in the cause of improving their working conditions, which are often disregarded in the at-will employment regime, and the rights that employers deserve to advance their interests by promoting generally-lauded values, such as civility and the protection of privacy. ■



Robert Baror is the Managing Member of The Baror Law Firm, LLC, an employment law firm located in Bethesda, Maryland representing both employees and employers in all employment law matters. He can be contacted at Robert@barorlaw.com.

A large graphic with a black background. At the top is a white silhouette of a city skyline with several buildings of varying heights. Below the skyline, the text "Federal Bar Association Annual Meeting and Convention" is written in white, bold, sans-serif font. Underneath that, the word "CLEVELAND" is written in large, bold, blue, block letters with a white outline. At the bottom of the graphic is a white silhouette of a bridge with a large arch and two smaller arches on either side. The date "SEPT. 15-17, 2016" is written in blue, bold, sans-serif font across the bridge. At the very bottom, the text "WESTIN CLEVELAND DOWNTOWN • WWW.FEDBAR.ORG/FBACON16" is written in white, bold, sans-serif font.

Labor and Employment Law Section Governing Board

CHAIR

Donna P. Currault
Gordon, Arata, McCollam,
Duplantis & Eagan, LLC
201 St. Charles Ave. 40th
Floor
New Orleans, Louisiana
70170-4000
Phone: (504) 582-1111

VICE CHAIR

Corie Tarara
Seaton, Peters & Revnew, P.A.
7300 Metro Blvd. Suite 500
Minneapolis, MN 55439
(952) 921-4615
ctarara@seatonlaw.com

DEPUTY CHAIR

Karleen Green
Phelps Dunbar LLP
City Plaza, 400 Convention
Street, Suite 1100
P.O. Box 4412
Baton Rouge, LA 70821
Phone: (225) 346-0285
Fax: (225) 381-9197
karleen.green@phelps.com

SECRETARY

Kathryn M. Knight
Stone Pigman Walther
Wittmann L.L.C.
546 Carondelet St.
New Orleans, LA 70130
(504) 593-0915
kknight@stonepigman.com

TREASURER

Elizabeth "Betsy" Siberry
Chestney
Cornell Smith Mierl &
Brutocao
1607 West Avenue
Austin, Texas 78701
(512) 328-1540
bchestney@cornellsmith.com

IMMEDIATE PAST CHAIR

Craig A. Cowart
Jackson Lewis P.C.
999 Shady Grove Road
Suite 110
Memphis, TN 38120
Phone: (901) 462-2618
Craig.Cowart@jacksonlewis.com

EDITOR, THE LABOURING OAR

Kathryn M. Knight
Stone Pigman Walther
Wittmann L.L.C.
546 Carondelet St.
New Orleans, LA 70130
(504) 593-0915
kknight@stonepigman.com

STANDING COMMITTEES:

(All Chairs/Co-Chairs are members of the Governing Board)

Standing Committee on Membership and Chapter Relations:

Chair:
Danielle Brewer Jones
The Brewer Law Office, PLLC
1891 Pass Rd.
Biloxi, MS 39531
Phone: (228) 388-0053
dbrewer@brewerlegalservices.com

Standing Committee on Publications and Public Relations:

Chair:
EDITOR, THE LABOURING OAR
Kathryn M. Knight
Stone Pigman Walther
Wittmann L.L.C.
546 Carondelet St.
New Orleans, LA 70130
(504) 593-0915
kknight@stonepigman.com

Standing Committee on Programming and Continuing Legal Education:

Chair:
Corie Tarara
Seaton, Peters & Revnew, P.A.
7300 Metro Blvd. Suite 500
Minneapolis, MN 55439
(952) 921-4615
ctarara@seatonlaw.com

Standing Committee on Finance and Expenditures:

Co-Chairs:
Nancy Bloodgood
The Foster Law Firm, LLC
895 Island Park Drive, Suite 202
Daniel Island, S.C. 29492
Phone: 843-744-7828
nbloodgood@fosterfoster.com

Elizabeth "Betsy" Siberry
Chestney
Cornell Smith Mierl &
Brutocao
1607 West Avenue
Austin, Texas 78701
(512) 328-1540
bchestney@cornellsmith.com

Standing Committee on Executive Agency Outreach:

Chair:
M. Kathleen McKinney
National Labor Relations Board
600 South Maestri Place
7th Floor
New Orleans, LA 70130
(504) 589-6374
kathleen.mckinney@nrlb.gov

Standing Committee on Legislation and Congressional Relations:

Co-Chairs:
Steven F. Griffith, Jr.
Baker Donelson Bearman et al PC
201 St. Charles Ave., Suite 3600
New Orleans, Louisiana 70170
(504) 566-5225
sgriffith@bakerdonelson.com

Standing Committee on Awards

Craig A. Cowart
Jackson Lewis P.C.
999 Shady Grove Road
Suite 110
Memphis, TN 38120
Phone: (901) 462-2618
Craig.Cowart@jacksonlewis.com

CHAPTER REPRESENTATIVES:

(All are members of the Governing Board and of Standing Committee on Membership and Chapter Relations)

Timothy Bliss
Vetter & White
CenterPlace
50 Park Row West, Suite 109
Providence, RI 02903
(401) 421-3060
TBliss@vetterandwhite.com

José Gonzalez-Nogueras
Jimenez Graffam & Lausell
Midtown Bldg. Fourth Floor
420 Ponce de Leon Ave.
San Juan, Puerto Rico 00918-3405
Phone: (787) 767-1030
Fax: (787) 751-4068
jgonzalez@jgl.com

Jim Hammerschmidt
The Law Firm of Paley
Rothman, Attorneys at Law
4800 Hampden Ln 4th Floor
Bethesda, MD 20814
(301) 951-9338
jrh@paleyrothman.com

Whitney Sedwick Meister
Fennemore Craig PC
2394 E. Camelback Road
Suite 600
Phoenix, AZ 85016
(602)916-5412
wmeister@fclaw.com

Joel P. Schroeder
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-8860
joel.schroeder@FaegreBD.com