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Employment Law Update

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Introduction

Like many areas of law, employment law changes at a fast pace. New issues spawn new developments or even just a renewed enforcement focus with existing laws. Moreover, when an important issue surfaces, Congress can sometimes be slow to react. As a result, there continues a trend toward the proliferation of state law protections or agency action in new and emerging areas, often creating confusion and uncertainty. These materials reflect an effort to lead the reader through a series of recent developments, including state law initiatives and areas of new or renewed focus.

A. Anti-Bullying Efforts — New Efforts to Solve an Old Problem

One area which is under development from a state law standpoint is the issue of workplace bullying. A recent survey² conducted by the Workplace Bullying Institute³ in cooperation with Zogby International (hereafter referred to as the WBI Survey) revealed some interesting statistics on the prevalence of workplace bullying. Among the key findings from the WBI Survey, it was reported that some “37% of American workers, an estimated 54 million people, have been bullied at work. It affects half (49%) of American workers, 71.5 million workers, when witnesses are included.”⁴ The prevalence is startling, but perhaps not overly surprising. With the proliferation of web sites devoted to a wide variety of work related issues, one need go farther than one’s computer to report on a bad boss.⁵ Moreover, the anti-jerk movement has been

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² U.S. Workplace Bullying Survey (September 2007), available at <http://bullyinginstitute.org/zogby2007/wbi-zogby2007.html> (last accessed 1/23/08).

³ <http://bullyinginstitute.org/>

⁴ WBI Survey at Section 2, available at <http://bullyinginstitute.org/zogby2007/zogbyprevalence.html>

⁵ See, e.g., <http://www.ebosswatch.com>, a web site launched in June 2007 and devoted to collecting data on bad bosses. Its’ motto: “Nobody should have to work with a jerk.”

gaining some ground, with various reports of official or unofficial policies against bad behavior⁶ or concerns expressed on this topic.⁷ One of the most public companies reported on this issue is SuccessFactors, Inc., a California based company whose founding principles include the following:

No jerks! Our organization will consist only of people that absolutely love what we do, with a white hot passion. We will have utmost respect for the individual in a collaborative, egalitarian, and meritocratic environment - no blind copying, no politics, no parochialism, no silos, no games, no cynicism, no arrogance - just being good! As the world's first provider of goal alignment, performance, talent development, succession planning, pay for performance, learning, and recruiting built together from the ground up, we are transforming organizations to achieve their true potential, and motivating employees to do the same.⁸

Bullying, however, is a far more serious issue than mere bad behavior. According to the WBI Survey, bullying has reached the level of a “public health hazard” with some 45% of bullied targets reporting that stress affects their health.⁹ Moreover, the WBI Survey suggests that bullying is often not an isolated occurrence; rather, “in 75% of bullying cases, mistreatment was experienced repeatedly by targets.”¹⁰ For repeated bullying, the WBI Survey found that “73% of bullied targets endure bullying for more than 6 months, 44% for more than one year”.

Moreover, while the law often provides redress when bullying is done to individuals based on some status or characteristic protected by law, the WBI Survey reported that “bullying is 4 times more prevalent than illegal forms of “harassment.””¹¹ Unfortunately, bullying in the absence of some protected status or characteristic as a factor often yields little in the way of a meaningful

⁶ Robert Sutton, *The No Asshole Rule*, Vol. 4 The Complete Lawyer No. 1, available at <http://www.thecompletelawyer.com/volume4/issue1/index.php> (last accessed 1/24/08); Julie Cook Ramirez, *Bad Blood — No longer willing to accept workplace jerks as a necessary evil, organizations are taking steps to remove them from their ranks*, Human Resources Executive Online (6/2/07), available at <http://www.hreonline.com/HRE/story.jsp?storyId=14614740> (last accessed 1/23/08).

⁷ See Eric A. Tate and Mahogany P. Jenkins, *Microinequities: Can Bad Behavior Be Actionable? There is Cause for Concern over Incivility, Even If Not Technically Illegal*, 5/21/2007 Nat'l L.J. S3, col. 1, S3, col. 1+ (2007).

⁸ See <http://www.successfactors.com/company/founding-principals/> (last accessed 1/23/08).

⁹ WBI Survey at Section 7, available at <http://bullyinginstitute.org/zogby2007/zogbytargets.html> (last accessed 1/23/08).

¹⁰ *Id.*

¹¹ WBI Survey at Section 4, available at <http://bullyinginstitute.org/zogby2007/zogbydifferent.html> (last accessed 1/23/08).

legal remedy. This leads to the classic “square peg/round hole” problem of attempting to meaningfully address this type of issue within the framework of the existing discrimination laws, which has not always been effective. One suspects in part this is due to the somewhat controversial legal rationale sometimes employed in rejecting claims of abusive behavior in general when the alleged violator falls into the category of the “equal opportunity harasser”.¹² In such a circumstance, traditional discrimination theories often grant little protection.¹³

However, state legislatures are in a few instances attempting to take the issue on¹⁴, with the Workplace Bullying Institute — Legislative Campaign reporting that some 13 states as of this writing having considered the issue.¹⁵ Of those, three are reported as having legislation pending.¹⁶

As this issue has gained momentum, a number of commentators have weighed in with advice on how to handle bullying.¹⁷ Various themes from these commentators include identifying the individuals engaging in the behavior¹⁸, ways to reform misbehaving employees¹⁹, and policy and response elements employers should consider on this issue.²⁰

¹² For more detail regarding the “equal opportunity harasser” principle, *see, e.g.*, Mark J. McCullough, *One is a Claim, Two is a Defense: Bringing An End To The Equal Opportunity Harasser Defense*, 67 U. Pitt. L. Rev. 469 (Winter 2005) and Shylah Miles., *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 Wash. L. Rev. 603 (2001).

¹³ *Id.*; *but see EEOC v. National Education Association*, 422 F. 3rd 840 (9th Cir. 2005)(suggesting possible gender based remedy for bullying behavior even where both men and women subjected to treatment).

¹⁴ *See* Michael Felton-O'Brien, *Ban the Bully*, Human Resources Executive Online (1/1/08), available at <http://www.hrexecutive.com/HRE/story.jsp?storyId=59865573&query=bullying> (last accessed 1/24/08).

¹⁵ *See* <http://workplacebullyinglaw.org/>; *see also*, Marlene Prost, *Fighting Workplace Bullying*, Human Resources Executive Online (4/30/07) available at <http://www.hreonline.com/HRE/story.jsp?storyId=12224017> (last accessed 1/23/08) and Stephen M. Paskoff, *EMPLOYMENT LAW: Anti-Bullying – A New Era in Workplace Civil Rights?*, Human Resources Executive Online (11/19/07), available at <http://hre.lrp.com/HRE/story.jsp?storyId=46955287&query=complying> (last accessed 1/24/08).

¹⁶ *See* <http://workplacebullyinglaw.org/> citing to pending legislation in Washington (HB 2142 and SB 6622), Vermont, 2007-08 (H 548 and S 312) and New York (A7801-A and S2715 and A04921)(last accessed 1/23/08).

¹⁷ *See, e.g.*, Christopher S. Simon and Denise B. Simon, *Bully For You; Full Steam Ahead —How Pennsylvania Law Permits Bullying in the Workplace*, 16 Widener L.J. 141 (2006)(suggesting mediation and other ways to govern bullying).

¹⁸ Julie Fleming Brown, *How to Spot and Deal with Jerks*, Vol. 4 The Complete Lawyer No. 1, available at <http://www.thecompletelawyer.com/volume4/issue1/index.php> (last accessed 1/24/08).

B. Domestic Abuse — An Emerging Area of Protection

In recent years, advocacy groups like the National Coalition Against Domestic Violence²¹ (NCADV) have sought to educate employers on the workplace implications of domestic violence.²² In one such effort, data was compiled regarding the prevalence of domestic violence²³, the costs²⁴, and the impact of domestic violence on job performance and productivity²⁵, all of which were substantial. In response to efforts like these, more and more

¹⁹ Allison West, *Yes, There Are Ways to Reform Workplace Jerks*, Vol. 4 The Complete Lawyer No. 1, available at <http://www.thecompletelawyer.com/volume4/issue1/index.php> (last accessed 1/24/08).

²⁰ See, e.g., *DIGNITY AT Work: A Good Practice Guide for Higher Education Institutions on Dealing with Bullying and Harassment in the Workplace*, Equity Challenge Unit (UK, January 2007), available at http://www.ecu.ac.uk/publications/pubs_jguidance.html#DAWGoodPracticeGuide (last accessed 1/23/08); see also, Andrew R. McIlvaine, *Anti-Bullying Best Practices*, Human Resources Executive Online (1/1/08)(available at <http://www.hrexecutive.com/HRE/story.jsp?storyId=55021701&query=bullying> (last accessed 1/24/08); Ian C. Schaefer, *Bullying Reaches New Heights*, Human Resources Executive Online (7/1/06)(available at <http://www.hrexecutive.com/HRE/story.jsp?storyId=5931433&query=bullying>) (last accessed 1/24/08).

²¹ <http://www.ncadv.org/>

²² It has been suggested that domestic violence occurs in the workplace more frequently than one might expect. According to one commentator, workplace violence is the number one cause of death for women in the workplace. It has been suggested this is due in part “because of domestic violence spillover, where an abuser harms his victim as well as any co-workers who try to intervene.” See, e.g., Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 Mich. J. Gender & L. 275, 277 (2006) and citing Kristine L. Hayes, *Prepostal Prevention of Workplace Violence: Establishing an Ombuds Program as One Possible Solution*, 14 Ohio St. J. on Disp. Resol. 215 (1998) (additional citations omitted).

²³ One fact sheet by NCADV reported on a 2005 national survey by the CDC finding that 21% of full time employed adults were victims of domestic violence, while another done by Partnership for Prevention found that 44% of respondent’s personally experienced domestic violence’s impact on the workplace, most frequently because a co-worker was a victim. See *Domestic Violence in the Workplace* (hereafter “*DV Fact Sheet*”), available at <http://www.ncadv.org/files/workplace.pdf> (last accessed 1/24/08)(additional citations omitted).

²⁴ See *DV Fact Sheet*, *supra* at n. 23, reporting that the Centers for Disease Control and Prevention estimates that the annual cost of lost productivity due to domestic violence equals \$727.8 million. (additional internal citations omitted).

²⁵ See *DV Fact Sheet*, *supra*, n. 23, reporting that “[i]n a survey of 7,000 women, 37% said domestic violence had a negative impact on their job performance” and that “[d]omestic violence victims lose

states have enacted laws that provide domestic violence victims certain protections.²⁶ The laws themselves vary by state. For example, some state laws focus on the employment law issues, such as needing leave to deal with the issues surrounding domestic violence, such as the need to obtain assistance or safe housing.²⁷ Some provide for protection due to court appearances, either specifically for domestic violence or in general as part of a crime victim statute.²⁸ Some contain an anti-discrimination element.²⁹ In addition, over time state unemployment laws have also evolved, presumably on the premise that “[m]any victims and survivors of domestic violence, sexual assault, and stalking must leave work in order to protect themselves, their families, and their coworkers.”³⁰

Finally, other potential sources of protection can be found in existing laws. One such example is the Americans with Disabilities Act (ADA), which can provide protection for someone who becomes disabled as a result of domestic violence.³¹ Another, the Family and Medical Leave Act (FMLA) could come into play in a domestic violence situation when a victim is hurt and the situation meets the criteria for a “serious health condition” under the Act.³² Even a Title VII sex discrimination claim can come into play given the right set of facts.³³

nearly 8 million days of paid work—the equivalent of more than 32,000 full-time jobs—and nearly 5.6 million days of household productivity as a result of violence.” (additional internal citations omitted).

²⁶ See, e.g., 820 Ill. Comp. Stat. §180/30(b)(1), Cal. Lab. Code §230 and 230.1, Col. Rev. Stat. §24-34-402.7, Fla Stat. §741.313, Haw. Rev. Stat. 378-672, Kan. Stat. 44-1132, 26 ME Rev. Stat.. §850.

²⁷ See, e.g., N.C. Gen. Stat. 50-B-5.5 and 95-270a.

²⁸ See, e.g., N.D. Cent. Code § 27-09.1-17; Conn. Gen. Stat. §54-85b.

²⁹ See, e.g., R.I. Gen. Laws § 12-28-10 (non-discrimination for seeking/obtaining protective order)

³⁰ *UNEMPLOYMENT INSURANCE FOR SURVIVORS OF DOMESTIC VIOLENCE — Fact Sheet For Advocates*, National Employment Law Project (May 2002), available at <http://www.nelp.org/docUploads/pub135.pdf> (last accessed 1/24/08).

³¹ See Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 Mich. J. Gender & L. 275, 304-310 (2006)(discussing various ADA issues surrounding domestic violence).

³² Comment, *Employer Liability For Domestic Violence In The Workplace: Are Employers Walking A Tightrope Without A Safety Net?*, 31 Tex. Tech L. Rev. 139 (2000); *Domestic Violence & Employment — Taking Leave to Care For a Family Member*, The Legal Aid Society of San Francisco, available at www.las-elc.org/00055784.DOC (last accessed 1/24/08).

³³ See, e.g., Maria Amelia Calaf, *Breaking The Cycle: Title VII, Domestic Violence, And Workplace Discrimination*, 21 Law & Ineq. 167 (Winter 2003).

The potential intrusion of domestic violence into the workplace raises other important issues employers must consider as well. These include issues like the “general duty clause” under OSHA and how domestic violence relates to a private employer’s obligation to provide a safe work environment³⁴, whether to seek an injunction to prevent a disgruntled spouse from accessing the employee’s work location³⁵, and the scope of workers compensation coverage if an employer does not act in some way or is deemed negligent in the workplace handling of a domestic abuse issue and violence occurs.³⁶ Potential tort³⁷ and negligence³⁸ based claims are also considerations for employers. Finally, as employers grapple with a response to this challenge, questions arise regarding policy development and scope.³⁹

C. Gender Identity and Expression — Expansion Efforts Continue

The issue of state law and policy expansion to cover gender identity and gender expression is not necessarily new, but it does continue to gain momentum so some discussion is warranted. By way of introduction, it is first important to understand the terminology. For purposes of addressing the topic, the term transgender is used “to mean a broad range of people who experience and/or express their gender differently from what most people expect — either in terms of expressing a gender that does not match the sex listed on their original birth certificate, or physically changing their sex. It is an umbrella term that includes people who are transsexual, cross-dressers or otherwise gender non-conforming.”⁴⁰ Gender identity is understood as a “person’s innate, deeply felt psychological identification as male or female, which may or may not correspond to the person’s body or assigned sex at birth (meaning what sex was listed on a

³⁴ See Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 Mich. J. Gender & L. 275, 316 (2006).

³⁵ See Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. Cal. Rev. L. & Soc. Just. 371, 374-375 (Spring 2007).

³⁶ See Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 Mich. J. Gender & L. 275, 313-316 (2006).

³⁷ See John E. Matejkovic, *Which Suit Would You Like? The Employer's Dilemma In Dealing With Domestic Violence*, 33 Cap. U. L. Rev. 309 (Winter 2004).

³⁸ See Stephanie L. Perin, *Employers May Have To Pay When Domestic Violence Goes To Work*, 18 Rev. Litig. 365 (Spring 1999).

³⁹ One excellent resource in this regard is the Corporate Alliance to End Partner Violence (<http://www.caepv.org/>), a nonprofit organization dedicated to preventing “partner violence by leveraging the strength and resources of the corporate community.” See <http://www.caepv.org/about/purpose.php> (last accessed 1/24/08).

⁴⁰ See *Transgender Americans: A Handbook for Understanding*, Human Rights Campaign Foundation (2005), available at http://www.hrc.org/documents/Transgender_handbook.pdf (last accessed 1/23/08).

person's birth certificate).”⁴¹ The term gender expression “[r]efers to all external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, physical characteristics and speech patterns.”⁴²

While state laws can and do vary, as of the time of this writing, at least 13 states plus Washington D.C. had some level of protection from discrimination on the basis of gender identity or expression.⁴³ The Transgender Law and Policy Institute also reports dozens of local laws and ordinances throughout the country have been enacted.⁴⁴ In addition, college campuses have been affected as this trend continues. The Gender Public Advocacy Coalition reports that some 150 campuses extend protection from discrimination based on gender identity and expression.⁴⁵ These protections are separate and apart from the cases that have allowed a Title VII theory of gender discrimination to be used in this context.⁴⁶ However, issues affecting transgender individuals go beyond merely the general recognition of non-discrimination in a non-discrimination policy, or prohibiting gender identity or gender expression discrimination in ordinary employment decisions like hiring. Many more issues can and do arise and employers should be prepared. To name just a few such issues, consider:

⁴¹ *Transgender Issues in the Workplace — A Tool for Managers*, Human Rights Campaign Foundation (2004), at p. 5, available at <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf> (last accessed 1/23/08).

⁴² *Id.* at p. 5, available at <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf> (last accessed 1/23/08) citing Currah, Paisley, Shannon Minter and Jamison Green. *Transgender Equality: A Handbook for Activists and Policymakers* (Washington, DC: The Policy Institute of the National Gay & Lesbian Task Force; San Francisco: The National Center for Lesbian Rights, 2000).

⁴³ The states are California, Colorado, Washington D.C., Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *See State Nondiscrimination Laws in the U.S.*, National Gay and Lesbian Task Force (9/17/07), available at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_09_07.pdf (last accessed 1/24/08).

⁴⁴ For a comprehensive listing through July 2007, *see Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws*, Transgender Law & Policy Institute and National Gay and Lesbian task Force (June 2007), available at http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_30_07.pdf (last accessed 1/24/08).

⁴⁵ About.com: *Gay Life, Universities with Gender Identity/Gender Expression Non-Discrimination Policies*, available at <http://gaylife.about.com/od/transgender/a/identitycollege.htm> (last accessed 1/24/08).

⁴⁶ *See, e.g., Smith v. City of Salem*, 378 F. 3rd 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F 3rd 729 (6th Cir. 2005); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006); *see also*, Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561 (2007); Jeffrey J. Nolan, “*Because of Sex*”: *The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U. L. 361 (2006).

- Employee privacy issues, particularly during a period of transition⁴⁷
- The possible need to adjust personnel and administrative records, and for public employers with public records laws, the implications of such changes⁴⁸
- Restroom access issue when full time gender presentation conflicts with the current biological state⁴⁹
- Locker room use⁵⁰
- Dress codes⁵¹
- Health insurance coverage⁵²

D. Wage and Hour Law — An Old Law with Renewed Interest

No employment update would be complete without referring to a clearly troubling pattern of renewed interest in claims under the Fair Labor Standards Act. The FLSA is the federal law governing, among other items, minimum wage and overtime. Much has been discussed over the past several years regarding the proliferation of misclassification issues (exempt or

⁴⁷ *Transgender Issues in the Workplace — A Tool for Managers*, Human Rights Campaign Foundation (2004), at p. 17, available at <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf> (last accessed 1/24/08).

⁴⁸ *Id.* at p. 18.

⁴⁹ Transgender Law Center, *Peeing in Peace — A Resource Guide for Transgender Activists and Allies* (2005), available at <http://transgenderlawcenter.org/pdf/PIP%20Resource%20Guide.pdf> (last accessed 1/24/08).

⁵⁰ *Transgender Issues in the Workplace — A Tool for Managers*, Human Rights Campaign Foundation (2004), at p. 18, available at <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf> (last accessed 1/24/08).

⁵¹ *Id.* at p. 19.

⁵² *Transgender Health and The Law: Identifying and Fighting Health Care Discrimination*, Transgender Law Center (July 2004, available at <http://www.transgenderlawcenter.org/pdf/Health%20Law%20fact%20sheet.pdf> (last accessed 1/24/08). Jody Marksamer and Dylan Vade, *Recommendations for Transgender Health Care*, Transgender Law Center available at <http://www.transgenderlaw.org/resources/tlchealth.htm> (last accessed 1/24/08).

nonexempt)⁵³, and these issues continue to proliferate, with class litigation becoming increasingly more popular (and expensive). Moreover, the costs associated with these claims are enormous. According the U.S. Department of Labor (DOL, its' Wage and Hour Division's enforcement data for Fiscal Year 2007 demonstrated that the 341,624 workers receiving recovered back wages is the second largest number since 1993, and the amount of those wages, \$220,613,703, is the highest ever.⁵⁴ Since FY 2000, DOL has recouped more than **\$1.25 billion** for nearly two million workers.⁵⁵ Consider:

- CVS Pharmacy Inc. agreed to pay more than \$226,000 in penalties and more than \$38,000 in back wages following investigation by DOL⁵⁶
- Merrill Lynch agreed to pay up to \$37 million to approximately 3,250 of its California stock brokers to settle claims that it failed to pay overtime wages⁵⁷
- DOL filed suit against Houston-based grocery chain to recover more than \$2 million dollars in overtime back wages⁵⁸
- DOL recovers nearly \$1 million in back wages for Hurricane Katrina workers⁵⁹
- Court orders Southern California home cleaning business to pay more than \$4.5 million in back wages and liquidated damages⁶⁰

⁵³ Susan E. McPherson and Matthew D. Fridy, *Fair Pay Exemptions for You and Your Client*, 66 Ala. Law. 269 (2005). Indeed, as to the exemption issue, perhaps the area with the most potential for employer liability is that of misclassification of IT workers as exempt, something difficult to meet given the agency's narrow interpretation of what constitutes exempt activity. See, e.g., WH Op. Ltr. 2006-42 (10/26/06).

⁵⁴ U.S. Department of Labor ESA News Release (12/28/2007), available at <http://www.dol.gov/opa/media/press/esa/ESA20071952.htm> (last accessed 1/24/08).

⁵⁵ *Id.*

⁵⁶ U.S. Department of Labor ESA News Release (12/10/2007), available at <http://www.dol.gov/opa/media/press/esa/ESA20071543.htm> (last accessed 1/24/08).

⁵⁷ *Merrill Lynch Settlement of FLSA Collective Action Draws Scrutiny of Broker Compensation Arrangements*, Jackson Lewis (2005), available at <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=836> (last accessed on 1/24/08).

⁵⁸ U.S. Department of Labor ESA News Release (10/09/2007), available at <http://www.dol.gov/opa/media/press/esa/esa20070926.htm> (last accessed 1/24/08).

⁵⁹ U.S. Department of Labor ESA News Release (9/19/07), available at <http://www.dol.gov/opa/media/press/esa/ESA20071347.htm> (last accessed 1/24/08).

- DOL sues Pittsburgh, Texas-based Pilgrim's Pride Corp. to recover more than \$3 million in back wages⁶¹

However, core compliance issues such as minimum wage and overtime are steadily increasing. Equally troubling is what may develop as new technology uses are layered on core compensable time principles. After the Supreme Court's decision in *IBT v. Alvarez*⁶², there has been speculation that a renewed interest in determine the duration of the work day. Expect developments on issues such as exactly when the work day starts for compensation purposes.⁶³

E. EEOC Caregiver Guidance — A Step Toward Embracing Family Responsibilities Discrimination?

In May, 2007, the EEOC issues two new policy based documents. Titled respectively the *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*⁶⁴ and *Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*⁶⁵, these two documents purport to assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under Title VII or the ADA. The EEOC's stated rationale for issuance is as follows:

Changing workplace demographics, including women's increased participation in the labor force, have created the potential for greater discrimination against working parents and others with caregiving responsibilities. The new guidance is intended to assist employers, employees, and Commission staff in determining whether discrimination against persons with caregiving responsibilities constitutes unlawful disparate treatment under federal EEO law.

⁶⁰ U.S. Department of Labor ESA News Release (8/30/07), available at <http://www.dol.gov/opa/media/press/esa/ESA20071313.htm> (last accessed 1/24/08).

⁶¹ U.S. Department of Labor ESA News Release (8/8/07), available at <http://www.dol.gov/opa/media/press/esa/ESA20071154.htm> (last accessed 1/24/08).

⁶² 126 S.Ct. 514 (2005). *Alvarez* was a "donning and doffing" case involving the determination of whether time spent putting on certain gear was compensable.

⁶³ See Ellen Kearns, *Questions That Remain Open After IBT v. Alvarez*, ABA (2006), available to members at <http://www.bna.com/bnabooks/ababna/annual/2006/18.pdf> (last accessed 1/24/08).

⁶⁴ Available at <http://www.eeoc.gov/policy/docs/caregiving.pdf> (last accessed 1/24/08).

⁶⁵ http://www.eeoc.gov/policy/docs/qanda_caregiving.html

The guidance is divided into five sections, with the main focus being the possible disparate treatment of individuals with caregiver responsibility. Within that section, the following categories of issues are discussed:

- sex-based disparate treatment of female caregivers, focusing on sex-based stereotypes
- stereotyping and other disparate treatment of pregnant workers
- sex-based disparate treatment of male caregivers, such as the denial of childcare leave that is available to female workers
- disparate treatment of women of color who have caregiving responsibilities
- disparate treatment of a worker with caregiving responsibilities for an individual with a disability, such as a child or a parent
- harassment resulting in a hostile work environment for a worker with caregiving responsibilities.

While disclaiming on its face that it is intended to create a new category of protection, the Guidance nonetheless is remarkably well matched with an emerging theme of Family Responsibilities Discrimination (FRD) being advanced in the courts with some success. As described by one commentator, “FRD occurs when an employee suffers discrimination at work based on unexamined biases about how employees with family caregiving responsibilities will or should act.”⁶⁶ It is a troubling trend⁶⁷, given that one study by the Center for WorkLife Law reports that “in the last decade (1996-2005), the number of family responsibilities discrimination (FRD) cases filed grew nearly 400% from the previous decade, from 97 cases to 481.”⁶⁸ The report also stated that based on the available data, the “mean award is \$768,976; the median just over \$100,000, and the majority (54%) are for more than \$100,000”. Claims for FRD typically

⁶⁶ Joan C. Williams and Cynthia Thomas Calvert, *Emerging Family Responsibilities Claims Under the Family and Medical Leave Act and Sex Discrimination Laws*, SM097 ALI-ABA 23 (May 2007).

⁶⁷ Joan C. Williams, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 Lab. Law. 293 (Winter/Spring 2007); Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Cases*, 763 PLI/Lit 333 (2007); Joan C. Williams and Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. Rev. 171 (2006).

⁶⁸ Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities*, Center for WorkLife Law, University of California Hastings College of the Law (7/6/06), available at http://www.uchastings.edu/site_files/WLL/FRDreport.pdf (last accessed 1/24/08).

arise under either a Title VII theory⁶⁹ or as an interference claim under the FMLA⁷⁰, although other laws have been implicated as well.⁷¹ This continues to be an area to watch.

F. EEOC Retiree Rule — Agency Change in Approach

An employment law update would not be complete without at least brief mention of the EEOC's issuance of final rules on the issue of retiree health care. On December 26, 2007, the EEOC published its final retiree health rule.⁷² Under this rule, the EEOC creates a narrow regulatory exemption from the prohibitions of the ADEA in order to allow “employers who provide retiree health benefits to continue the practice of coordinating those benefits with Medicare, without ensuring that Medicare eligible retirees are receiving the same benefits as younger retirees.”⁷³ As explained by the EEOC, “[s]ome employers coordinate with Medicare by supplementing the Medicare benefit; others simply provide retirees under age 65 with health insurance to “bridge” the gap between the time they retire and the time they become eligible for Medicare.”⁷⁴ The issue of retiree health care is significant, and the original *Erie County* decision⁷⁵ that started the debate and led to this point has sparked much discussion on the implications if coordination were not to be allowed.⁷⁶

⁶⁹ See, e.g., *Timothy v. Our Lady of Mercy Medical Center*, 2004 WL 503760 (S.D.N.Y. 2004); *Lehmuller v. Inc. Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996).

⁷⁰ See, e.g., *Stansfield v. O'Reilly Automotive*, 2006 WL 1030010, 98 Fair Empl. Prac. Cas. (BNA) 33 (S.D. Tex. 2006); see also, Carmelyn Malalis and Linda A. Meilan, *A Crackdown on Caregiver Discrimination*, 43-AUG Trial 32 (August 2007).

⁷¹ See, e.g., *Smith v. Alexander & Alexander, Inc.*, 25 F. Supp. 2d 404 (S.D.N.Y. 1998)(ADA, FMLA, ERISA violations alleged); Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Cases*, 763 PLI/Lit 333 (2007).

⁷² 72 Fed. Reg. 72938-72945 (12/26/07).

⁷³ See *Questions and Answers About the EEOC's Retiree Health Rule*, available at http://www.eeoc.gov/policy/docs/qanda_retireehealthrule.html (last accessed 1/24/08).

⁷⁴ *Id.*

⁷⁵ *Erie County Retirees Assn. v. County of Erie, Pa.*, 220 F. 3rd 193 (3rd Cir. 2000).

⁷⁶ See, e.g., Larry Grudzien, *The Great Vanishing Benefit, Employer Provided Retiree Medical Benefits: The Problem and Possible Solutions*, 39 J. Marshall L. Rev. 785 (Spring 2006); Michael A. Pavlick, *A Bridge Too Far: Can the EEOC's New Rule Regarding Retiree Medicare Bridge Programs Survive Judicial Scrutiny?*, 2005 WLNR 17004470 (2005); Christopher E. Condeluci, *Winning the Battle but Losing the War: Purported Age Discrimination May Discourage Employers From Providing Retiree Medical Benefits*, 35 J. Marshall L. Rev. 709 (2002).

These rules will not end the debate as AARP vows fight on. As noted by my co-presenter, at the time of this writing, a petition for certiorari was pending with the Supreme Court in November of 2007 to review the Third Circuit's decision in the related litigation, *American Association of Retired Persons v. E.E.O.C.*, 489 F. 3d. 558 (3d Cir. 2007), *petition for cert. filed*, 76 USLW 3288 (U.S. Nov. 19, 2007) (No. 07-662).

G. Volunteers — New Issues on the Radar Screen

Two issues come to mind on the issues of volunteers on campus. The first of these is suitability, that is, who is volunteering and is this person creating a liability for the institution. Second, is the volunteer arrangement appropriate from a legal standpoint based on principles arising under the Fair Labor Standards Act. Some comment on each of these issues follows.

On the issue of screening, much has already been said about the use of background checks on faculty and staff in higher education, so this reference serves merely as a notation that the issue continues to be fodder for discussion.⁷⁷ Moreover, the next iteration of campus background checks, that of students in the admissions context, is beyond the scope of this employment law update. Rather, mention is made of the issue of background checks in the context of a subset of the college and university community regarding whom little has been discussed, that is, campus volunteers. On any college campus, volunteers can proliferate, offering valuable institutional support at little or no cost with interest and enthusiasm. As such, volunteers are a valuable resource. But what about institutional liability for volunteers? In recent years, some effort has been made to examine this issue in some detail in the context of a youth setting⁷⁸ and also as a result of some of the clergy scandals⁷⁹, with a general trend toward the screening of volunteers working with children. In that regard, the liability theories employed when something happens are typically either that of vicarious liability⁸⁰ and also negligence principles⁸¹, but it cannot be

⁷⁷ For a summary of the issues surrounding background checks in general, see Barbara A. Lee, *Who Are You? Fraudulent Credentials and Background Checks in Academe*, 32 J.C. & U.L. 655 (2006).

⁷⁸ See, e.g., Mark C. Lear, *Just Perfect for Pedophiles? Charitable Organizations That Work With Children and Their Duty to Screen Volunteers*, 76 Tex. L. Rev. 143 (November 1997).

⁷⁹ Morgan Fife, *Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations*, 2006 B.Y.U.L.Rev. 569 (2006).

⁸⁰ See, e.g., *Southport Little League v. Vaughn*, 734 NE 2d 261 (Ind.Ct.App.2000)

⁸¹ See *Golden Spread Council v. Akins*, 926 S.W. 2d 287 (Tex. 1996)(rejecting application of negligent hiring, but allowing case to proceed based on finding duty existed on part of local council); *Broderick v. King's Way Assembly of God Church*, 808 P. 2d 1211 (Alaska 1991)(failure to properly screen volunteer demonstrated lack of due care); *Big Brother/Big Sister of Metro Atlanta v. Terrell*, 359 S.E. 2d 241 (Ga.Ct.App. 1987)(factually finding no negligence based on actions taken in screening by entity).

said the law is well settled in this regard.⁸² It is, however, one to watch for as this area continues to evolve.

The second issue, that of structuring volunteer arrangements, is also worthy of brief comment. Within the past several years ago, DOL issued a series of opinion letters intended to offer guidance on this issue. In general, the application of the FLSA is dependant in the first instance on the existence of an employment relationship. To that end, therefore, relationships such as those between an institution and an independent contractor do not implicate the law.⁸³ For public employers, DOL's regulations provide generally that an individual who "performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for the services rendered, is considered to be a volunteer during those hours."⁸⁴ The regulations further provide that in order to meet the definition of a volunteer, the individual must:

- serve as a volunteer for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation (although expenses, reasonable benefits, or a nominal fee may be provided)⁸⁵; and
- offer their services freely and without pressure or coercion, direct or implied, from an employer.⁸⁶

In addition, the regulations generally preclude an individual employed by a public agency from volunteering in the same capacity⁸⁷ in which they are employed.⁸⁸ While these regulations only

⁸² *Supra*, note 79.

⁸³ This assumes that the independent contractor relationship does in fact meet the applicable criteria. *See, e.g.*, The DOL's fact sheet explaining the "economic realities" test use to determine employee status, available at www.dol.gov/elaws/esa/flsa/scope/ee14.asp (last accessed 1/24/08) and IRS guidance on this same topic, available at <http://www.irs.gov/govt/fslg/article/0,,id=110344,00.html> (last accessed 1/24/08).

⁸⁴ *See* 29 C.F.R. §553.101(a); *see also*, 29 C.F.R. §553.104 (describing appropriate circumstances for private individuals to volunteer without implicating the FLSA).

⁸⁵ *See* 29 C.F.R. §553.101(b).

⁸⁶ *See* 29 C.F.R. §553.101(c).

⁸⁷ The regulations provide clarification, describing the following as examples of volunteer services which do not constitute the same type of services: "A city police officer who volunteers as a part-time referee in a basketball league sponsored by the city; an employee of the city parks department who serves as a volunteer city firefighter; and an office employee of a city hospital or other health care institution who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours as an act of charity." *See* 29 C.F.R. §553.103(c); *see also*, WH Op. Ltr 2006-40 (10/20/06), WH Op. Ltr 2006-28 (8/7/06), and WH Op. Ltr. 2006-2 (1/13/06), all available at <http://www.dol.gov/esa/whd/opinion/flsa.htm>

apply to volunteers at public agencies, DOL does permit the use of volunteers the use of volunteers in private non-profit organizations using similar considerations, albeit with a higher level of scrutiny as to the factual circumstances.⁸⁹

The regulations do in concept permit (and a recent opinion letter reaffirms) that the payment of expenses and even a nominal fee to volunteers as a general rule will not cause a change in status to “employee”, but has cautioned that ‘whether “the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the FLSA can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.”⁹⁰

On a somewhat related volunteer issue, the practice of employers in recent years allowing their employees to “volunteer” at local agencies unconnected to their employer but during work time with no loss of pay are becoming increasingly common. Keep in mind that if you permit such an arrangement, the DOL’s perspective is that it must meet certain standards in order to not convert any off duty hours into compensable time.⁹¹ A final related “volunteer” issue to be caution of is the use of students in externships and whether those arrangements can in fact meet the test of an employment relationship under the FLSA. Within the past several years, DOL did take an opportunity to reaffirm its reliance on six factors that must be met to avoid FLSA coverage, as follows:⁹²

- The training is similar to what would be given in a vocational school or academic educational instruction;

⁸⁸ See 29 C.F.R. §553.101(d). On extremely rare occasions, a situation may arise that is an exception to this requirement, such as in 2005 when DOL permitted volunteer deputy sheriffs to perform paid work for one week per year, but this is very much the exception and should not be taken as a general rule. See WH Op. Ltr. 2005-32 (9/9/05), available at http://www.dol.gov/esa/whd/opinion/FLSA/2005/2005_09_09_32_FLSA.pdf (last accessed 1/24/08).

⁸⁹ See, e.g., WH Op. Ltr. 2002-9 (10/7/02) available at http://www.dol.gov/esa/whd/opinion/FLSA/2002/2002_10_07_9_FLSA.pdf (last accessed 1/24/08); WH Op. Ltr. 1998 WL 1147729 (9/28/98).

⁹⁰ See 29 C.F.R. §553.106; WH Op. Ltr. 2005-51 (11/10/05), available at http://www.dol.gov/esa/whd/opinion/FLSA/2005/2005_11_10_51_FLSA.pdf ; see also, WH Op. Ltr. 2006-28 (8/7/06), available at http://www.dol.gov/esa/whd/opinion/FLSA/2006/2006_08_07_28_FLSA.pdf (last accessed 1/24/08).

⁹¹ See WH Op. Ltr. 2006-4 (1/27/06), available at http://www.dol.gov/esa/whd/opinion/FLSA/2006/2006_01_27_04_FLSA.pdf (last accessed 1/24/08).

⁹² See WH Op. Ltr. 2006-12 (4/6/06), available at http://www.dol.gov/esa/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.pdf (last accessed 1/24/08).

- The training is for the benefit of the trainees or students;
- The trainees or students do not displace regular employees, but work under their close observation;
- The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded;
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

In closing, volunteer issues are gaining closer scrutiny, and this is an important issue to monitor.

H. The Era of Accountability and Compliance

Over the past year, it seemed impossible to pick up a newspaper and not see, at least every few days, some new scandal or issue relating to corporate ethics. The lead story everyone followed embroiled the entire financial aid industry in a highly public examination of loan practices and institutional relationships with lenders. That fallout continues, with new regulations having been adopted on financial aid⁹³ and investigations still ongoing.⁹⁴

What was unique in this circumstance was the emergence of an intense focus on what has come to be known institutional conflict of interest. Historically, institutions often thought of conflict of interest in very individualistic terms, that is, employees must not accept gifts; employees must not self deal with their institution, and other individual prohibitions. Laws on these issues abound, with a number of states having ethics codes that govern public employers and their employees⁹⁵, including colleges and universities. In addition, following the passage of Sarbanes Oxley, some states began adopting similar measures.⁹⁶ Then the financial aid crisis came, and the new dimension of institutional conflict came to the forefront, with the suggestion made by some that colleges and universities had been reaping a benefit on the backs of students in a way

⁹³ See 72 FR 62013-62034 (11/1/07).

⁹⁴ See, e.g., Paul Basken, *Education Department Seeks More Information From 55 Colleges on Dealings With Student Lenders*, The Chronicle of Higher Education (11/1/07), available to members at <http://chronicle.com>.

⁹⁵ See, e.g., Chapter 112, Part III, *Fla. Stat.*,

⁹⁶ Todd L.C. Klipp, *The "SOX" Are Coming: Sarbanes-Oxley-Style Accountability Measures*, NACUA Annual Conference (2006).

that was somehow secretive and inappropriate. Soon it seemed there came the casting of a broader net, with inquiries initiated on practices like study abroad⁹⁷ with perhaps a hint that student debit cards⁹⁸ may also be an issue.

But what does this mean in the context of an employment law update. Quite simply, as institutions adjust to this new paradigm shift where conflict of interest has been broadened, it is important not to lose sight of the individual conflict issues and the attendant challenges associated with maintaining an ethical workplace. A policy is a good place to start, but what was learned in the financial aid crisis is that a policy alone without some monitoring or reporting mechanism will likely not be sufficient to avoid the individual conflict issues like those which surfaced during the financial aid investigation. Moreover, reporting methods must be effective and protections against retaliation robust if the institution wishes to maintain an effective program. Achieving true accountability and avoiding conflict continue to be “best practice” issues requires institutional commitment and effective management programs.⁹⁹

The views expressed herein are those of the author only. The information contained in these materials is intended as an informational report on legal issues and developments of general interest. It is not intended to provide a complete analysis or discussion of each subject covered. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format.

⁹⁷ See, e.g., Elizabeth Redden, *Study Abroad Policies and Practices*, Insider Higher Ed (10/9/07), available at <http://www.insidehighered.com/news/2007/10/09/abroad> (last accessed 1/24/08).

⁹⁸ Dean Foust, *Even Cozier Deals on Campus*, Business Week (10/1/07), available at http://www.businessweek.com/magazine/content/07_40/b4052059.htm?chan=bschools_undergraduate+business+programs+---+new+design_school+life (last accessed 1/24/08).

⁹⁹ See *Principles for Good Governance and Ethical Practices — A Guide for Charities and Foundations*, Panel on the Nonprofit Sector (October 2007), and available at http://www.nonprofitpanel.org/report/principles/principles_guide.pdf (last accessed 1/24/08)(containing recommendations on conflict of interest, whistleblowing, Board independence, loans to Board members, and travel by individuals accompanying someone on business travel for the organization).