



OSB

Labor &
Employment
Law Section

Fourth Annual Labor and Employment Law Boot Camp

Sponsored by the Labor & Employment Law Section

Thursday, June 7, 2018, 8:15 a.m.–5 p.m.

Friday, June 8, 2018, 8:30 a.m.–5 p.m.

14.75 General CLE credits

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AGENDA

OSB LABOR AND EMPLOYMENT SECTION BOOT CAMP

June 7-8, 2018

Schwabe, Williamson & Wyatt
1211 SW Fifth Ave., Suite 1900
Portland, Oregon 97205
June 7-8, 2018

Thursday June 7, 2018

- 8:15 **Introduction and Opening Remarks**
- 8:30-9:30 **Non-competition, Non-solicitation and Severance Agreements**
Jeff Edelson, Steffan Alexander
Markowitz Herbold PC
- 9:30 – 10:30 **Overview of State and Federal Anti-Discrimination Laws**
Scott Hunt, Busse and Hunt
Karen L. O'Connor, Stoel Rives
- 10:30 – 10:45 Break
- 10:45 – 11:45 **Overview of State and Federal Anti-Discrimination Laws (continued)**
- 11:45 – 12:30 Lunch (provided)
- 12:30-1:30 **Nuts and Bolts of Wage and Hour Laws**
Clarence Belnavis, Fisher Phillips LLP
Karen A. Moore, Schuck Law LLC
- 1:30 – 2:30 **Section 1983 Employment Claims**
Matthew Ellis, Law Office of Matthew Ellis
Jackie Kamins, Multnomah County Counsel

- 2:30 – 2:45 Break
- 2:45 – 4:00 **Oregon and Federal Disability Laws**
Stephen Brischetto, Law Offices of Stephen Brischetto
William E. Weiner, Lane Powell
- 4:00 – 5:00 **Employment Relations Board: Jurisdiction, Practice
and Procedure**
Adam L. Rhynard, Board Chair,
Oregon Employment Relations Board
-

Friday, June 8, 2018

- 8:30 – 10:00 **Discovery in Labor and Employment Law**
Talia Stoessel, Bennett Hartmann Morris and Kaplan
Elizabeth A. Falcone, Ogletree Deakins
- 10:00 – 10:15 Break
- 10:15 – 11:15 **Oregon Public Sector Labor Law**
Jennifer Chapman, Oregon AFSCME
Adam Collier, Ogletree Deakins
- 11:15 – 12:15 **Nuts and Bolts of Labor Law: NLRB Overview**
Jessica Dietz, National Labor Relations Board
- 12:15 – 12:45 Lunch Provided
- 12:45 – 1:45 **Nuts and Bolts of Labor Law: Private Sector Labor Law**
Kyle T. Abraham, Barran Liebman LLP
Jason Weyand, Tedesco Law Group

- 1:45 – 2:30 **Nuts and Bolts of Labor Law continued: Overview of the Collective Bargaining Process**
- 2:30 – 2:45 Break
- 2:45 – 3:45 **BOLI Civil Rights Process Overview**
Chris Lynch, Oregon Bureau of Labor and Industries
- 3:45 – 5:00 **Overview of Oregon and Federal Leave Laws**
Karen Davis, Senior Employment Attorney, Vigilant

PROGRAM FACULTY

2018 Labor and Employment Law Boot Camp

KYLE ABRAHAM

Kyle Abraham represents employers in both traditional labor and employment law matters. He works with businesses of all sizes, government entities, and not-for-profit organizations. Kyle's labor practice includes negotiating collective bargaining agreements, advising employers on labor matters, and representing employers before labor arbitrators, the National Labor Relations Board, and the Oregon Employment Relations Board. In his employment law practice, Kyle works closely with employers to develop effective workplace policies, and he provides proactive advice and counsel. Prior to joining Barran Liebman, he served as a Judge Advocate General (JAG) in the Department of the Air Force, and he represented the Air Force in labor and employment matters around the world.

STEFFAN ALEXANDER

Steffan Alexander is a trial lawyer and shareholder at Markowitz Herbold. He represents a broad range of clients from individuals, executives, and government officials, to small businesses and multi-million dollar companies. Steffan helps clients successfully resolve a wide variety of complex litigation disputes including breach of contract, breach of noncompetition and non-solicitation agreements, employment matters, intellectual property and trademark infringement violations, breach of corporate fiduciary duties, shareholder oppression and derivative actions, products liability claims, professional negligence suits, and estates and trusts disputes.

Before joining Markowitz Herbold, Steffan was in-house litigation counsel for Infinite Energy, Inc., a multi-state energy company. While at Infinite Energy, he litigated the company's contract disputes, collections claims, and employment matters. Steffan's experience working in-house affords him a client's business perspective in making critical financial and tactical decisions related to litigation. Steffan also served as an Assistant State Attorney. As a prosecutor, he was the lead trial lawyer in more than twenty jury trials and handled over one thousand varied felony and misdemeanor cases.

CLARENCE M. BELNAVIS

Clarence Belnavis is a partner in the Portland office of Fisher and Phillips. He has substantial experience handling various types of employment litigation including disability, racial, and gender discrimination; retaliation; sexual harassment; and wrongful discharge. He also represents employers in wage and hour claims, employment class actions and traditional labor matters. Clarence began his legal career serving as a law clerk in the Office of the General Counsel for the Department of the Navy, and he served as a judicial intern for Judge A. Burnett of the District of Columbia Superior Court. He has been named one of Portland's "Top 40 Under 40" by the *Portland Business Journal*, and he has been repeatedly recognized in *Oregon Super Lawyers* for his work in labor and employment law. Clarence has been listed in *Chambers USA, America's Leading Business Lawyers* since 2006 and he has been listed in *The Best Lawyers in America* since 2009. In 2011 Clarence was honored as a "Convocation on Equality Champion" in

recognition of the diversity work that he has been engaged in during his career. Clarence has served as the president of both the Oregon Chapter of the National Bar Association and the Association of Oregon Black Lawyers. He is a member of the Owen M. Panner Chapter of the American Inns of Court and a former coach of the Jefferson High School (Portland, OR) Mock Trial Team.

STEPHEN L. BRISCHETTO

Stephen L. Brischetto is a graduate of the University of Notre Dame (1974) and the Notre Dame Law School (1977). Mr. Brischetto has been in private practice since 1983. His practice focuses on employment law and civil rights. He has both a trial and appellate practice in federal and state court. His web-site located at www.employmentlaworegon.com provides a more complete description of his background and his practice.

JENNIFER K. CHAPMAN

Jennifer Chapman is the Senior Legal Counsel at Oregon AFSCME, where she handles grievance arbitrations, unfair labor practice complaints, and other litigation in addition to providing routine advice. Jennifer grew up in Texas, but moved to Oregon in 2000 to attend law school at Lewis & Clark. Jennifer began her legal career at an insurance defense law firm, where she handled personal injury and construction defect lawsuits. She was subsequently hired by the Oregon Department of Justice (DOJ), where she spent several years handling state plaintiff's work, collections, regulatory compliance cases, and child support matters. Jennifer's varied background has given her experience with a diverse range of legal subjects, personalities, and forums. Since coming to work for Oregon AFSCME, Jennifer has advised members on a variety of FMLA, OFLA, and ADA issues. She also provides regular trainings for members and union leaders on those subjects.

ADAM S. COLLIER

Adam is a partner with Ogletree, Deakins, Nash, Smoak & Stewart, P.C. and has been practicing labor and employment law for 20 years. Adam enjoys helping clients navigate complicated labor issues and arrive at a plan for workable labor-management relations. He represents both public and private sector employers in collective bargaining negotiations, Employment Relations Board (ERB) proceedings, NLRB proceedings and labor arbitrations. He has successfully represented numerous public sector clients in interest arbitration cases.

Adam partners closely with his clients to help them avoid trouble, offering ongoing preventative labor and employment law advice. He advises on labor contract administration, union organizing campaigns, employment discrimination and personnel policies and procedures. Adam is one of the four overall editors of the Oregon State Bar Continuing Legal Education manual on Labor and Employment Law (Public Sector) and is a contributing editor to The Developing Labor Law

KAREN DAVIS

Karen Davis is a senior employment attorney at Vigilant (www.vigilant.org), where she has exclusively advised private employers on employment and labor issues since 1994. She edits and writes for Vigilant's employment law newsletter as well as legal guides, model forms, and model

policies available on the Vigilant member website. Karen is an internal resource for other Vigilant attorneys and staff, in addition to advising Vigilant member companies on a broad array of employment-related topics such as family and medical leave, disability **accommodation**, harassment, discrimination, labor relations, and wage and hour. She also oversees Vigilant's affirmative action services for employers with federal contracts. She is an active participant and past chairperson and secretary for the Northwest Industry Liaison Group in Seattle, which facilitates communication between industry and government on affirmative action issues. Karen is a member of the Oregon State Bar.

JESSICA DIETZ

Jessica Dietz was appointed as the Officer in Charge of the NLRB Subregion 36 office in April 2015, after working as a Field Examiner in the Portland office for nine years. She leads the Subregion's outreach program and is a frequent speaker on various NLRB topics. Jessica graduated from Lewis & Clark College in 2001 with a Bachelor of Arts in International Affairs and received a Master of Business Administration from Portland State University in 2003. Prior to joining the NLRB, Jessica worked for several years at the U.S. Railroad Retirement Board.

JEFF EDELSON

Jeff Edelson has been a shareholder at Markowitz Herbold PC since 1995. He represents individual and corporate clients in business, real estate, construction and employment disputes with an emphasis on competitive injury, trade secrets and other business torts and contracts. While much of his practice is devoted to helping his clients avoid litigation, such as counseling businesses and employees on noncompetition agreements and trade secrets, Jeff is an aggressive and gifted trial lawyer when litigation becomes necessary. Jeff relishes opportunities to bring and defend against temporary restraining orders and preliminary injunctions, and has proven adept at recovering attorney fees for his clients after defeating or prosecuting claims for trade secret violations, contract breaches and securities law violations. Jeff is ranked by the publications Best Lawyers in America and Oregon Super Lawyers as a top Portland attorney in commercial litigation and labor and employment law. He is also recognized by Benchmark Litigation Plaintiff's edition as a Litigation Star. After graduating from the Villanova School of Law, Jeff served as a staff attorney for Delaware County Legal Assistance Association in Chester, Pennsylvania, where he represented indigent clients primarily in bankruptcy, public housing and healthcare. In 1988, he became a member of the Oregon State Bar and served as a staff attorney for Marion-Polk Legal Aid Service in Salem, Oregon. From 1988 to 1989, Jeff served as law clerk to U.S. District Court Magistrate Judge George E. Juba. In 1991, Jeff served as law clerk to U.S. District Judge Owen M. Panner, until joining Markowitz Herbold later that year.

MATTHEW C. ELLIS

Matthew Ellis graduated from Emerson College in 1998 with a BFA in Acting. After spending several years working as a rock music critic by day and a struggling professional actor by night in Boston and New York, he attended Lewis and Clark Law School, which he graduated from in 2007. Since then, his law practice has focused on plaintiff-side employment. He has served as an Executive Member of both the MBA Professionalism Committee and of the Oregon State Bar Civil Rights Section. He is also a team leader in the Owen M. Panner American Inn of Court

and, since 2013, has co-chaired the Employment Section of the Oregon Trial Lawyers Association.

ELIZABETH FALCONE

Elizabeth Falcone is a Shareholder with Ogletree, Deakins, Nash, Smoak & Stewart, P.C. Ms. Falcone represents private and public employers in all aspects of employment law, including wage/hour matters, wrongful termination, discrimination, and harassment litigation. She has experience defending class action cases, as well as single and multi-plaintiff cases. She has tried cases for employers in state and federal courts. She also has experience with appeals, prevailing on employment cases before the Oregon Court of Appeals, the California Courts of Appeal, and the Ninth Circuit. Based on the breadth of her experience and her achievements, in April 2016, Law360 selected Ms. Falcone from among over 1,000 nominees as one of the top lawyers in the United States under the age of 40. She was one of just 7 lawyers nationwide selected in the Employment Law practice area. She has been listed in Best Lawyers since 2015, and has been selected for inclusion in Super Lawyers, Rising Stars, starting in 2009. She received her undergraduate degree in English, with honors, from Northwestern University, and her law degree from New York University.

SCOTT N. HUNT

Mr. Hunt has been partner with Busse & Hunt since 1997. Mr. Hunt represents employees in wrongful discharge claims and all types of discrimination, harassment, retaliation and whistleblowing actions as well as medical leave claims and wage claims. In 1999 he argued *Albertson's v. Kirkingburg*, a seminal disability discrimination case, before the United States Supreme Court. Since then his primary focus has been on disability law. He has also argued before the Washington Supreme Court, the Oregon Court of Appeals, and the Ninth Circuit Court of Appeals. Many of those cases have resulted in significant appellate court rulings, including *Head v. Glacier Northwest*, 413 F.3d 1053 (9th Cir. 2005).

Mr. Hunt has been listed in *The Best Lawyers in America* for Labor and Employment Law, since 2007. He has been selected by his peers for inclusion in Oregon *Super Lawyers* from 2007 to the present, which is limited to only 5% of the attorneys in Oregon. He is currently listed in Oregon *Super Lawyers* Top 50 attorneys. Martindale-Hubbell has awarded him an "AV rating", its highest for legal ability and ethics. In addition to his trial and appellate practice, Mr. Hunt is active in the Oregon State Bar continuing legal education program. He co-authored the "Reinstatement Rights of Injured and Disabled Workers" chapter of Workers Compensation (Oregon CLE, 1994), with his now partner, Richard C. Busse, and chapters in other Oregon State Bar publications.

In addition to speaking at continuing legal education seminars, his bar activities include service on the following committees: Disability Section Executive Committee (2000-2002); Uniform Civil Jury Instructions Committee (2004 through 2006); the Civil Rights Section Executive Committee (2007 to 2009); and the Labor and Employment Section Executive Committee (2005 through 2006 and 2008 to the present).

In 2010 he was appointed to The Bench and Bar Commission on Professionalism and served as Chair of the Commission in 2013. In 2014, Mr. Hunt was elected into *The College of Labor and Employment Lawyers*, an international organization. Recently he was selected by *The Best Lawyers in America* as Portland, Oregon's 2016 "Lawyer of the Year," for the category of "Employment Law-Individuals," and as Portland, Oregon's 2017 "Lawyer of the Year," for the category "Litigation – Labor and Employment."

JACQUELINE KAMINS

Jackie Kamins has spent most of her career representing governments in 1983 litigation. She is currently a Senior Assistant County Attorney at Multnomah County, representing the county in 1983 cases in the trial and appellate courts. Prior to that, she spent nearly a decade as an Assistant Attorney General in the Trial Division of the Oregon Department of Justice. During that time she represented the state in hundreds of section 1983 cases and supervised the section 1983 team. She attended college at Columbia University and law school at the University of Virginia School of Law. She clerked for Judge Kim McLane Wardlaw on the Ninth Circuit Court of Appeals where she routinely advocated for the plaintiff in 1983 cases.

CHRIS LYNCH

Chris Lynch is the Portland Operations Manager for the Bureau of Labor and Industries, Civil Rights Division. He is a former BOLI investigator and also worked as the Program Coordinator for the Division's Technical Assistance unit. In his former roles, he was charged with investigating employment and housing discrimination claims and advising employers on how to comply with state and federal discrimination laws. He currently oversees the work of the Portland investigative team.

KAREN A. MOORE

Karen A. Moore is an attorney with Schuck Law, LLC. For over 10 years, Karen has represented over 100,000 employees in wage and hour cases, both individually and in class actions. Karen has successfully litigated wage and hour cases in Oregon State Court, Federal Courts, and in arbitration.

KAREN L. O'CONNOR

Karen O'Connor is a partner in the Labor and Employment group at Stoel Rives, LLP. Her practice includes counseling and litigation on complex employment issues including leave laws, workplace harassment and discrimination, discipline and documentation, and drug and alcohol issues. She represents clients before Oregon and Washington state and federal courts and in administrative proceedings. Karen co-teaches in the human resources program at Portland State University and is a frequent speaker in the community.

Before joining Stoel Rives, Karen was a partner at Barran Liebman LLP (1999–2012), an associate at Foster Pepper & Shefelman LLP (1997-1999), and served as a judicial clerk to the Honorable Malcolm F. Marsh, U.S. District Court for the District of Oregon (1995-1997). - See more at: <http://www.stoel.com/showbio.aspx?Show=9107#sthash.XJm8Utfo.dpuf>

ADAM RHYNARD

Adam is the Chairperson of the Oregon Employment Relations Board. Adam was first appointed to the ERB by the Governor as a Board Member effective March 15, 2013. He was reappointed to a four-year term effective October 1, 2015, and subsequently was appointed as the Chairperson effective October 1, 2016. Before being appointed to the ERB, he served as a staff attorney for the Oregon Workers' Compensation Board. Before that, he practiced extensively in the areas of labor, employment, and campaign finance law, primarily in New York. He received his J.D. from Northeastern University School of Law, and his B.F.A. and M.A. from the University of Arizona.

TALIA Y. STOESSEL

As a partner at Bennett, Hartman, Morris, & Kaplan, LLP, Talia Stoessel represents unions and individuals in employment litigation and labor law matters as well as ERISA trust funds in benefits collection matters. Talia's employment litigation practice focuses primarily on discrimination, retaliation, whistleblower, and disability claims, with an emphasis on serving LGBTQ communities. Talia is licensed in both Washington and Oregon and has been rated as an Oregon "Rising Star" since 2016. Prior to her time at BHMK, Talia worked as General Counsel for the International Union of Operating Engineers, Local 701. Talia graduated from Northeastern University School of Law and earned her B.A. in Psychology from the University of California, Santa Cruz. Talia has served on the board of the Labor and Employment Relations Association as well as OGALLA, the LGBTQ Bar Association of Oregon.

WILL WEINER

Will Weiner is an attorney in the Portland office of Lane Powell, where he handles employment litigation, strategic HR consulting, and employment contracts on behalf of employers. Will handles all aspects of employment litigation up through and including trial in a wide range of issues, such as discrimination, failure to accommodate, harassment, retaliation, breach of contract, leave interference, and wage and hour violations. Will also advises companies regarding complex HR issues and high potential exposure employment events, including discharge and discipline, mass layoffs, employee leaves, whistleblowing investigations, worker classification, wage and work hours, and preventative non-discrimination and anti-harassment practices. In addition, he regularly drafts offer letters, employee handbooks, separation agreements, non-competes, and other employment-related contracts and policies for clients. Will is licensed to practice law in both California and Oregon and regularly represents companies with multi-state workforces. Before joining Lane Powell in 2015, Will practiced employment law in Los Angeles with Jackson Lewis PC.

JASON M. WEYAND

Jason Weyand has been a partner with the Tedesco Law Group since February 2017. Jason specializes in representing public and private sector unions in all aspects of labor relations, but also represents individual clients in employment and licensing matters.

Jason earned his B.A. from Oregon State University and his J.D. from the University of Oregon School of Law. After law school, he served as an ERISA/Bankruptcy attorney in the Office of the General Counsel of the Pension Benefit Guaranty Corporation. This federal agency in Washington, D.C. is responsible for protecting and insuring the defined pension plans of American workers in the private sector. While working for the federal government, Jason became active as a steward in his local union, ultimately leading him to accept a position as Legal Counsel with Oregon AFSCME in 2004. He served in that position until the Governor appointed him to the Oregon Employment Relations Board in 2012.

Non-competition, Non-solicitation and Severance Agreements

Jeff Edelson and Steffan Alexander, *Markowitz Herbold PC*

Evaluating, Prosecuting, and Defending Non-compete and Trade Secret Litigation

Jeffrey M. Edelson
and
Steffan Alexander
Markowitz Herbold PC

I. Non-competition and non-solicitation agreements

1. Is there an enforceable non-competition or non-solicitation agreement?

- What law governs the dispute – ORS 15.320; Restatement (Second) of Conflict of Laws §§ 187, 188
- Forum selection issues
- Transfer of venue – *forum non conveniens*; 28 U.S.C. § 1404(a); first-to-file
- Flow chart – ORS 653.295 (pre and post-2008; and post-2016)
- Non-solicitation agreements – partial time and geographic restriction, good consideration, and reasonable and fair protection balanced against public interest
- Enforceability of provisions that require repayment of costs for employee training, or reduced value of shares for departing shareholders
- Assignability – competing rules, but best practices for assignment is notice of assignability in the contract, or in the absence of such provision, with the parties' consent

2. **Is there anything worth protecting?**
 - Expense
 - Risk of losing
 - Better ways to protect business
 - Is the employee capable of hurting business
3. **What can the employee do when there is an enforceable non-competition or non-solicitation agreement?**
 - Follow the terms
 - Move to California or Washington?
 - Negotiate carve outs
 - Indemnify and defend from new employer
4. **What can the employee do when it is not enforceable?**
 - Negotiate for release or modification
 - Letter from employee's lawyer to new employer
 - Declaratory relief action – voidable on fast track
 - Estoppel letter to former employer
 - Arbitration/mediation on fast track
5. **What can employee do to reduce risk of being sued, and be in a better position to defend against a suit?**
 - Return data and records
 - Destroy nothing

- Stay away from the office after hours
- Don't copy data or records
- Invite IT department to cleanse personal devices

6. What are some of the most significant cases on these topics?

- *Actuant Corp. v. Huffman*, CV-04-998-HU, 2005 WL 396610 (D. Or. Feb. 18, 2005)
- *Acrymed, Inc. v. Convatec*, 317 F. Supp. 2d 1204 (D. Or. 2004)
- *Dymock v. Norwest Safety Protective Equipment for Oregon Indus.*, 172 Or. App. 399, 19 P. 3d 934 (2001), *rev'd on other grounds*, 334 Or. 55, 45 P. 3d 114 (2002)
- *First Allmerica Fin. Life Ins. Co. v. Sumner*, 212 F. Supp. 2d 1235 (D. Or. 2002)
- *IKON Office Solutions, Inc. v. Am. Office Products, Inc.*, 178 F. Supp. 2d 1154 (D. Or. 2001)
- *Kaib's Roving R.P.H. Agency, Inc. v. Smith*, 237 Or. App. 96, 239 P. 3d 247 (2010)
- *Konecranes, Inc. v. Sinclair*, 340 F. Supp. 2d 1126 (D. Or. 2004)
- *Machado-Miller v. Merserau & Shannon, LLP*, 180 Or. App. 586, 43 P.3d 1207 (2002)
- *Naegeli Reporting Corporation v. Petersen*, CV – 3:11-1138-HA, 2011 WL 11785484 (D. Or. Dec. 5, 2011)
- *Nike, Inc. v. McCarthy*, 379 F. 3d 576 (9th Cir. 2004)

- *North Pac. Lumber Co. v. Moore*, 275 Or. 359, 551 P.2d 431 (Or. 1976)
- *Rem Metals Corp. v. Logan*, 278 Or. 715, 565 P.2d 1080 (1977)
- *Bernard v. S.B., Inc.*, 270 Or. App. 710, 712, 350 P.3d 460, 461 (2015)
- *Brinton Bus. Ventures, Inc. v. Searle*, 248 F. Supp. 3d 1029, 1031 (D. Or. 2017)
- *Espinoza v. Evergreen Helicopters, Inc.*, 266 Or. App. 24, 43, 337 P.3d 169, 182 (2014), aff'd, 359 Or. 63, 376 P.3d 960 (2016)

II. Misappropriation of trade secrets

1. Does the information satisfy the definition of trade secret under ORS § 646.461?

- “Trade secret” means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique, or process
 - derives independent economic value, and not generally known to the public
 - subject to reasonable efforts to maintain its secrecy
- Customer lists? – time, money, market size
- Knowledge, skill, experience?

2. Actual or threatened misappropriation?

- Improper means

- Acquisition of trade secret by a person who knows or had reason to know it was acquired by improper means
- Disclosure or use of trade secret, without consent, by a person who used improper means to acquire the trade secret
- Disclosure or use of trade secret, without consent, by a person who knew or had reason to know it was derived from or through a person who used improper means to acquire the trade secret, had a duty to maintain its secrecy, or limit its use
- Injunctive relief – ORS § 646.463

3. Identification of trade secrets during discovery?

- Timing
- Specificity
- California disclosure requirement
- Preserving secrecy – protective orders, filing under seal, and in camera review

4. Right to attorney fees?

- Bad faith filing
- Willful or malicious misappropriation
- Federal law – contractual notice of whistleblower immunity pursuant to 18 U.S.C. § 1833 (3)(A)

III. Prosecuting and defending

1. What you need for a TRO

- a. Analyze the noncompete agreement thoroughly;

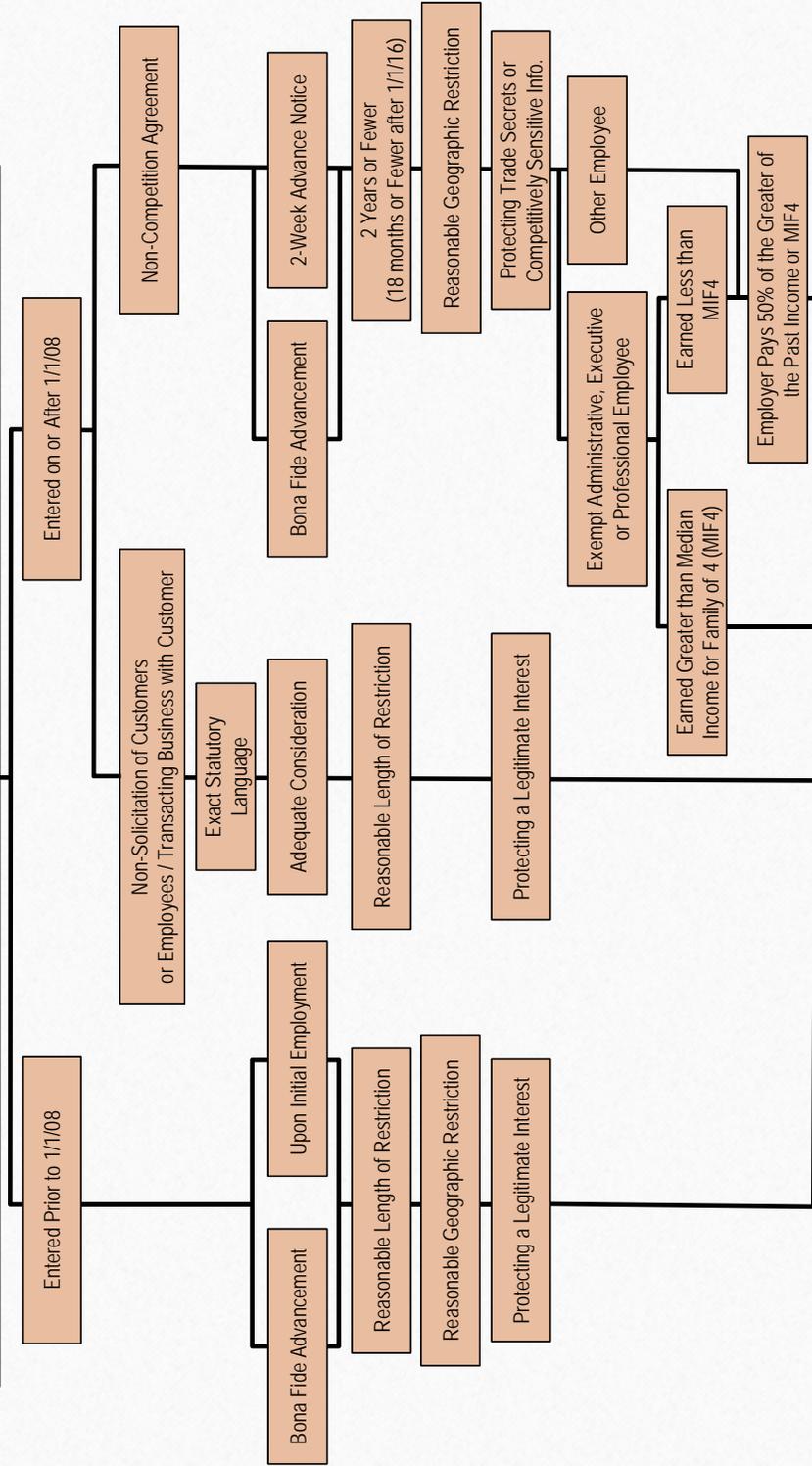
- b. Perform investigation into facts;
- c. Anticipate defenses;
- d. Advise client re risks and document preservation;
- e. Notify opposing party at least 24 hours before your appearance
- f. Complaint and filing fee -- sue new employer?
- g. Motion for temporary restraining order;
- h. Memorandum in support;
- i. Declaration from client;
- j. Declaration from lawyer re notice to opposing party;
- k. Order to show cause;
- l. Motion for expedited discovery;
- m. Protective order governing discovery;
- n. A fairly open calendar;
- o. Your client; and
- p. The ability to post a bond.

2. How you oppose a TRO

- a. Become familiar with the work actually performed by your client at former position and at current position
- b. Develop a time line of when, whether, and how client was informed of the non-compete agreement and when client began work

- c. Assess whether client received a *bona fide* advancement; i.e., did client's job content and responsibilities materially increase and status improve?
- d. Research the employer's products, advertising, Facebook, website, press releases, statements made to the public, etc.
- e. Compare your client's circumstances to the standards set out in the statutes and case law
- f. Assess whether the non-solicitation provision is merely reframing an unenforceable non-competition provision
- g. Determine if the company has "legitimate interest" entitled to protection, and assess whether the provision is "reasonable"

ROADS TO ENFORCEABLE RESTRICTIVE COVENANTS IN EMPLOYMENT



ENFORCEABLE

Overview of State and Federal Anti- Discrimination Laws

Scott Hunt, *Busse and Hunt*

Karen L. O'Connor, *Stoel Rives*

DISCRIMINATION & HARASSMENT: THE BASICS

Presented by:

Scott N. Hunt, Busse & Hunt
Karen O'Connor, Stoel Rives, LLP

June 7, 2018- Portland, Oregon

Understanding the Law

Employer responsibilities are created by:

- Federal law
 - Title VII
 - ADEA
 - ADA
- State law
- Local ordinances
- Common law
- Employer policies



What classes are protected?

Age
Race
Color
National origin
Sex (including pregnancy)
Disability
Religion
Association w/ a protected class

Military service
Use of protected leave
Marital status
Family relationship
Injured worker
Sexual orientation
Expunged juvenile records
Opposition to unlawful practices or reporting

CAN YOU THINK OF OTHERS?

Protected Classes- did you know all these?

Polygraph/blood alcohol testing
Genetic testing
Garnishment
Bankruptcy
Use of tobacco while off duty
Right to testify in criminal or civil proceeding
Legislative testimony
Whistleblowing

Is there anything that's not a protected class?

Characteristics that people can change:

- Education
- Standard of living
- Appearance
- Vegetarianism
- Hobbies



But what if vegetarianism is a tenet of a religious belief?

Cannabis use!

What is “discrimination” and when is it “unlawful”?

Discrimination: to treat someone differently on the basis of something other than personal merit

- Applies to all aspects of the employment relationship
 - Advertising available positions
 - Hiring
 - Opportunities for advancement
 - Promotions
 - Raises
 - Discipline
 - Termination

Discrimination Claims

- Disparate treatment – treating someone differently or less favorably because of their membership in a “protected class”
- Hostile work environment – where work environment is permeated due to protected class status

7

Stoel Rives Straight Talk: An HR Roundtable
THURSDAY, JUNE 27, 2013 • SALT LAKE CITY



Circumstantial Evidence and McDonnell Douglas Burden Shifting

- **Plaintiff** must establish a prima facie case
- Creates a **rebuttable presumption** that employer unlawfully discriminated against plaintiff
- Employer may rebut presumption with a **legitimate, nondiscriminatory reason** for the challenged action
- Employee retains ultimate burden of proof and must provide evidence of pretext to rebut the employer’s legitimate, nondiscriminatory reason (e.g., comparators)

How is “discrimination” shown?

Can be proved by DIRECT EVIDENCE

- No inference needed
- “We’ve got enough women at this firm”

Can be proved by CIRCUMSTANTIAL (INDIRECT) EVIDENCE

- Protected class +
- Adverse action +
- Doing a decent job +
- Others outside protected class treated better

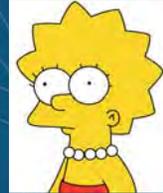
What is “Harassment”?

- Harassment = form of discrimination
- Harassment can be “quid pro quo”
- Or, harassment can create a “hostile work environment”
- Harassment violates the law if discriminatory treatment on the basis of ANY PROTECTED CLASS OR ANY PROTECTED ACTIVITY



Quid Pro Quo- What is that?

- “This for that”
- Prima facie case:
 - Protected Class
 - Unwelcome sexual advances (motivated by gender/sex), in exchange for
 - Promises of benefits OR threats*



Elements of a harassment claim

To establish a hostile work environment, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the plaintiff was subjected to comments or physical contact or intimidation based upon or because of their membership in a protected class;
2. the conduct was unwelcome;
3. the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive or hostile work environment;
4. the plaintiff perceived the working environment to be abusive or hostile; and
5. a reasonable person would consider the working environment to be abusive or hostile.

Elements of a harassment claim, cont'd

Whether a work environment is “hostile” is determined by the totality of the circumstances:

- the frequency of the harassing conduct;
- the severity of the conduct;
- whether the conduct was physically threatening or humiliating or a mere offensive utterance; and
- whether it unreasonably interfered with an employee’s work performance.

What is a “Hostile Work Environment”?

- Some forms of harassment: slurs, jokes, comments, nicknames, pictures, emails...
- The law does not prohibit simple teasing, offhand comments, or isolated incidents that are not “extremely serious”

Elements of a hostile work environment claim, cont'd

Whether an environment is a “hostile work environment” is determined by the totality of the circumstances:

- the frequency of the harassing conduct;
- the severity of the conduct;
- whether the conduct was physically threatening or humiliating or a mere offensive utterance;
- whether it unreasonably interfered with an employee’s work performance.

What if there’s just a single incident of harassment?

A single episode can be illegal harassment (as well as a policy violation) if:

- Severe
 - Unusually demeaning
 - Physical, particularly if threatening
-
- Stray remarks – when are they enough? How severe?



Who decides if it was harassment?

The Reasonable Person: Objective + subjective

- Would a reasonable person
- In the employee's position
- Considering all the circumstances
- Find working conditions to be:
 - Hostile
 - Offensive
 - Abusive

Appropriate or Inappropriate?

- A pat on the butt
- Asking someone out for drinks after work
- A hug on a bad day
- Complimenting a coworker on recent weight loss
- Calling an older worker "pops" out of friendship
- Remarking how close to delivery a pregnant coworker might be
- Imitating a coworker's accent

What about JOKES?

What if you:

- Repeated the joke?
- Laughed?
- Said nothing?



Who's liable?

- Title VII – no individual liability
 - Same for ADA and ADEA
- Employer may be liable
- If coworker is the harasser, employer may be liable if it knew or reasonably should have known about it and failed to take reasonable steps to prevent it
- If a supervisor is the harasser, it's more complicated
- Aiding and abetting – individual liability

Who's liable? cont'd

1. If the supervisor took a “tangible employment action,” then the employer is vicariously liable.
2. If the supervisor did not take a “tangible employment action,” then the employer may escape liability with an affirmative defense which requires two prongs:
 1. The employer exercised reasonable care to prevent the harassment and to promptly correct it; and
 2. The employee reasonably failed to take advantage of the of the complaint procedures provided by the employer

Faragher/Ellerth

Affirmative Defense to Harassment

If no “tangible employment action,” an employer can avoid liability if:

- Employer exercised reasonable care to prevent and promptly correct any harassing behavior; and
- Employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer

Retaliation



Retaliation is adverse treatment of someone who has raised a concern or made a complaint about harassment or discrimination

- Protected activity +
- Adverse action +
- Causation

Elements of a retaliation claim

The plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the plaintiff engaged in or was engaging in an activity protected under federal law, that is _____;
2. the employer subjected the plaintiff to an adverse employment action, that is _____; and
3. the plaintiff was subjected to the adverse employment action because of his/her participation in protected activity.

Elements of a retaliation claim, cont'd

“BUT FOR”

A plaintiff is "subjected to an adverse employment action" because of his/her participation in protected activity if the adverse employment action would not have occurred but for that participation.

Handling Harassment Claims

How would you advise this client?

Q: We joke around a lot at our workplace and most of our employees like to have fun and don't take things too seriously. Melissa is in your office complaining that one of her co-workers whistled at her.

How should you advise her?

What if the whistler was Melissa's supervisor?

Can you tell Melissa that she shouldn't wear such short skirts?

I'M NOT A
DOG, DON'T
WHISTLE AT
ME.

Handling Harassment Claims

How would you advise this client?

Q: Jane is a long-term employee whose previous evaluations have been great. However, her personnel file reflects that this year she's had angry outbursts that have alienated her co-workers.

Jane comes to you to complain about her co-workers "harassing" her and causing her stress. She is also upset about recently being moved to another department, and her shift was changed.



Discussion: Scenario 1

Every day at work, Sam eats lunch in the break room by himself. Lately, four other employees have also been eating lunch there. Their conversations are peppered with sexually explicit jokes and comments. Sam sits away from the group, and they do not direct their comments to Sam, but he can hear their jokes and comments.

Sam comes to you with a complaint about his "hostile work environment."



Discussion: Scenario 2

The head of a client team informs the group that the client has requested a “young, energetic team” and then announces his selections for the new team, all of whom are white, male and under 40.

- Is this discrimination? What steps do you take?
- What if they are all under 40 but some are diverse?



Discussion: Scenario 3

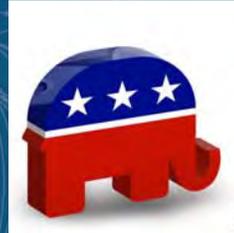
A potential client comes to you about a contractor on her work site who makes derogatory remarks about immigrants, wears a “Make America Great Again” hat at work and threatens to call INS when he is stopped at the gate for routine identification .

- Is your potential client a victim of unlawful harassment?
- How do you advise your client?
- Does the employer have to stop the contractor?



Discussion: Scenario 5

James is a conservative Republican, but he often seems reluctant to openly discuss his viewpoint. In conversations, people will sometimes refer to him as “our resident Republican” and ask him to explain or comment on various issues.



- Is this harassment?

Remedies

- Title VII
 - Back and front pay
 - Other equitable relief (e.g., reinstatement)
 - Compensatory and punitive damages with caps (\$50,000 for small employers; up to \$300,000 for large employers)
- 42 USC 1983; 1981
 - No caps
- State Laws
 - Generally no caps
- Attorney Fees

Exhaustion

- Generally required to exhaust administrative remedies
- Exhaustion means
 1. Timely filing a charge with the EEOC and/or state anti-discrimination agency (e.g., BOLI).
 2. Receiving right to sue letter*
- 90 days after right to sue letter to file complaint

How can employers avoid all this?

- Adopt a policy
 - Specifically giving employees multiple avenues to complain
- Communicate the policy
- Train supervisors and employees to understand/ use the policy
- Investigate complaints and take protective action



Typical Day What do you do all day?

- Labor v. employment
- Plaintiff/defendant
- Partner/associate
- Litigation vs. advice
- Sample tasks
- Typical (?) project
- Typical (?) day



How do I get started? How do I find clients?



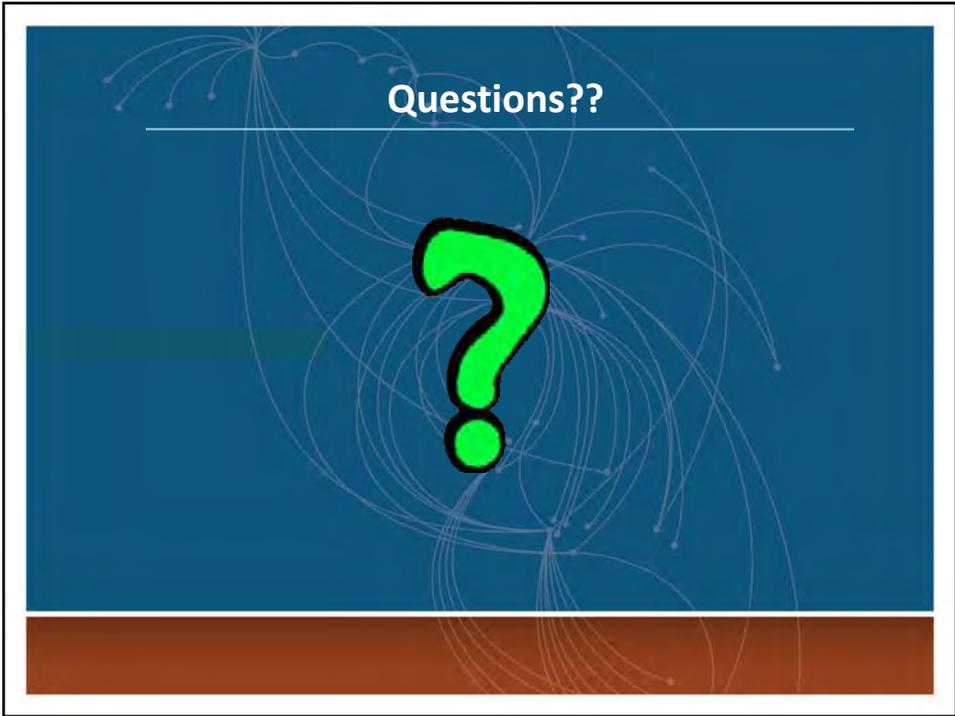
Professionalism: Do's and Don'ts



Evaluating a case

- How do you decide whether to take a case?
- What is the first thing you do?





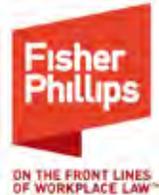
Nuts and Bolts of Wage and Hour Laws

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Nuts and Bolts of Wage and Hour Law

Labor and Employment Law Boot Camp
June 7, 2018

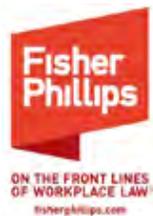


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Wage and Hour Laws

Fair Labor Standards Act of 1938 (FLSA)

29 U.S.C. § 201 through § 219

29 C.F.R. § 510 through § 794

Oregon Wage Collection Laws

ORS ch. 652

Oregon Minimum and Overtime Wage Laws

ORS ch. 653

Fair Labor Standards Act (FLSA)

Establishes:

- Minimum Wage Standard
- Overtime Standards (threshold 40 hrs / wk)
- Exempt from Overtime
- Recordkeeping
- Youth employment standards



29 U.S.C. § 201 through § 219
29 C.F.R. § 510 through § 794

Oregon Wage & Hour Laws

ORS ch. 652 establishes:

- Method of paying wages. ORS 652.110
- Paydays. ORS 652.120
- End of employment / Final paycheck. ORS 652.140
- Penalty Wages. ORS 652.150
- Payment when wages in dispute. ORS 652.160
- Attorney fees for prevailing employee. ORS 652.200
- Earnings statements. ORS 652.610(1)-(2)
- Deductions from wages. ORS 652.610(3)
- Damages for unlawful deductions. ORS 652.615

Enforcement through BOLI or private right of action.

See also OAR 839-001-000 et seq.

Oregon Wage & Hour Laws

ORS ch. 653 establishes:

- Definitions ORS 653.010
- Excluded Employees ORS 653.020
- Minimum wage ORS 653.025
- Deductions ORS 653.035
- Overtime wages ORS 653.261
- Recordkeeping ORS 653.045
- Civil Penalties ORS 653.055
- Attorney fees for prevailing party ORS 653.055

Enforcement through BOLI or private right of action.

See also OAR 839-020-0000 et seq

Dual Coverage

Most employers are subject to dual coverage, i.e., covered by FLSA and Oregon wage and hour laws

Where similar provisions of state and federal law differ the standard most advantageous to the employee applies. OAR 839-020-0115

There are limitations to recovery under both FLSA and Oregon wage statutes.

Common Conduct Resulting in Wage Claims



- Misclassification
 - Independent contractor
 - Salary Exempt
- Overtime
 - *And Exemptions*
- Method of Payment
- Miscalculation of Wages
- Deductions
- Off-the-Clock Work
- Final pay (when and what)



What wage claims can the employee make? Oregon ...

- Unpaid Wages:
 - Regular Wages
 - Minimum Wages
 - Overtime Wages
 - Sick Time
 - Vacation Time
 - Paid Time Off (“PTO”)
- Minimum Wages: ongoing increase and depending on 3 geographic regions.
 - BOLI administrative rules on applicable region and wage rate. (OAR 839-020-0011)
- Deducted Wages (ORS 652.610(3)) and matching amount or \$200 (ORS 652.615)
- Penalty Wages (ORS 652.150) or Civil Penalties (ORS 653.055) calculated as: 8 hours * rate of pay * days wages unpaid or late capped at 30 days
 - For example: minimum wage civil penalty would be 8 hours * \$9.75 * 30 days = \$2,340.00
- Oregon statutory interest at 9% per annum on amounts due. ORS 82.010; *Russell v. US Bank*, 246 Or App 74 (2011)
- Wage claim discrimination or retaliation (ORS 652.355 and ORS 659A.820)

What wage claims can the employee make?

FLSA:

- Minimum Wages
- Overtime Wages
 - Unpaid Time
 - Miscalculated overtime premium rate
- Liquidated Damages (matching amount of unpaid wages)
- Attorney fees and costs



29 U.S.C. § 216

Statute of Limitations

FLSA

- Two Years: minimum wages, overtime wages, and liquidated damages
- Three Years: if employer's violation is willful



Oregon

- Six Years: unpaid wages and minimum wages
- Three Years: penalty wages and civil penalties
- Two years: overtime wages and civil penalties connected with overtime wages

Investigation

Investigate! Plaintiff's attorneys should get as much information and documents from the employee before filing a case. Defendant will request this later.

What to ask for:

- Hours Worked: schedules, time cards, emails, etc.
- Itemized wage statements, paycheck stubs, images of checks
- Employee Handbooks / Policies
- Proof of "employment"
- Witnesses: coworkers, manager, HR personnel, payroll, etc.
- Emails and text messages – even if the employee says that they don't relate to wages. Get them anyways!

Considerations before representing employee

- What evidence could exist to prove the claims? What are the exceptions / defenses to the claims? Consider: witness credibility and document credibility / admissibility
- Why did the employment relationship end? Did employee "willfully violate contract of employment"? ORS 652.200(2)
- What's the worst thing the employer will say about the employee?
- Counterclaims: does representation on the claims include representation on any counterclaims?
- Who's responsible for collections on any judgment?
 - Is this employer solvent?
 - Are there assets?
 - What if the employer goes bankrupt or disappears?
- Are these novel or complex issues that take a lot of time or possibly result in appeal?
 - Do I want to work on this case and for this client for possibly two years or more?

Plaintiff's Attorney

1. Explain to client the timeline for case resolution. Litigation is not a quick way to recover wages.
2. Clearly define the claims the attorney is willing to bring and what client has authorized.
3. Make sure the client knows the risks of each claim. For example, attorney fees for prevailing employee (ORS 652.200) versus prevailing party (ORS 652.615 and ORS 653.055).
4. Explain that settlement is reasonable, but may not include the full amount of all claims.
5. What are risks of collection on any judgment?
6. Comply with notice requirements!

Proving the Claims

- Unpaid wages: must show "work time" including time of authorized attendance. ORS 653.010(11)



- Could the employee be exempt?
 - Minimum Wage Exceptions
 - Overtime Exceptions



- Deductions from Wages ORS 652.610(3)
 - Authorization in writing
 - For the employee's benefit
 - Ultimate recipient of the money
 - As a result of garnishment ORS 18.736
 - Loan to employee

- ORS 652.360: "An employer may not by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ... any statute relating to the payment of wages" except with permission from BOLI Commissioner.

Recordkeeping and Hours Worked

- Employer's obligations to keep records
 - Actual hours worked ORS 653.045(1)(b)
 - Itemized statements of amount and purpose of deductions ORS 653.045(3)
 - Work week OAR 839-020-0080
 - Total wages, including regular rate, hours, straight-time, and overtime OAR 839-020-0080
- Employee can provide a reasonable estimate of hours. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946) and *Chard v. Beauty-N-Beast Salon*, 148 Or App 623 (1997). Consider what work the employee was doing during that time.
- Employer can provide actual hours and/or attack reasonableness of employee's estimate. Consider what else would prove what the employee was doing during that time.



Wages Due at the End of Employment

- ORS 652.140 Wages due at the end of employment:
 - All unpaid wages during employment are due at the end of employment regardless of when those wages were earned. *Salinas v. One Stop Detail*, 194 Or App 457, 461 (2004)
 - Timing
 - Next business day: fired or discharged by Employer, or ends by mutual agreement
 - Last day of employment when employee gives not less than 48 hours' notice
 - 5 business days or next payday if employee does not give notice
- Method of payment:
 - Final wages must be available to the employee. See *Wales v. Walt Stallcup Ent.*, 167 Or App 212, rev denied, 330 Or 553 (2000)
 - Mailed if employee requests mailing. ORS 652.140(4)
- Consider:
 - Contract of Employment. ORS 652.140(2)(a)
 - Collective Bargaining Agreement. ORS 652.140(5)
 - Dispute over amounts due. ORS 652.160
 - Reason employment ended
 - Counterclaims



Penalty Wages and Civil Penalties

- ORS 652.150: If an employer willfully fails to pay any wages as provided in ORS 652.140, the employee can seek penalty wages.
 - Calculated as: 8 hours times hourly rate of pay times the number of days wages were late or unpaid up to 30 days
 - Notice Requirements!
- Willful Conduct: was the employer's conduct willful?

"In civil cases the word 'wilful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent."

State ex rel. Nilsen v. Johnston, 233 Or 103, 108 (1962). See also, *Wilson v. Smurfit Newsprint Corp.*, 194 Or App 648, rev. dismissed 339 Or 407 (2005), *Taylor v. Werner Ent., Inc.*, 329 Or 471 (1999), *Sabin v. Willamette-Western Corp.*, 276 Or 1083 (1976).
- ORS 653.055: for violations of ORS 653.010 to 653.261, employee can recover:
 - Full amount of the wages due
 - Civil penalties as provided in ORS 652.150

Wage Claim Notice Requirements

652.150(2)(c): must include estimated amount of wages or allegation of facts sufficient to estimate the amount owed, unless employer has violated ORS 652.610, 652.640 or 653.045.

652.200(2): precludes attorney fees if attorney "unreasonably failed to give written notice of the wage claim" before filing the case.



Employee Notice Requirements

Plaintiff's attorney needs to:

1. Be as detailed as possible regarding estimated amount due and allegation of facts
2. Include:
 - a. Wages
 - b. Penalty wages
 - c. Attorney fees and costs
3. Consider:
 - a. Requesting employee's personnel file, payroll records, and time clock records
 - b. Preservation of evidence



The notice requirements do not change the employer's record keeping requirements. ORS 653.045, OAR 839-020-0080 and OAR 839-020-0083

Cutting Off Claims

Always force the claimant to provide specifics reasons why he/she alleges that wages were missed.

- ORS 652.150(2)(c) requires an estimated amount of wages or a statement of facts sufficient to estimate the alleged missed wages.
 - If you cannot determine what the individual is owed, then the written notice is no good and the penalty can is capped.

Cutting Off Penalties

Do not ignore written requests to correct any alleged missed wages.

- ORS 652.150(2) penalty can be limited to 100% of missed wages if issue cured within 12 days after receipt of notice.



Suspend Before Termination

- When an employer discharges the employee, the final paycheck is due the end of the first business day after discharge. ORS 652.140(1).



*– Why rush to termination?
Better to just suspend (with or without pay) and use the time to get other paperwork in order.*

Managing the Civil Action

- *Check for any mandatory arbitration agreements to eliminate juries and possibly class action proceedings.*
- This is controversial and the law is in a state of flux, but it can be effective.

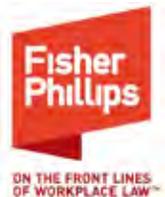


Steal the Thunder

- *If there is an undisputed amount, send a check to the other side as soon as possible and follow up with an Offer of Judgment.*
- If the other side cannot beat the Offer, then you cut off fees and costs in state court and costs in federal court.

Resources

- OSB Barbooks
 - Labor and Employment Law: Private Sector
 - Labor and Employment Law: Public Sector
- BOLI website
 - FAQ section for Wage and Hour Division
 - BOLI handbooks
- Department of Labor
 - Fact Sheets
- Fellow practitioners



SCHUCK LAW, LLC

Section 1983 Employment Claims

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Overview of 42 U.S.C. § 1983 Employment Litigation in Oregon

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1. 1983 Overview
 - a. 42 U.S.C. § 1983 is the main basis for review of state and local violations of federal law and is the most important vehicle for litigation of federal civil rights.
 - i. Over 10% of all of the cases currently filed in federal court are Section 1983 actions.
 - ii. As of 2015, 37,000 civil rights cases filed, most of which were Section 1983.
2. Section 1983 Elements
 - a. Simplified: 42 U.S.C. § 1983, a plaintiff must allege: 1) that the defendant, a “person,” acted under color of state law, 2) to deprive the plaintiff of federal constitutional or federal statutory or regulatory rights. *Briley v. California*, 564 F.2d 849, 853 (9th Cir. 1977).
 - b. More Accurate:
 - i. A violation of rights protected by the federal Constitution or created by federal statute or regulation
 - ii. Caused
 - iii. by the conduct of a “person”
 - iv. who acted under the color of law
 - v. And, if defendant is a municipality, that the conduct is attributable to enforcement of a municipal policy or practice.
3. Step 1- Identify the underlying fed right.
 - a. 1983 is just a vehicle –Not a general tort statute- a federal right must be identified.
 - i. Note: Most arise from deprivation of rights secured by Bill of Rights
 - b. Distinguish Federal Jurisdiction from Federal rights:
 - i. 1983 can be brought in fed or state law but is subject to removal;
 1. 28 U.S.C. § 1331 and U.S.C. § 1343(3) provide basis for federal jurisdiction
 - c. Note: Oregon Constitution - One cannot bring a claim for damages under Oregon Constitution.
 - i. Oregon does not have a State Law version of Section 1983. *Hunter v. City of Eugene*, 309 Or. 298 (1990).

4. Step 2 - What is the state action that caused the deprivation of those rights?
 - a. Misconduct complained of must occur while the defendant was acting “under color of any statute, ordinance, regulation, custom, or usage of any state or territory.”
 - b. Tip: Must plead “color of law”, identify the person and the conduct.
 - i. Generally, doesn’t implicate private actors. However, private actors can sometime act under color of law:
 1. Example, a private health care provider working pursuant to a contract to provide medical care in a jail or prison is acting under color of state law.
 - c. Color of law v. Scope of employment: Color of law is broader than “scope of employment.” One can act outside of the rules and expectations of employee and still do so under color of law.
 - i. i.e. Sex assault by cops or prison guards.
5. Common Employment Claims under Section 1983 –
 - a. **First Amendment**: Congress shall make no law . . . abridging freedom of speech, . . . or the right to petition the Government for a redress of grievances.”
 - i. Five Step Test. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009).
 1. Whether the plaintiff spoke on a matter of public concern;
 2. Whether the plaintiff spoke as a private citizen or public employee;
 3. Whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action;
 4. Whether the state had an adequate justification for treating the employee differently from other members of the general public; and
 5. Whether the state would have taken the adverse employment action even absent the protected speech.
 - ii. Speech Clause:
 1. *Pickering v. Board of Ed*, 391 U.S. 563 (1968) A Public employee has a first amendment right when the employee speaks 1) as a Citizen (rather than as an employee) and 2) On a matter of public concern (rather than on a solely work-related concern.
 2. *Public Concern*: A matter of public concern” is a matter that fairly relates to political, social or other aspects of the community. *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The Ninth Circuit has specifically held that “[u]nlawful conduct by a government employee or illegal activity within a government agency is a matter of public concern.” *Thomas v. City of Beaverton*, 379 F.3d 802, 809 (9th Cir.2004).
 - a. Public Concern is “purely a question of law.” *Gibson v. Office of Atty. Gen., State of California*, 561 F.3d 920, 925 (9th Cir.2009).
 3. *As a Citizen*:
 - a. *Garcetti v. Ceballos*: If employees are engaged in speech “pursuant to their official duties” at work, they are not

speaking as “citizens” and thus, enjoy no First Amendment protection for their speech.

- b. Official duties are your real duties that you are expected to perform. “The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.”
4. Post Garcetti: *Dahlia v. Rodriguez*, 689 F.3d 1094, 1097-99 (9th Cir. 2012)
 - a. First, Internal complaints, especially for police officers, are often pursuant to one’s official job duties, but with following exceptions
 - b. Second, if a public employee raises within the organization broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee’s regular job duties involve investigating such conduct (i.e., IA, HR)
 - c. Third, when a public employee speaks in direct contravention to his supervisor’s orders, that speech may often fall outside of the speaker’s professional duties.
 5. If test met then must balance rights against employer’s interest in efficiency, orderly administration, etc.
- iii. Petition Clause: Includes filing lawsuits and institute non-frivolous lawsuits and mobilize popular support to change existing laws in a peaceful manner but still has to be on a matter of public concern. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2502-03, 180 L. Ed. 2d 408 (2011).

b. Equal Protection

- i. Must show defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
 1. Includes showing that (1) one has been treated differently from others with whom she is similarly situated, and (2) that the unequal treatment was the result of intentional or purposeful discrimination. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000).
 - a. One can show a purpose to discriminate by showing they are treated in a discriminatory manner, or that the employer is imposing different burdens on different classes of people. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). One may satisfy the second element by demonstrating either that he is a member of a protected

class. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008).

i. Protected Classes subject to heightened Scrutiny Includes

1. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (race)
2. Sex. *Craig v. Boren*, 429 U.S. 190 (1976)
3. Sexual orientation. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); See also *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014)

b. Can't be rational basis categories / pure arbitrary basis in employment context

- i. A public employee cannot “state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class.” *Engquist v. Oregon Department of Agriculture*, 128 S.Ct. 2146, 2148-2149, 2157 (2008).

c. Procedural Due Process:

- i. Public employers must provide their employees with due process protections before depriving the employees of a property interest in their employment or any constitutionally-protected liberty interests. *Board of Regents v. Roth*, 408 U.S. 564 (1972).
- ii. Property interest in employment.
1. An employee may have a protected property right to continued public employment as a result of state academic tenure statutes, *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), civil service laws and systems, *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), or established rules and understandings that effectively create a de facto tenure system. *Perry v. Sinderman*, 408 U.S. 593 (1972).
 2. Employees who are terminable at will generally lack a protected property interest in continued employment. *Bishop v. Wood*, 426 U.S. 341 (1976).
- iii. Liberty interest in employment
1. Even at-will employees who do not have a cognizable property interest may have employment-related liberty interests. Where a public employee's name, reputation, honor or integrity are at stake because of an action by the public employer that imposes a stigma that limits the person's future employment opportunities, the employee is entitled to notice and a “name-clearing” hearing. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

2. If the deprivation was not justified, the plaintiff recovers wage loss in addition to compensatory damages for resulting emotional distress. *Carey v Piphus*, 435 US 247 (1978)
 - ii. Liberty:
 1. The fact-finder determines the truth or falsity of the charges. If the charges are true, the plaintiff is entitled to recover nominal damages, compensatory damages arising from the denial of process. If the charges are false, the plaintiff is entitled to recover for any actual injury arising from the procedural deprivation.
6. Remedies:
- a. Full panoply of damages.
 - i. It is “the level of damages is ordinarily determined according to principles derived from the common law of torts. *Memphis Community School District v Stachura*, 477 US 299, 306 (1986). Compensatory and punitive damages.
 - ii. A plaintiff who establishes liability under 42 U.S.C. § 1983 is entitled to recover for all compensatory damages and compensatory damages include “not only out-of-pocket loss and other monetary harms, but also such injuries as ‘impairment to reputation ...personal humiliation, and mental anguish and suffering.’” *Memphis Community School District v. Stachura*, 477 U.S. 299, 307 (1986); see also *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir.1988) (same).
 - iii. No caps on damages; There are no limits on damages in § 1983 claims. Even when § 1983 claims are brought in state court there are no caps on damages. *Rogers v. Saylor*, 306 Or 267 (1988).
 - iv. Statute of Limitations: look to closest state law analogue – often, but not always, 2-year negligence SOL.
 - v. Attorney’s fees and costs, 42 USC 1988.
 1. Case costs are better than under Oregon law since they include depositions expense, and can also include expert witness fees at Court’s discretion. 42 USC 1988(c).
 - b. Against whom?
 - i. Individuals acting in their “individual capacity”:
 1. Eleventh Amendment bars suits against States and prohibits damages claims against state employees “in their official capacity.” As a result, damages claim against state employees must allege that the individual state defendants are sued in their individual capacities. A claim for money damages against a state actor “in her official capacity” is barred in a federal court action.
 - a. Claims for purely declarative or prospective injunctive relief not implicated. ; *Ex Parte Young*, 209 U.S. 123 (1908).
 - ii. Municipalities, Counties and other local governments if pursuant to custom, policy or practice:

- c. Level of involvement:
 - i. One must personally participate in the alleged deprivation of rights to be liable.: *Rizzo v. Goode*, 423 US 362 (1976). *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989) (finding supervisor liability if they "participated in or directed the violations, or knew of the violations and failed to act to prevent them."
- 7. Name Correct Parties
 - a. Defendant
 - i. Neither the State nor its Agency can be sued - 11th Amendment
 - a. The Eleventh Amendment prohibits suits, including § 1983 suits, against states and state agencies in federal court. *Quern v. Jordan*, 440 U.S. 332 (1979); *Ex Parte Young*, 209 U.S. 123 (1908).
 - b. Eleventh Amendment Immunity can be waived by College Savings Bank, supra, held that a state may waive Eleventh Amendment immunity by invoking a federal court's jurisdiction or by making a "clear declaration" that it intends to submit to federal court jurisdiction. See also *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 758 (9th Cir. 1999) (waiver found where state agency defends on the merits in federal court); *Fordyce v. City of Seattle*, 55 F.3d 436, 441 (9th Cir. 1995).
 - c. Waiver usually comes up in removal, as consent to removal is a waiver of 11th Amendment Immunity. *Lapides v. Board of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002).
 - ii. Neither the State nor its Agency can be sued because State is not a "person" under 1983.
 - a. Although a state official sued in his individual capacity is a person, *Hafer v. Melo*, 502 U.S. 21 (1991), a state, state agency or state official sued in an official capacity for damages are not considered persons. *Will v. Michigan State Police*, 491 U.S. 58 (1989).
 - iii. Municipalities and local governments can be persons, but still no vicarious liability.
 - 1. Municipal Liability
 - a. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).
 - i. Decided that Congress did not intend to afford municipal bodies absolute immunities from Section 1983 claims.
 - ii. Municipalities and other local governing bodies may be held liable for monetary, declaratory and injunctive relief so long as the alleged misconduct was the result of an unconstitutional policy, custom or practice. The Court also held that the qualified

- immunity defense, i.e., the “good faith” defense, does not apply to Monell defendants.
- iii. Liability may attach to a municipality only where the municipality itself causes the constitutional violation through ‘execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy’”. *Ulrich v City and County of San Francisco*, 308 F. 3d 968, 984 (9th Cir. 2002).
 - iv. Custom, policy or practice, Includes
 1. Longstanding practice that constitutes the SOP of the local entity
 2. Also includes decision made by one with final policy-making authority: Individual who committed tort was an official with an official with ‘final policy-making authority’ and that the challenged action itself thus constituted an act of official government policy.
 - a. Note: Whether one is a final policy maker is a function of state law or the way the local municipality operates in practice. *Lytle v. Carl*, 382 F. 3d 978, 982-83 (9th Cir. 2004); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126, 108 S. Ct. (1988); *Pembauer v. Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292 (1986).
 3. Delegation: If one delegates their policy making to another, who acts on the policymaker’s behalf, the municipality can be liable where ‘the officials’ discretionary decision is [not] ‘constrained by policies not of that officials’ making’ and [not] “subject to review by the municipality’s authorized policymakers”. *Ulrich v. City and County of San Francisco*, 308 F. 3d 968 (9th Cir. 2002); *Christie v. Iopa*, 176 F. 3d 1231, 1236-37 (9th Cir. 1999)
 4. Ratification: the plaintiff may prove that an official with final policy-making authority, or the municipality itself, ratified an unconstitutional action. *Hopper v. City of Pasco*, 241 F. 3d 1067, 1082-83 (9th Cir

2001), cert. denied, 534 U.S. 951, 122 S. Ct. 346 (2001); *Menotti v. City of Seattle*, 409 F.3d at 1147.

- a. To show ratification, a plaintiff must show that the ‘authorized policymakers approved a subordinate’s decision and the basis for it.’ *Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004).
 - b. The policymaker must have knowledge of the constitutional violation and approve it. A mere failure to overrule a subordinate’s actions without more, is insufficient to support a § 1983 claim.
- iv. Individual state actors can be sued, but only in their individual capacities
 1. Tip: Do not reference their official capacities, unless your claims are for purely declarative or prospective injunctive relief. *Ex Parte Young*, 209 U.S. 123 (1908).
 - v. Non-government individuals and businesses
 1. Can be named if contracting to perform a government function (i.e. provide medical care in prisons.)
 2. Dispositive Question: Is it under Color of State law or not?
 - vi. No Respondeat Superior liability
 1. Supervisors cannot be held liable simply because they have the authority to control subordinates and fail to do so. *Rizzo v. Goode*, 423 U.S. 362 (1976).
 2. Intersection with Oregon law on indemnification
 - a. : In Oregon, a government employee will be defended and indemnified for actions that “arise out of an alleged act or omission occurring in the performance of duty,” unless the employee’s alleged misconduct “amounted to malfeasance in office or willful or wanton neglect of duty.” ORS 30.287(1).
 - b. If conduct is outside course and scope, but under color of law, may end up with a judgment against insolvent party.
 - c. *Note*: Oregon common law vicarious liability rules are much more favorable; *Chesterman v. Barmon*, 305 Or. 439 (1988); *Barrington v. Sandberg*, 164 Or. App. 292 (1999); *Lourim v. Swensen*, 328 Or. 380 (1999). Consider bringing a common-law claim against state employer, too, if this is an issue for your 1983 claim.
8. Other considerations: Other claims vs. Section 1983
 - a. Damages:
 - i. 1983: no cap, punitives authorized

- ii. OTCA: capped at 2M; punitives not allowed.
 - 1. *Horton v. OHSU*
 - a. Muddled waters on suing an individual government employee
 - 2. ORS 31.710 *may* limit non-economics to \$500,000.
 - b. Tort Claims Notice / SOL
 - i. 1983: No Notice requirement; SOL is two years.
 - ii. OTCA: Requires Notice; shorter SOL.
 - c. ORS 31.735 does not apply
 - i. The Oregon “take away” statute that requires successful plaintiffs to forfeit 60% of punitive damage awards (ORS 31.735) does not apply to federal civil rights awards.
 - d. Standard of Proof
 - i. 1983: “Deliberate Indifference”
 - ii. OTCA: Negligence standard, usually.
 - e. Vicarious Liability:
 - i. 1983: No Vicarious Liability
 - ii. OTCA: Vicarious liability applies, and Oregon rules on this are broad
 - f. Exhaustion:
 - i. 1983: No exhaustion requirement for employment claims
 - ii. State law employment claims: no exhaustion requirement, but notice requirement for public employers.
 - iii. Most federal employment discrimination claims *are* subject to exhaustion, with relatively short times to do so. (ADA, ADEA, Title VII, etc.)
 - g. Interplay between 1983 and State laws requiring indemnification
 - i. OTCA issues: In Oregon, a government employee will be defended and indemnified for actions that “arise out of an alleged act or omission occurring in the performance of duty,” unless the employee’s alleged misconduct “amounted to malfeasance in office or willful or wanton neglect of duty.” ORS 30.287(1).
 - 1. If conduct is outside course and scope, but under color of law, may end up with a judgment against insolvent party.
 - 2. Note: Oregon common law vicarious liability rules are much more favorable; *Chesterman v. Barmon*, 305 Or. 439 (1988); *Barrington v. Sandberg*, 164 Or. App. 292 (1999); *Lourim v. Swensen*, 328 Or. 380 (1999). Consider bringing a common-law claim against state employer, too, if this is an issue for your 1983 claim.
9. Forum:
- a. Section 1983 claim can be brought in federal or state court. *Felder v. Casey*, 487 U.S. 131, 139 (1988).
 - i. Unless against State actor, then has to be filed in State court.
 - ii. If against City, County, etc, can file in either.
 - b. Disadvantage to Federal Court in 1983 Claim:
 - i. Qualified Immunity rulings can result in interlocutory appeal.

10. Defenses

a. SOL

- i. Even though § 1983 is a federal law, courts apply the statutes of limitations of the forum state, using the state's general statute for personal injuries. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Owens v. Okure*, 488 U.S. 235, 249-250 (1989). In Oregon this is two years. *Davis v. Harvey*, 789 F2d 1332 (9th Cir. 1986). *Rogers v. Saylor*, 306 Or 267, 282, 760 P2d 232, 241 (1988)
- ii. Federal law determines when a § 1983 action accrues. *Chardon v. Fernandez*, 454 U.S. 6 (1981). Since § 1983 is based on federal law, the state tort claim notice requirement is not applicable. *Felder v. Casey*, 487 U.S. 131 (1988).

b. Absolute Immunity

i. Judicial:

1. Generally speaking, judges are immune for their judicial actions. *Stump v. Sparkman*, 435 U.S. 349 (1978) (judge immune from damage suit for issuing an order sterilizing a young girl).

ii. Prosecutorial

1. Prosecutors are immune when functioning as a prosecutor. *Imbler v. Pachtman*, 424 US 409 (1976). However, a prosecutor acting outside the traditional role of a prosecutor, such as in the role of a complaining witness, loses her absolute immunity. *Kalina v. Fletcher*, 522 U.S. 118 (1997).

c. Qualified Immunity

i. Most Important Defense, but not available Monell defendants.

1. Essentially, shields individual defendants from liability if acts were taken in good faith.

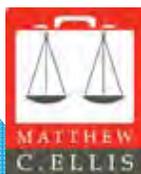
ii. Qualified Immunity Standard:

1. Government officials are liable for monetary damages only if their conduct violates "clearly established" statutory or constitutional rights of the injured plaintiff.
2. Saucier "two step": *Saucier v. Katz*, 533 U.S. 194 (2001),
 - a. Determine whether defendant violated a constitutional right, taking the facts most favorable to the plaintiff;
 - b. If a constitutional right has been violated, determine whether the right was clearly established at the time of the claimed misconduct.
 - i. In determining whether a right was clearly established, the court will determine whether a reasonable official in the shoes of the defendant should have known that the alleged misconduct was unlawful

1. NOTE: Because of qualified immunity, you can lose a 1983 case even if you prove that your client's federal rights were violated.

3. Is Right Clearly Established:
 - a. Doesn't require precedent on all fours, but the law can't be hazy.
 4. Also: Right must be clearly established as of the time of the violation – not as of date of filing of lawsuit.
- iii. Interlocutory Appeal:
1. A reviewing court has jurisdiction to entertain an interlocutory appeal from a denial of qualified immunity only when the order turns on the legal issue of whether the plaintiff's rights were clearly established. *Johnson v. Jones*, 515 U.S. 304 (1995)
 - a. If the qualified immunity issue is legal (as opposed to based on a factual dispute), a federal court defendant has the right to an immediate interlocutory appeal. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).
 - b. But factual determinations that issues of material fact exist are not subject to appeal. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).
 - i. NOTE: Set forth the misconduct in the complaint in detail, since this is often litigation on a FRCP 12(b)(6) motion.

42 U.S.C. § 1983 - EMPLOYMENT LAW OVERVIEW



MATTHEW C. ELLIS
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ELEMENTS

- Simplified:
- 1) the defendant, a “person,” acted under color of state law,
- 2) deprived the plaintiff of federal constitutional or federal statutory or regulatory rights.
 - *Briley v. California*, 564 F.2d 849, 853 (9th Cir. 1977).
- More Accurate
 - A violation of rights protected by the federal Constitution or created by federal statute or regulation
 - Caused
 - by the conduct of a “person”
 - who acted under the color of law
 - And, if defendant is a municipality, that the conduct is attributable to enforcement of a municipal policy or practice.

STEP 1 – IDENTIFY THE UNDERLYING FEDERAL RIGHT

Step 1 - What is the federal right being violated?

- 1983 is just a vehicle. It is not a general tort statute. A federal right must be identified.
 - Note: Most arise from deprivation of rights secured by Bill of Rights
- Distinguish Federal Jurisdiction from Federal rights:
 - 1983 can be brought in fed or state law but is subject to removal;
 - 28 U.S.C. § 1331 and U.S.C. § 1343(3) provide basis for federal jurisdiction
- Note: Oregon Constitution - One cannot bring a claim for damages under Oregon Constitution.
 - Oregon does not have a State Law version of Section 1983. *Hunter v. City of Eugene*, 309 Or. 298 (1990).

STEP 2 – IDENTIFY THE STATE ACTION

Step 2 - What is the state action that caused the deprivation of those federal rights?

- Misconduct complained of must occur while the defendant was acting “under color of any statute, ordinance, regulation, custom, or usage of any state or territory.”
- Tip: Must plead “color of law”, identify the person and the conduct.
 - Generally, Section doesn’t implicate private actors.
 - However, private actors can sometime act under color of law:
 - Example, a private health care provider working pursuant to a contract to provide medical care in a jail or prison is acting under color of state law.
- Color of law v. Scope of employment: Color of law is broader than “scope of employment.” One can act outside of the rules and expectations of employee and still do so under color of law.
 - i.e. Sex assault by cops or prison guards.

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- FIRST AMENDMENT
- EQUAL PROTECTION
- PROCEDURAL DUE PROCESS
- SUBSTANTIVE DUE PROCESS

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **FIRST AMENDMENT:**
 - “Congress shall make no law . . . abridging freedom of speech, . . . or the right to petition the Government for a redress of grievances.”
 - ELEMENTS
 - Whether the plaintiff spoke on a matter of public concern;
 - Whether the plaintiff spoke as a private citizen or public employee;
 - Whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
 - Whether the state had an adequate justification for treating the employee differently from other members of the general public; and
 - Whether the state would have taken the adverse employment action even absent the protected speech.
 - *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009).

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **FIRST AMENDMENT: Speech as a citizen**
 - A Public employee has a first amendment right when the employee speaks 1) as a Citizen (rather than as an employee) and 2) On a matter of public concern (rather than on a solely work-related concern.)
 - Whether the plaintiff spoke on a matter of public concern;
 - Broad: Issue is whether it is an issue of social, political, or other interest to a community.
 - Whether the plaintiff spoke as a private citizen or public employee;
 - *Garcetti v. Ceballos*: If employees are engaged in speech “pursuant to their official duties” at work, they are not speaking as “citizens” and thus, enjoy no First Amendment protection for their speech.

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **FIRST AMENDMENT: Speech as a citizen**
 - *Dahlia v. Rodriguez*, 689 F.3d 1094 (9th Cir. 2012)
 - First, Internal complaints, especially for police officers, are often pursuant to one’s official job duties, but with exceptions
 - Second, if a public employee raises within the organization broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee
 - except when the employee’s regular job duties involve investigating such conduct (i.e., IA, HR)
 - Third, when a public employee speaks in direct contravention to his supervisor’s orders, that speech may often fall outside of the speaker’s professional duties.

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **FIRST AMENDMENT: Petition Clause**
 - Congress shall make no law . . . abridging freedom of speech, . . .
. . . or the right to petition the Government for a redress of grievances.”
 - Includes filing non-frivolous lawsuits and public complaints and efforts to mobilize popular support to change existing laws in a peaceful manner but still has to be on a matter of public concern. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2502-03, 180 L. Ed. 2d 408 (2011).

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **EQUAL PROTECTION: Discrimination based on protected class**
 - Must show defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.”
Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)
 - Often requires showing that (1) one has been treated differently from others with whom she is similarly situated, and (2) that the unequal treatment was the result of intentional or purposeful discrimination. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000).
 - Protected Classes: Sex, Sexual Orientation and Race
 - No cause of action for arbitrary treatment, even if not based on protected class. *Engquist v. Oregon Department of Agriculture*, 128 S.Ct. 2146, 2148-2149, 2157 (2008).

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **DUE PROCESS – PROCEDURAL**
 - Public employers must provide their employees with due process before depriving the employees of a property interest in their employment or any constitutionally-protected liberty interests. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **DUE PROCESS – PROCEDURAL / PROPERTY**
 - An employee may have a protected property right to continued public employment as a result of state academic tenure statutes, *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), civil service laws and systems, *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), or established rules and understandings that effectively create a de facto tenure system. *Perry v. Sinderman*, 408 U.S. 593 (1972).
 - Employees who are terminable at will generally lack a protected property interest in continued employment. *Bishop v. Wood*, 426 U.S. 341 (1976).

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **DUE PROCESS – PROCEDURAL / LIBERTY**

- Even at-will employees who do not have a cognizable property interest may have employment-related liberty interests. Where a public employee's name, reputation, honor or integrity are at stake because of an action by the public employer that imposes a stigma that limits the person's future employment opportunities, the employee is entitled to notice and a "name-clearing" hearing. *Board of Regents v. Roth*, 408 U.S. 564 (1972).
- "Stigma plus": It is not enough that the allegations or action against the person merely damages the person's reputation. "Stigma plus" – a stigma to one's reputation *plus* deprivation of some additional right or interest – is required. There must also be a "temporal nexus" between the publication and the alteration of the right.

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **REMEDY FOR PROCEDURAL DUE PROCESS VIOLATIONS**

- If a liberty interest is implicated, the stigmatized employee is entitled to a "name-clearing" hearing or similar process to refute the stigmatizing charge. *Cox v. Roskelley*, 359 F.3d at 1110 (2004); *Mustafa v. Clark Cty. Sch. Dist.*, 157 F.3d 1169, 1179 (9th Cir. 1998).
- In the case of a non-tenured government employee that has been stigmatized, the hearing "is solely to provide the person an opportunity to clear his name." *Codd v. Velger*, 429 U.S. 624, 627, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977)
- Also, can get damages for not being afforded the process and, if the deprivation of employment was unjustified, compensatory damages arising from loss of employment. *Carey v Piphus*, 435 US 247 (1978).

COMMON SECTION 1983 EMPLOYMENT CLAIMS

- **DUE PROCESS - SUBSTANTIVE**

- The substantive component of the due process clause prevents the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'" *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998)
- Substantive due process claims for a public employer's violations of occupational liberty are limited to extreme cases, such as a "government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted individual from his occupation, much as if the government had yanked the license of an individual in an occupation that requires licensure." *Engquist v. Oregon Dept. of Agric.*, 478 F.3d 985, 996-97 (9th Cir. 2007), quoting *Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir.1997)).

42 U.S.C. § 1983 REMEDIES

- It is "the level of damages is ordinarily determined according to principles derived from the common law of torts. *Memphis Community School District v Stachura*, 477 US 299, 306 (1986).
- No limits on damages in § 1983 claims.
 - Even when § 1983 claims are brought in state court. *Rogers v. Saylor*, 306 Or 267 (1988).
- Statute of Limitations: 2-year general tort SOL in Oregon
- Attorney's fees and costs, 42 USC 1988.
 - Case costs are better than under Oregon law since they include depositions expenses, and can also include expert witness fees at Court's discretion. 42 USC 1988(c). But see ORS 20.107 (permits expert fees if case based on immutable characteristics, etc.)

NAME THE CORRECT PARTIES

- **Neither the State nor its Agency can be sued - 11th Amendment**
 - The Eleventh Amendment prohibits suits, including § 1983 suits, against states and state agencies in federal court. *Quern v. Jordan*, 440 U.S. 332 (1979); *Ex Parte Young*, 209 U.S. 123 (1908).
 - Eleventh Amendment Immunity can be waived!: *College Savings Bank*, supra, held that a state may waive Eleventh Amendment immunity by invoking a federal court's jurisdiction or by making a "clear declaration" that it intends to submit to federal court jurisdiction. See also *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 758 (9th Cir. 1999) (waiver found where state agency defends on the merits in federal court); *Fordyce v. City of Seattle*, 55 F.3d 436, 441 (9th Cir. 1995).
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NAME THE CORRECT PARTIES

- **Neither the State nor its Agency can be sued because State is not a "person" under 1983.**
 - Although a state official sued in his individual capacity is a person, *Hafer v. Melo*, 502 U.S. 21 (1991), a state, state agency or state official sued in an official capacity for damages are not considered "persons." *Will v. Michigan State Police*, 491 U.S. 58 (1989).

NAME THE CORRECT PARTIES

- **Only those who personally participate in the violation are proper parties**
 - One must personally participate in the alleged deprivation of rights to be liable.: *Rizzo v. Goode*, 423 US 362 (1976). *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989) (finding supervisor liability if they "participated in or directed the violations, or knew of the violations and failed to act to prevent them.")
 - No respondeat superior liability under Section 1983- so Supervisors cannot be held liable simply because they have the authority to control subordinates and fail to do so. *Rizzo v. Goode*, 423 U.S. 362 (1976).

NAME THE CORRECT PARTIES

- **Individual state actors can be sued, but only in their individual capacities**
 - Don't mess this up! Do not reference their official capacities.
- **Non-government individuals and businesses not liable because No State action**
 - Unusual for employment claims, but companies can be named if contracting to perform a government function (i.e. provide medical care in prisons.)
 - **Dispositive Question:** Is it under Color of State law or not?

NAME THE CORRECT PARTIES

- **City and Counties can be named as parties, if deprivation is pursuant to a custom, policy and practice of the City/County: *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).**
 - Decided that Congress did not intend to afford municipal bodies absolute immunity from Section 1983 claims.
 - Municipalities and other local governing bodies may be held liable for monetary, declaratory and injunctive relief so long as the alleged misconduct was the result of an unconstitutional policy, custom or practice. The Court also held that the qualified immunity defense, i.e., the “good faith” defense, does not apply Monell defendants.
 - Liability may attach to a municipality only where the municipality itself causes the constitutional violation through ‘execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy’”. *Ulrich v City and County of San Francisco*, 308 F. 3d 968, 984 (9th Cir. 2002).

NAME THE CORRECT PARTIES

- **Custom, Policy or Practice:**
 - First, Longstanding **custom, policy or practice** that constitutes the SOP of the local entity
 - Second, also includes decision made by one **with final policy-making authority**: Individual who committed tort was an official with an official with ‘final policy-making authority’ and that the challenged action itself thus constituted an act of official government policy.
 - Third, also includes when an official with final policy-making authority, or the municipality itself, **ratified** an unconstitutional action. *Hopper v. City of Pasco*, 241 F. 3d 1067, 1082-83 (9th Cir 2001), cert. denied, 534 U.S 951, 122 S. Ct. 346 (2001); *Menotti v. City of Seattle*, 409 F. 3d at 1147.

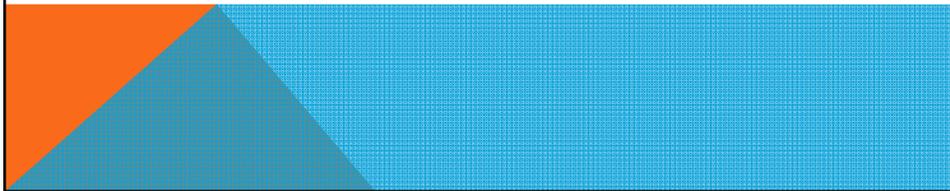
OTHER CONSIDERATIONS; 42 U.S.C. § 1983 VS. STATE LAW CLAIMS

42 U.S.C. § 1983

No Cap on Damages
Punitive Damages OK
No Notice Requirement
No Respondeat Superior
Deliberate Indifference Std.

STATE LAW CLAIMS

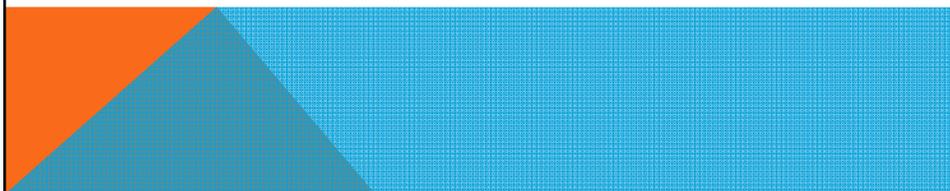
Subject to OTCA Limits
Punitive Damages Not OK
180 Day OTCA Notice
Respondeat Superior
Negligence Std., usually



FORUM

- Section 1983 claim can be brought in federal or state court. *Felder v. Casey*, 487 U.S. 131, 139 (1988).
 - Unless against State employee, then has to be filed in state court, or subject to dismissal for 11th Amendment Immunity
 - Removal to Federal Court waives 11th Amendment.
 - If against City, County, etc, can file in either – no 11th Amendment issues.

- Main disadvantage to Federal Court in 1983 Claims:
 - Qualified Immunity rulings are subject to interlocutory appeal



DEFENSES

▪ Qualified Immunity

- Government officials are liable for monetary damages only if their conduct violates “clearly established” statutory or constitutional rights of the injured plaintiff.
- Saucier “two step”: *Saucier v. Katz*, 533 U.S. 194 (2001),
 - 1. Determine whether defendant violated a constitutional right, taking the facts most favorable to the plaintiff;
 - 2. If a constitutional right has been violated, determine whether the right was clearly established at the time of the claimed misconduct.

DEFENSES

▪ Qualified immunity is subject to immediate interlocutory appeal in Federal Court

- A reviewing court has jurisdiction to entertain an interlocutory appeal from a denial of qualified immunity only when the order turns on the legal issue of whether the plaintiff’s rights were clearly established. *Johnson v. Jones*, 515 U.S. 304 (1995)
- If the qualified immunity issue is legal (as opposed to based on a factual dispute), a federal court defendant has the right to an immediate interlocutory appeal. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).
 - But factual determinations that issues of material fact exist are not subject to appeal. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

Oregon and Federal Disability Laws

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QUESTIONS TO ANSWER BEFORE FILING OR DEFENDING YOUR FIRST DISABILITY DISCRIMINATION CASE

By
Stephen L. Brischetto and Will Weiner

QUESTIONS RELATED TO COVERAGE

I. What are the statutes of limitations applicable to a disability discrimination claim?

- A. Exhaustion of administrative remedies is required under the federal ADA prior to filing in court. One hundred eighty days to file with EEOC or 300 days if first filed with the Oregon Bureau of Labor and Industries (“BOLI”). 42 U.S.C. § 2000e-5(e). Deadline for filing is generally measured from the date the unlawful act “occurred.” EEOC and BOLI have work sharing agreements so that an administrative complaint filed with one is forwarded for filing with the other. OAR 893-003-0015. Exhaustion requirement gives the administrative agency the opportunity to investigate and settle disputes through conference, mediation, conciliation, and persuasion before the aggrieved party is permitted to file suit. Ninety days to file in court after the mailing date of the Notice of Private Right to Sue. 42 U.S.C. § 2000e-5(f).
- B. Under Oregon discrimination statutes, one year to file complaint with BOLI or with Circuit Court. No exhaustion required. ORS 659A.875(1). If the complaint is filed with BOLI first, 90 days from mailing of Notice of Private Right to Sue to file in court. ORS 659A.875(2).
- C. Statutes of limitations under federal discrimination laws are not jurisdictional and as a result are subject to waiver, estoppel, and equitable tolling. *Valenzuela v. Kraft*, 801 F.2d 1170, 1174 (9th Cir. 1986) *as amended* 815 F.2d 570 (9th Cir. 1987). The federal courts have applied equitable tolling to state law statutes of limitations. *See Logan v. West Coast Benson Hotel*, 981 F. Supp. 1301, 1319 (D. Or. 1997); *but see Huff v. Great Western Seed Co.*, 322 Or. 457, 909 P.2d 858 (1996) (declining to apply “discovery rule” to commencement of claims under employment statute).
- D. If public agency is involved, 180 days from injury, Tort Claim Notice must be filed with appropriate public entity. The notice must include the time, place, and circumstances giving rise to the claim, and the notice must be such that a reasonable person would conclude that the claimant intends to assert a claim against the public body. *Flug v. University of Oregon*, 335 Or. 540, 73 P.3d 917 (2003).
- E. If recipient of federal financial assistance involved, two years to file complaint of disability discrimination in court under The Rehabilitation Act of 1973.

- F. Constitutional Equal Protection claims. *See generally, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 466, (1985). There is a two-year statute of limitation on Constitutional claims filed pursuant to 42 U.S.C. § 1983.

QUESTIONS RELATED TO PARTIES TO THE LAWSUIT

2. Is the prospective defendant an “employer” and the plaintiff an “employee?”

- A. ADA uses term “covered entity” to mean an “employer, employment agency, labor organization, or joint labor-management committee.” 42 U.S.C. § 12111(2). The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5). “Employer” excludes the United States, Indian Tribes, and bona fide private membership clubs (other than labor organizations) that are exempt from taxation under Section 501(c) of Title 26.
- B. Oregon disability discrimination law applies to employers with six or more employees. ORS 659A.106.
- C. Independent contractor vs. an employee. Discuss how courts determine under ADA: “economic realities” test, “hybrid” common-law test, and traditional common-law agency test. Ninth Circuit has determined that “there is no functional difference between the three formulations,” *Murray v. Principal Fin. Group*, 613 F.3d 943, 945 (9th Cir. 2010), but is there? Recent U.S. Dep’t. of Labor Administrator’s Interpretation (No. 2015-1) reflecting that courts and the Dep’t. of Labor continue to use the broader “economic-realities” test (and not the narrower “control test”) to determine whether someone is an employee under the Fair Labor Standards Act.
- D. Is the plaintiff an owner or an employee. *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (holding court considers six factor common law test to determine if shareholder-director in professional corporation is an owner or an employee).

3. Is the plaintiff a person with a disability?

- A. Disability: (a) physical or mental impairment that substantially limits one or more major life activities; (b) a record of such an impairment; and (c) being regarded as having such an impairment (whether or not the impairment limits or is perceived to limit a major life activity).
- B. Changes in the definition of disability under the ADAAA. The ADA Amendments Act of 2008 became effective on January 1, 2009. The ADAAA overturned four Supreme Court decisions, *Toyota Mfg Ky v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); and *Albertson’s v. Kirkingburg*, 527 U.S. 555 (1999). The ADAAA makes it easier for individuals to establish coverage and shifts the focus of litigation to the concept of “reasonable accommodation.”
- C. Definition of “disability” should be interpreted in favor of broad coverage of individuals (cancer, diabetes, epilepsy, etc.)

- D. “Substantially limits” requires lower degree of functional limitation compared to average person in the general population and should be construed broadly. Impairment does not need to prevent or severely/significantly limit major life activity. The employee’s own testimony will usually suffice for evidence. The determination whether the impairment “substantially limits” is made without regard to the ameliorative effects of mitigating measures like medication or hearing aids with one exception (eyeglasses/contact lenses).
- E. Episodic impairments or those in remission are disabilities under ADA if they substantially limit a major life activity when active. Examples: epilepsy, hypertension, MS, asthma, diabetes, depression, bipolar, cancer in remission.
- F. Transitory and minor impairments are usually not covered by the ADA because they generally have little or no long-term impact. Transitory means impairment with an actual or expected duration of six months or less. Examples: sprains, concussions, and influenza. However, if a transitory impairment is severe, it can be considered a disability. Example: severe car accident with multiple broken bones.
- G. What constitutes a major life activity (“MLA”) (broad, and includes major bodily functions (“MBF”)). MLA: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and **working**. MBF: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- H. “Regarded as” claims. Focus is on how the person has been treated, not on what employer believed about the nature of the person’s impairment. This category protects against the problem of stereotyping and discriminating against employees with particular conditions as disabled even if they are not. No reasonable accommodations required for regarded-as claims.

4. Should I name an owner or supervisor as a defendant?

- A. Under the ADA, supervisors are not an “employer” and thus are not proper defendants. *Miller v. Maxwell’s International*, 991 F.2d 583, 587 (9th Cir. 1993) (Title VII does not provide a cause of action against supervisors).
- B. Under Oregon non-discrimination laws, supervisors may be sued for compensatory damages for aiding, assisting, coercing employer in discriminatory acts. Supervisors may not be sued for equitable relief as they are not an “employer” who can provide such relief. See ORS 659A.030(1)(g); *Schram v. Albertson’s Inc.*, 146 Or. App. 415, 934 P.2d 483, 489 (1997).
- C. But when suing a public entity under ADA or Oregon law, the sole cause of action is against the employer (Oregon Tort Claims Act). ORS 30.265(2).

WHAT IS MY CLAIM OF DISCRIMINATION

5. The plaintiff was subjected to different treatment because of a disability.

- A. The elements of a claim of disability discrimination are proof that claimant has a disability, that the claimant is qualified to perform the essential functions of the job, and that the claimant has suffered adverse employment action because of the disability. *Hutton v. Elf Etochem No. Am., Inc.*, 273 F.3d 885, 895 (9th Cir. 2001)

Types of different treatment (discharge, terms/conditions, intimidation, harassment, constructive discharge, etc.)

6. The defendant failed to provide plaintiff with reasonable accommodation.

- A. Three categories: changes to a job application process, changes to work environment (or the way a job is usually done), and changes that enable an employee with a disability to enjoy equal benefits and privileges of employment (such as access to training). 29 C.F.R. § 1630.2(o)(1)(i)-(iii).
- B. Request for accommodation or employer notice of need for accommodation. Orally or in writing; individual may use plain language and needn't mention ADA or use the phrase "reasonable accommodation." If employee doesn't specifically request reasonable accommodation, employer can simply ask "how can we help?" Advisable for employer to document oral requests for assistance/accommodation to create a record that it has engaged with employee in good faith at every step along the way.
- C. Reasonable-accommodation process also activated when employer with a known physical or mental impairment is observed having difficulty performing essential functions of his or her job because of the impairment.
- D. Defining essential functions of the employee's job (as opposed to marginal job duties). Essential functions should be set out in a job description. If no job description exists at the time a request for accommodation is made, it is still useful to make one. Employee may challenge employer's determination as to what is an essential function of the job.
- E. Duty to participate in an interactive process to arrive at accommodation. Involve employee in discussions regarding:
- What are the employee's abilities and limitations?
 - Can the employee perform the essential functions of the job without an accommodation?
 - Are there marginal duties that the employee cannot perform without an accommodation?
 - What are the potential accommodations?

- F. Interactive process can also include (from *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *vacated on other grounds*, 535 U.S. 391 (2002)):
- Analyzing job functions to establish essential and nonessential job tasks;
 - Identifying barriers to job performance by consulting and cooperating with disabled employees so that both parties discover the precise limitations and the types of accommodations which would be most effective;
 - Evaluating proposed accommodations requiring further dialogue and assessing the effectiveness of each accommodation in terms of enabling the employee to successfully perform the job.
- G. Forms of reasonable accommodation include the following: modifying equipment; providing accessible materials; providing accessible facilities; modifying policies; restructuring non-essential job duties; modifying work schedule; reassigning to a vacant position; and offering leave. Special issues are discussed below.
- Reassignment to vacant position: According to EEOC Guidance, this is generally a last resort accommodation before offering leave. Thus, employers should usually only offer reassignment if unable to accommodate current position. When reassignment is offered, the employee must be qualified to perform the essential functions of the reassigned position. The employer also has no requirement to accommodate by bumping another employee, promoting an employee with a disability, or creating a new position or light-duty job.
 - Light-duty jobs: EEOC has concluded that light-duty jobs, if provided, must be available to disabled persons suffering from off-the-job problems and not limited to employees recovering from on-the-job injuries. EEOC Reasonable Accommodation Guidance, “Workers’ Compensation” and the ADA section, question 28. But not all courts agree: in *Watson v. Lithonia Lighting*, 304 F.3d 749 (7th Cir. 2002), the court held that the ADA does not require indefinite light-duty positions for workers recovering from temporary injuries.
 - Working at home? Compare *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir 2001) (employer required to allow plaintiff, a medical transcriptionist, to work from home because other medical transcriptionists were permitted to do so, even though plaintiff did not meet the employer’s requirements for being permitted to work at home under normal circumstances) with *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114 (10th Cir. 2004) (employer established that working from home was not a reasonable accommodation because attendance at the workplace for purposes of supervision and teamwork was an essential job function for a service coordinator with a communications systems company).
 - Leave: Courts generally find that unpaid leave is a reasonable accommodation, so long as the leave is not indefinite and/or does not cause an undue hardship. But federal courts are split as to whether the ADA requires providing an *extended* medical leave of absence. Compare *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998) (ADA required employee be given temporary leave to receive treatment for depression);

with *Severson v. Heartland Woodcraft*, 872 F.3d 476 (7th Cir. 2017) (“A long-term leave of absence cannot be a reasonable accommodation” under the ADA). When deciding how much leave is appropriate – and whether it is “temporary” or “extended” – employers should conduct a case-by-case analysis, taking into account the nature of the job, the history of the leave, business realities, and applicable legal precedent.

- H. Accommodation imposes undue hardship. Burden is on the employer and should include a careful analysis of the hardship. Each request for reasonable accommodation should be evaluated separately to determine whether it would impose an undue hardship in light of (1) nature and cost of accommodation needed; (2) overall financial resources of the business, number of persons employed, and the effect on the expenses and resources of the business; and (3) the impact of the accommodation on the business. 42 U.S.C. § 12111(1); 29 C.F.R. § 1630.2(p). If the modification has been made for other employees, it will be difficult to argue that the same modification for the disabled employee will impose an undue hardship on the employer. *Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004).
- I. Employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide. 29 C.F.R. § 1630.9 app.
- J. Accommodation requires breach of collective bargaining agreement. Under *US Airways v. Barnett*, 535 U.S. 391 (2002), a normally reasonable accommodation will usually be rendered unreasonable if the assignment violates a seniority system, whether imposed by the employer or the result of collective bargaining. *Barnett, supra*, 351 U.S., 391, 394. The plaintiff remains free to show special circumstances that make “reasonable” a seniority rule exception in the particular case. *Id.* To claim the protection of a seniority rule, the employer must show that the requested accommodation was explicitly prohibited by the terms of the bargaining agreement. *Buckingham v. US*, 998 F.2d 735, 741 (9th Cir. 1993). If the proposed accommodation does not actually usurp the legitimate rights of other employees under a collective bargaining agreement, the collective bargaining does not affect the reasonableness of the proposed accommodation. *Buckingham, supra*, 998 F.3d at 740.

7. The defendant subjected plaintiff to qualification standards that have a disparate impact on qualified persons with disabilities.

- A. The ADA, unlike other discrimination statutes, includes specific provisions related disparate impact discrimination. Thus, the ADA likely requires a different analysis of disparate impact than other laws. See *Lopez v Pacific Maritime Ass’n*, 657 F.3d 762,767 (9th Cir 2009) (precluding plaintiff from arguing that ADA requires different analysis of disparate impact than does Title VII because plaintiff failed to timely raise the argument).
- B. Under the ADA, discrimination includes use of a qualification standard that screens out or tends to screen out those with a disability. Qualification standards which screen out those with a disability must be justified through a showing that the standard is job related and consistent with business necessity. *Bates v. United Parcel Service*, 511 F.3d 974 (9th Cir. 2007), discusses how to apply the disparate impact and business necessity affirmative defense

as it relates to the ADA definition of a “qualified” individual with a disability. The employer bears the burden of proof on this affirmative defense. *Rohr v. Salt River Agricultural Imp.*, 555 F.3d 850 (9th Cir. 2009).

- C. “Qualification standards” should not be confused with “essential functions” of the job. Essential functions are a job’s “basic duties,” 29 C.F.R. 1630.2(n)(1), while qualification standards are ‘personal and professional attributes’ which may include physical, medical, [and] safety requirements. 29 C.F.R. 1630.2(q). See *Bates, supra*, 511 F.3d at 990.

8. The defendant made prohibited medical inquiries/breached confidentiality of plaintiff.

- A. The ADA governs the procedure or sequence in which an employer may make medical inquiries of applicants. *Leonel v. American Airlines*, 400 F.3d 702 (9th Cir. 2005). As to job applicants, employers may not ask for information about the existence, nature, or severity of a disability. Employers should only ask whether an employee can perform the essential job functions with or without a reasonable accommodation.
- B. For current employees who have requested an accommodation, employers have a right to seek reasonable medical documentation of the disability and the individual’s limitations. But employer can’t ask for documentation unrelated to determining the existence of disability and the necessity for an accommodation (can’t seek complete medical records). Employer requests for medical information must be job related and consistent with business necessity. *Yin v. State of California*, 95 F.3d 864 (9th Cir. 1996); *Van Patten v. State*, 243 Or. App. 476 (2015).
- C. When an employer needs documentation to substantiate a disability and/or work restrictions, the employer should first ask the employee to provide such documentation. If employee fails to provide sufficient documentation upon reasonable request, the employer can ask for permission to contact the employee’s health care provider. If the employee’s health care provider fails to provide sufficient documentation upon reasonable request, the employer can send the employee to the employer’s health care provider at the employer’s expense.
- D. When employers seek health care information related to a disability and/or work restrictions, they should include a disclaimer that they do not seek “genetic information” as defined in the Genetic Information Nondiscrimination Act of 2008 (“GINA”).
- E. The ADA requires confidentiality of medical information gathered by employers. The majority of cases hold that either a person with a disability or a non-disabled person has standing to assert a breach of the confidentiality requirements. See, e.g., *Roe v. Cheyenne Mountain Resort*, 124 F.3d 1221, 1229 (10th Cir. 1997). The majority of courts also hold that a breach of the ADA confidentiality requirements may be asserted as a claim in circumstances where the plaintiff has suffered injury in fact. See *Tice v. Centre Area Transportation Authority*, 247 F.3d 506, 519 (3d Cir. 2001) (economic, emotional distress or otherwise). See also *Cossette v. Minnesota Power and Light*, 188 F.3d 964, 969 (8th Cir 1999).

9. The defendant retaliated against the plaintiff for opposing discrimination or for seeking accommodation.

- A. Plaintiffs may assert claims either under the ADA, the Rehabilitation Act, or state law that they were retaliated against for seeking reasonable accommodation at work or for opposing disability discrimination in the workplace. *Barker v. Riverside County Office Education*, 584 F.3d 821 (9th Cir 2009) (Rehabilitation Act protects any person who has been threatened, coerced, intimidated, or discriminated against for purposes of interfering with rights under this chapter); *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009) (holding that ADA provides claim for equitable relief for retaliation; no compensatory or punitive damages); ORS 659A.030(1)(f) and ORS 659A.885(3) (providing cause of action for compensatory and punitive damages for opposition to unlawful employment practices).
- B. Disability retaliation claims under the ADA and Oregon law are similar to those under Title VII. The employee must prove: (1) she engaged in activity the ADA protects; (2) the employer took an adverse employment action against the employee; and (3) there is a causal link between the two.
- C. Disability harassment is similar to hostile work environment claims based on other protected characteristics. To recover on a hostile environment claim, a disabled plaintiff must demonstrate not only that she subjectively perceived her workplace environment as hostile, but also that a reasonable person would so perceive it as hostile, *i.e.*, that it was objectively hostile.

10. Is there an issue of “overlap” between my disability discrimination claim and another law?

- A. ADA rights overlap with FMLA, OFLA, and workers’ compensation laws (including injured-worker discrimination law).
- B. An ADA accommodation leave may run simultaneously with a protected leave under FMLA/OFLA. Once FMLA/OFLA leave expires, a disabled employee may be entitled to further leave under the ADA. *See Leave discussion in Section 4.G, infra.*
- C. An injured worker subject to workers’ compensation may be disabled and therefore covered by the ADA. Additionally, injured workers in Oregon have reinstatement/reemployment rights. With certain exceptions, an injured worker must be reinstated if the worker’s former position exists and is available when the worker is released to return to work, even if that position has been filled by a replacement worker while injured worker was absent. ORS 659A.043(1). If an injured worker cannot perform her previous job, the employer must consider positions that are vacant and suitable, which includes positions within a reasonable geographical distance. ORS 659A.046. The time period for reinstatement/reemployment is generally three years.

11. ADA claims on summary judgment.

- A. Plaintiff’s *prima facie* case. For claims of disparate treatment, a plaintiff may create a *prima facie* case of discrimination through the *McDonnell Douglas* formulation. The elements of

- plaintiff's claim of disability discrimination are proof that (1) plaintiff is disabled; (2) he is otherwise qualified; and (3) he suffered discrimination because of his disability. *Bates v. United Parcel Service*, 511 F.3d 974, 988 (9th Cir. 2007).
- B. *McDonnell Douglas* burden-shifting (federal court). In federal court, the burden shifting analysis of *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973) applies. The plaintiff creates a presumption of discrimination through proof of a *prima facie* case. The defendant rebuts the presumption by articulating a legitimate, non-discriminatory reason for the disputed employment action. When defendant articulates a non-discriminatory reason, the presumption of unlawful discrimination "simply drops out of the picture." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 at 506-507 (1993). To survive summary judgment after the defendant offers a nondiscriminatory reason for its decision, the plaintiff must produce evidence showing that the employer's decision was a pretext for another motive which is discriminatory. *Wallis v. J.R. Simplot Company*, 26 F.3d 8845 (1994).
- C. Pretext. A plaintiff creates an issue of pretext through "direct evidence" of discrimination or "circumstantial evidence" of discrimination. When a plaintiff relies upon circumstantial evidence to create an issue of fact as to pretext, the circumstantial evidence must be "specific" and "substantial." Direct evidence of discrimination creates a triable issue of fact even if the evidence is not substantial. *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1038 (9th Cir. 2005).
- D. Burden-shifting in state court. Oregon has adopted the federal court formulation for proof of a *prima facie* case of discrimination for use in claims brought under ORS 659A. *Henderson v. Jantzen, Inc.*, 79 Or. App. 654, 657, 719 P.2d 1322, *rev den'd*, 302 Or. 35 (1986). Under this formulation, a plaintiff is not required to offer direct evidence of discrimination to establish a *prima facie* case. *Callan v. Confederation of Oregon School Administrators*, 79 Or. App. 73, 77 n.3., 717 P.2d 1252 (1986). The proof necessary for a *prima facie* case of discrimination is " * * * so minimal that it is virtually impervious to a motion based on evidentiary insufficiency." *Callan, supra*, 79 Or. App. at 78, n.3. Establishment of a *prima facie* case creates an inference of unlawful discrimination and an issue of fact for the fact-finder. *Henderson, supra*, 79 Or. App. at 657.
- E. In state court, upon proof of a *prima facie* case of discrimination, summary judgment is inappropriate even in the face of assertions by the defendant of nondiscriminatory action. *Henderson, supra*, 79 Or. App. at 658. Under Oregon law, a defendant does not defeat a plaintiff's showing of material facts on an employment discrimination claim "merely because [the] defendant asserts a nondiscriminatory reason which may or may not persuade the trier of fact." *Hardie v. Legacy Health Systems*, 167 Or. App. 425, 437, 6 P.3d 531 (quoting *Henderson v. Jantzen, Inc.*, 79 Or. App. 654, 658, 719 P.2d 1322). Thus, if a plaintiff presents *prima facie* evidence of discrimination and the employer offers evidence of a non-discriminatory reason, there is an issue of fact for resolution by the fact-finder. *Kirkwood, supra*, 129 P.3d at 727.
- F. For state law claims brought in federal court, the federal court will apply federal burden-shifting, not state procedural law on burden shifting. *Snead v Metropolitan Property and Casualty Co.*, 237 F.3d 1080, 1090 (9th Cir. 2001).

- G. Special Rules Applicable to Reasonable Accommodation Claims. Once a disabled employee has made a request for accommodation, the employer is under a “mandatory obligation” to engage in an informal interactive process to clarify what the individual needs and identify the appropriate accommodation. The requirements for the interactive process are set forth in *Barnett v. US Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000). Under the Ninth Circuit’s decision in *Barnett*, an employer who fails to initiate the interactive process “must face liability when a reasonable accommodation would have been possible.” *Barnett, supra*, 228 F.3d at 1116. The central issue for resolution when an employer fails to initiate the interactive process is whether “reasonable accommodation would have been possible.” *Id.* Under Ninth Circuit case law, defendant bears the burden of proving that no accommodation would have been possible or no accommodation was available when the employer fails to engage in the interactive process. *Morton v. United Parcel Service, Inc.*, 272 F.3d 1249, 1256 n.7 (9th Cir 2001).
- H. Whether a reasonable accommodation claim is, or isn’t, litigated as a failure to engage in the interactive process type of case, the Supreme Court’s decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), should be carefully reviewed. Under *Barnett*, a plaintiff in a reasonable accommodation appears to have a “burden of production” of general types of accommodation that are reasonable in the run of the mill type of case. Defendant has the burden of proving specifics showing the accommodation imposes undue hardship.

WHERE SHOULD I FILE MY CASE AND WHAT RELIEF SHOULD I SEEK?

12. Should I file in federal court or state court?

- A. The major factors to consider in choosing which court to file in an employment case are no different than in other kinds of plaintiff’s case. In federal court, the parties will have to make initial disclosures of documents and witnesses (see L.R. 26-7 “Initial Discovery Protocols for Employment Cases”); the parties may seek information through interrogatories; the parties will have to identify witnesses who give opinion evidence and produce reports from witnesses retained or specially employed to provide expert testimony (FRCP 26(a)(2)); the parties will have to supplement such disclosures; experts will be subject to deposition and the parties will have to comply with lengthy pre-trial requirements for disclosure of witnesses, witness testimony, exhibits, and motions (FRCP 26(a)(3) and 26(b)(3)-(5)). In state court, there are no initial disclosure requirements, no expert discovery, no interrogatories and (subject to some local trial court rules) very little required pre-trial submissions. See UTCR 6.050 - 6.080 for requirements for submission of trial memoranda, jury instructions, and marking of exhibits.
- B. Issues of sovereign immunity when the State of Oregon is potential defendant. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001), the Supreme Court struck down 42 U.S.C. § 12202, which had purported to abrogate states’ immunity from Title I ADA claims, holding that Congress was not acting pursuant to a valid grant of constitutional authority when it passed that provision. Thus, the Supreme Court held, the Eleventh Amendment bars suits against a state for money damages under Title I of the ADA. *Garrett*, 531 U.S. at 374; see also *Allen v. SAIF Corp.*, 2005 WL 708402, at *1 (D. Or. 2005). A plaintiff may recover declaratory and injunctive relief against a state official in his official capacity in federal court. See *Ex parte Young*, 209 U.S. 123 (1908).

- C. A state that accepts federal financial assistance may be sued for money damages in federal court for violations of Section 504 of the Rehabilitation Act of 1973. The state waives immunity to suit under Section 504 by accepting federal financial assistance. *Miranda B v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003); *Douglas v. California Dept of Youth Authority*, 271 F.3d 812 (9th Cir. 2001); 42 U.S.C. § 2000d-7.
- D. Differences in causation requirements under the various laws. “But for,” and “substantial factor” apply to ADA and state disability discrimination claims of intentional discrimination. A “sole” factor test applies to claims under the Rehabilitation Act of 1973. *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005).
- E. Differences in damage remedies. There is no damage limitation on claims for violation of ORS 659A.112 or on claims for violation of 24 U.S.C. § 794. There are damage limitations on claims under the ADA and claims under the Oregon Tort Claims Act. See answer to question 11 below.

13. What can the plaintiff recover?

- A. The powers, remedies, and enforcement provisions of Title VII apply to claims alleging employment discrimination on the basis of disability under the ADA. 42 U.S.C. § 12117(a).
- B. 42 U.S.C. § 1981a(a)(2) provides for recovery of compensatory and punitive damages against a defendant who engages in intentional discrimination against a defendant who violates 42 U.S.C. § 12112(b)(5) concerning the provision of reasonable accommodation. The statute does not authorize compensatory damages on disparate impact claims.
- C. On a claim for failure to provide reasonable accommodation, the defendant can avoid an award of damages through proof that defendant made good faith efforts, in consultation with the plaintiff, to identify and make reasonable accommodation. 42 U.S.C. § 1981a(a)(3).
- D. Limitations on damages under the ADA. 42 U.S.C. § 1981a(b)(3) limits the amount of damages recoverable based upon the number of employees of the defendant: \$50,000 for a respondent with more than 14 and less than 101 employees; \$100,00 for a respondent with more than 100 and fewer than 201 employees; \$200,000 for a respondent with more than 200 and fewer than 501 employees; and \$300,000 for respondents with more than 500 employees.
- E. For purposes of calculating the limitations on damages under the ADA, compensatory damages do not include backpay, interest on backpay, or any other type of relief authorized under 42 U.S.C. § 2000e-5(g). 42 U.S.C. § 1981a(b)(2). Front pay is also excluded from the limitation because it is relief authorized under 42 U.S.C. § 2000e-5(g). *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).
- F. Tort Claims Act limitations on damages apply to state law claims. The limitations are set forth in ORS 30.271 and ORS 30.272. Different limitations apply depending upon the date the “cause of action arises.” The Tort Claims Act limitation applies to state law claims whether filed in federal or state court.

- G. State of Oregon’s interest in punitive damages under state non-discrimination laws. ORS 31.35 (providing 30% of punitive damage award payable to prevailing party). The State of Oregon’s interest in punitive damages award under state non-discrimination laws applies whether the state law claim is filed in federal or state court. *Demendoza v. Huffman*, 334 Or. 425, 51 P.3d 1232 (2002); *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985 (9th Cir. 2007).

14. Do I get a jury on my claim or will the case be decided by a judge?

- A. Plaintiff is entitled to a jury on liability claims for violation of the ADA and for compensatory damages or punitive damages under the ADA. The court is precluded from informing the jury of the limitations on damages under the ADA. 42 U.S.C. § 1981a(c)(1).
- B. The Ninth Circuit has held that a plaintiff seeking “money damages” under Section 504 has a Seventh Amendment right to a jury trial. A plaintiff can seek money damages by asserting a Section 504 claim under 42 U.S.C. § 1983. A plaintiff seeking only equitable relief under Section 504 has no statutory or Constitutional right to a jury trial. *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990).
- D. The Ninth Circuit has held that claims for “back pay” under the ADA and The Rehabilitation Act are claims for the court. *Lutz v. Glendale Union High School*, 403 F.3d 1061, 1069 (9th Cir. 2005).
- E. The Ninth Circuit’s website says there is a significant question as to whether front pay claims under the ADA are questions for the jury or the court. See Ninth Circuit Model Civil Jury Instructions, Instruction No 12.13 ADA – Damages. It is true that there is no Ninth Circuit opinion on the question of front pay under the ADA. Nevertheless, the Ninth Circuit has held that whether to award front pay and the amount of front pay are issues for the court under FMLA. *Traxler v. Multnomah County*, 596 F.3d 1007, 1014 (9th Cir. 2010). It is unclear whether a plaintiff who seeks lost past wages and future wages as a form of money damages is entitled to a jury trial under *Smith*.

RESOURCES

EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. Part 1630.

The EEOC has issued Enforcement Guidance on the ADA which may be found on the Commission's website at <https://www.eeoc.gov/eeoc/publications/index.cfm>. The Enforcement Guidance covers the following topics:

Enforcement Guidance on Pre-Employment Disability Related Inquiries and Medical Examinations. October 10, 1995.

EEOC Enforcement Guidance on Disability Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act. July 27, 2000.

ADA Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities. March 25, 1997.

EEOC Enforcement Guidance: on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990. February 12, 1997.

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act. October 17, 2002.

EEOC Enforcement Guidance: Workers Compensation and the ADA. July 6, 2000.

The Ninth Circuit has model jury instructions for disability discrimination cases which are found on the Ninth Circuit website at: www3.ce9.uscourts.gov/jury-instructions/model-civil

The Bureau of Labor and Industries has regulations implementing Oregon state laws prohibiting disability and injured worker discrimination located at OAR 839-006-0100 through 839-006-0480. The Bureau's regulations can be found on the Bureau's website at www.Oregon.gov/Boli/legal/H_OAR.aspx.

Employment Relations Board: Jurisdiction, Practice and Procedure

Adam L. Rhynard, *Board Chair, Oregon Employment Relations Board*

Oregon Employment Relations Board: Jurisdiction, Practice and Procedure

Presented by:

Adam Rhynard

Chair, Employment Relations Board

June 7, 2018

What is the Employment Relations Board?

The Board is the "labor court" that resolves disputes between state and local governments and their employees, as well as some private sector employers and their employees. The Board issues final orders in contested case adjudications of unfair labor practice (ULP) complaints, union representation matters, appeals from state personnel actions, and related matters.



ERB administers three separate statutory schemes:

- **The Public Employee Collective Bargaining Act (PECBA)** -- ORS 243.650 through 243.766, which covers collective bargaining in state and local government in Oregon;
- **The State Personnel Relations Law (SPRL)** -- ORS Chapter 240, which creates appeal rights for certain personnel actions for management service and non-union employees of the State of Oregon; and
- **The private sector labor-management relations law** -- ORS 662.405 through 662.455, and 663.005 through 663.295, which concerns collective bargaining for private sector employees who are not covered by federal law.

Why should I care?

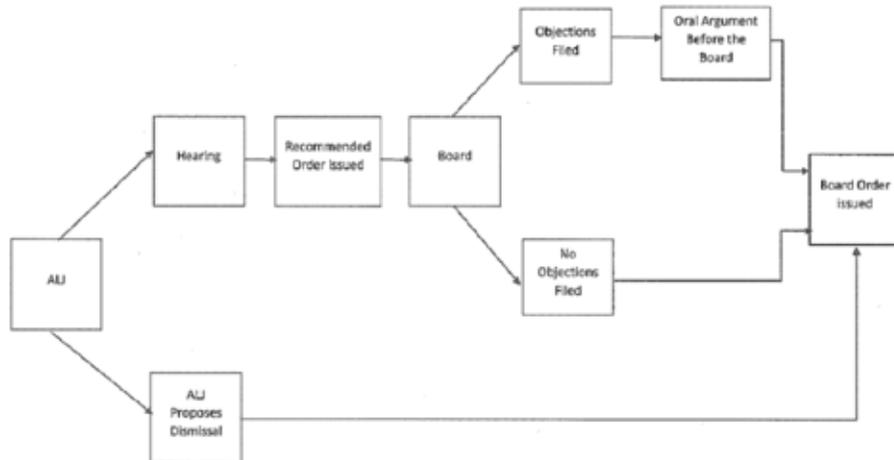
- Approximately 3,000 employers and 250,000 employees in the public and private sector are under our jurisdiction. Approximately 55% of public sector employees are represented by a union.
- Exclusive jurisdiction over unfair labor practices may impact employment litigation, and the two areas of law frequently overlap.
- Not just labor law-SPRL appeals for State management service employees and unrepresented classified employees.

Structure of the Board

- Three Person Board appointed by the Governor with consideration of the interests of management, labor and the public interest.
- State Conciliator appointed by the Board.
- Two full-time mediators.
- Three in-house administrative law judges-we do not use Office of Administrative Hearings.
- Election Coordinator.
- Board Chair: Adam Rhynard
- Board Members: Lisa Umscheid and Jennifer Sung
- State Conciliator: Janet Gillman

Case Processing

Case Processing -- Hearings



Cases can be withdrawn by parties prior to issuance of a Board Order.

Public Sector Unfair Labor Practices (ULP) Cases

- What is an unfair labor practice?
- Hint-it's not what it sounds like.



Types of Public Sector ULPs

Public Employer ULPs (ORS 243.672(1)):

- Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed under the PECBA.
- Dominate, interfere with or assist in the formation, existence or administration of any employee organization.
- Discriminate in regard to hiring, tenure, or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization.
- Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, complaint, or has given information or testimony in an ERB proceeding.
- Refuse to bargain collectively in good faith with the exclusive representative.
- Refuse or fail to comply with any provision of the PECBA. Violate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them.
- Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
- Violate ORS [243.670\(2\)](#) (which prohibits the use of public funds to oppose or support a union organizing campaign, or to take certain actions against employees who participate in hearings under this section).

Types of Public Sector ULPs

Labor Organization ULPs (ORS 243.672(2)):

- Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under the PECBA.
- Refuse to bargain collectively in good faith with the public employer if the labor organization is an exclusive representative.
- Refuse or fail to comply with any provision of the PECBA.
- Violate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate or to accept the terms of an arbitration award.
- Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
- Engage in unconventional strike activity not protected for private sector employees under the National Labor Relations Act (such as sitdown, slowdown, rolling, intermittent or on-and-off again strikes).
- Picket or cause, induce, or encourage to be picketed, or threaten to engage in such activity, at the residence or business premises of any individual who is a member of the governing body of a public employer, with respect to a dispute over a collective bargaining agreement or negotiations over employment relations, if an objective or effect of such picketing is to induce another person to cease doing business with the governing body member's business or to cease handling, transporting or dealing in goods or services produced at the governing body's business.

ULP Complaints

- **Standing:** Only an “injured party” may file a complaint. Can be either an individual, union, or employer. Whether a party can be considered “injured” depends on nature of the alleged violation.
- **Statute of limitations:** 180 days from the “occurrence” of the ULP. However, we apply a discovery rule, so must be filed within 180 days of date complainant knew or reasonably should have known of the occurrence of the ULP.
- Filed on a form approved by the Board, along with a \$300 filing fee. May be emailed, mailed, hand-delivered, or faxed (\$25 fax filing fee).
- Parties ARE NOT required to serve the initial complaint on the opposing parties.

ULP Hearings Process

- ULPs can either follow the standard process, or be set for expedited consideration by the Board.
- Standard Cases: ALJ “investigates” the complaint, and if there is an issue of fact or law, a hearing will be set.
- Expedited Cases: These cases will generally be heard by the Board directly and submitted on oral closing rather than briefs. The Board has discretion on whether to grant requests to expedite proceedings.

ULP Hearings Process

- Discovery: Discovery in ULP cases is generally informal, with parties disclosing relevant and non-privileged information upon request of the opposing party. However, attorneys may issue subpoenas and non-attorneys may request a subpoena from the ALJ. Depositions are limited only to times when necessary to perpetuate testimony. Other formal discovery methods available in civil litigation are generally not available (e.g., requests for admission, interrogatories).
- Motions: Parties may request “any ruling, order or other relief” by filing a written motion with the Board. There is no particular form required, but the moving party must make a good-faith effort to confer with the other party to seek resolution of the dispute. The motion must describe these efforts. Responses to a motion must be filed within 14 days of the date the motion is served.
- Answer: Respondents have 14 days from the date of service of the complaint to file their written answer to the complaint, including any affirmative defenses. If a respondent does not file an answer, it will not be allowed to present evidence at the hearing and will be restricted to making legal arguments. The answer is not considered filed until the \$300 filing fee is received.

ULP Hearings Process Continued

- Exhibits and Witness Lists: Parties must generally exchange copies of exhibits and witness lists no later than seven days before the hearing. A party that fails to comply with this requirement will not be allowed to offer evidence or call witnesses unless they can show good cause for the failure to comply.
- Prehearing Conferences: The ALJ may call a prehearing conference to discuss a wide variety of issues, including inter alia, scheduling hearing dates, the order in which the parties will call witnesses, formulation of the issues to be decided, and the disposition of motions. In most cases, a prehearing conference will be held immediately before the start of the hearing to discuss the admission of exhibits, the statement of the issues, and other procedural matters.

ULP Hearings Process Continued

- **Burden of Proof:** In ULP cases, the complainant has the burden of proof and the burden of going forward with the evidence. Respondents have the burden of proving affirmative defenses.
- **Evidentiary Standard:** The Board will admit evidence “of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs.” However, the Board will exclude irrelevant, immaterial, or unduly repetitious materials.
- **Post Hearing Briefs:** Briefs are usually filed after the hearing is concluded. Generally, these must not exceed 30 pages in length.

ULP Hearings Process Continued

- **Objections:**
 - Due within **14 days** of the date of service of the recommended order.
- **Cross-objections:**
 - Due within **7 days** of the service of the objections.
- **Oral Arguments:**
 - If objections are filed, the parties will have an opportunity for oral argument before the 3-member Board. A memo in aid of oral argument may be submitted 5 or more days before the oral argument.
- **Final Order:**
 - After oral arguments, the Board drafts and serves a final order in the case on the parties.
- **Motions for Reconsideration:** Parties may file a motion for reconsideration within 14 days after the date of service of the Board’s final order
- **Appeal of Board Orders:**
 - Board orders are appealable to the Oregon Court of Appeals under ORS 183.482. A written petition must be filed within 60 days of the date of the order.

ULP Representation Costs

- **Representation Costs:** Under OAR 115-035-0055, representation costs are awarded as follows:
 - \$250 for a case dismissed without a hearing (conclusion that respondent has not engaged in an unfair labor practice)
 - \$1,000 for a case presented solely on stipulated facts.
 - \$3,000 for a case requiring one day of hearing.
 - \$5,000 for a case that requires more than one day of hearing.
 - Full amount of reasonable representation costs if a civil penalty is awarded.
 - \$500 or less if a non-prevailing party had to rely on personal financial resources.
 - Petition only needs to be filed if a party seeks an award in excess of \$5,000 (due to civil penalty) Such a petition must be filed within 21 days of the issuance of the final order in the case.

ULP Representation Costs

- If petition for representation costs over \$5,000 is filed, objections to that petition must be filed within 21 days.
- If objection is based on excessive time, objector must submit statement describing objector's time spent on the case.
- If objection based on excessive hourly rate, objector must submit supporting statement identifying objector's hourly rate.

ULP Attorney Fees for Appeals

- In cases appealed to the Court of Appeals or Supreme Court, the Board must also issue attorney fees to the prevailing party.
- Petition must be filed within 21 days of date of appellate judgment.
- Petition must contain:
 - Statement of costs requested
 - Description of actual amount of fees incurred (or bases for request).
- Objections to petition must be filed within 14 days
- If objection based on excessive time, then must submit a supporting statement describing the objector's time.
- If objection based on excessive hourly rate, then must submit a supporting statement of objector's hourly rate.

State Personnel Relations Law Appeals

- Appeals from State employees for certain personnel actions
- Primarily 2 groups
 - Classified employees who are not represented by a labor organization
 - Management service

SPRL Appeals Continued

Classified Service Appeals:

- Who can file?
 - A “regular employee who is reduced, dismissed, suspended, or demoted.”
- When can the State take that action?
 - Misconduct
 - Inefficiency
 - Incompetence
 - Insubordination
 - Indolence
 - Malfeasance
 - Other unfitness to render effective service

SPRL Appeals Continued

- Management Service Appeals
 - Who can file?
 - A management service employee who was disciplined by:
 - Reprimand
 - Salary Reduction
 - Suspension
 - Demotion
 - Removal from management service
 - Dismissed from State service

SPRL Appeals Continued

- When Must Appeals Be Filed?
 - Within 30 days after the effective date of the action (postmarked or received)
- When will the Hearing Take Place?
 - Within 30 days, unless the parties agree to a postponement.
- Is a Particular Form Required?
 - No, but the appeal should provide sufficient information for the Board to understand who the employer is, when the personnel action was taken, and what issues are raised by appeal. Most commonly, appeals are submitted as letters from either the individual employee or their attorney. Copies of disciplinary documents or personnel actions are often included. Many appellants appear *pro se*.
- What is the Process of the Appeal?
 - Same general process as ULP complaints, including availability of judicial review.

Union Representation Matters

- Petitions for Representation
 - (Card Check or Election)
- Petition to add Unrepresented Employees to an Existing Bargaining Unit
 - (Card Check or Election)
- Other Petitions for Unit Change/Clarification
- Decertification Petitions

Union Representation Matters

- Petition with Showing of Interest
- Posting of Notice of Petition
- Ability to Waive Hearing and Agree to Consent Election
- Any Objections or Motions to Intervene
 - If so, Hearing and Recommended Order
- Election and Tally of Ballots
- Any Objections to Conduct of Election or Conduct Affecting Results of Election
- Certification of Election Results

Mediation and Conciliation Services

- Mediation of Collective Bargaining Disputes
- Grievance and ULP Mediation
- Interest-based Bargaining Training and Facilitation
- Arbitrator List

**RESOURCES FOR ADVOCATES IN EMPLOYMENT
RELATIONS BOARD MATTERS**

ERB Website – <http://www.oregon.gov/erb/pages/index.aspx>

- ERB Rulebook, Forms, Orders, Complaints, Interest Arbitration Awards, Conciliation Services, and more.
- SPRL Digest – summaries of Board orders decided under the SPRL
- SPRL Q & A—guide to SPRL procedures and cases

Oregon State Bar Treatise: *Labor and Employment Law: Public Sector*, 2011 Edition.

University of Oregon’s Labor Education and Research Center’s Monograph Series

Public Employee Collective Bargaining Act Digest

Public Employee Collective Bargaining Reporter

Discovery in Labor and Employment Law

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Oregon State Bar Labor and Employment Boot Camp

Discovery in Labor and Employment Law

June 2018

By: Talia Stoessel

A basic checklist from a plaintiff lawyer's perspective:

- **Client Communications re: Discovery**
 - ***Duty to preserve.*** Better to be overbroad at the beginning and fight about any potential relevancy later rather than not having the documents if the judge orders them.
 - Some examples include all documents, including communications, notes, diaries, letters, journals, emails, blogs, or social media entries related to a) offending employer and incident; b) any search for a new job; c) communications with current or former employees; d) emotional distress; e) any other legal proceedings; f) relevant medical issues; and g) economic losses and income since incident.
 - Advise caution re: taking ***copies of employer records.*** Review case law and employer's confidentiality policies for potential limitations.
 - If the defendant pursues legal action against the plaintiff for taking copies of employer records, consider whether it might constitute retaliation for protected activity if no arguable basis in law or fact. *See,*

e.g., Grimsley v. Charles River Laboratories, Inc., 467 Fed. Appx. 736 (9th Cir. 2012).

- Advise caution re: sharing **attorney-client privileged communications!** Disallow client use of employer email account, computers or phones for attorney communications.
- Be careful of use of recordings without consent. *See ORS 165.540-165.543.*

□ **Opposing Counsel Communications re: Discovery**

- Send **notice of non-spoilation**. *See e.g., Oregon Civil Litigation Manual, Litigation Technology Section, Form 6-1.*
- Federal - **Pretrial Discovery Conference** within 30 days of service upon the defendant. Or. Fed. Local Rule 26-1(1).
- **Confer, confer, confer!!!** *See, e.g., UTCR 5.010; Or. Fed. Local Rule 7-1.* Remember to actually speak to one another.

□ **Early Discovery**

- Request for **certified copy of personnel file** under ORS 652.750 (now includes time record information!). Read the rule carefully – allows for all documents, notes, and communications that “are used or have been used to determine the employee’s qualification for employment, promotion, additional compensation or employment termination or other disciplinary action.”
- **Public Records and Freedom of Information (FOIA)** requests, if applicable. *See e.g., 5 USC § 552; ORS Ch. 192; Oregon Attorney General’s Public Records and Meetings Manual.*
- **Independent investigation** with online resources and/or private investigators (*but see, OSB Formal Opinion No. 2013-189 for limitations on social media discovery*).
- **EEOC/BOLI investigation materials** – be sure to make a request for the file and obtain the employer’s position statement. You can also try to make a request for the **Employment Department’s file** related to any

unemployment insurance matter. Even though the determination may not be admissible under ORS 657.273, you may be able to use the employer's inconsistent statements against them later. *See, e.g.*, FRE 801(d)(1)(A), FRE 801(d)(2)(A), and FRE 613(a).

□ **Making Discovery Requests**

- ***Plan early!*** Seek out samples from colleagues/resources for ideas.
 - ***Tip:*** Remember that employment cases often rise and fall on circumstantial evidence so be sure to develop your requests accordingly. For example, documents related to timing, undermining an employer's stated business rationale, treatment of comparable employees, and statements evidencing discriminatory or retaliatory intent.
- Don't send form discovery requests – ***tailor*** to the case.
- ***Broad*** discovery; admissibility is not the standard – *see, e.g.*, ORCP 36 B(1); FRCP 26(b)(1).
 - **Note:** Although FRCP 26 was amended to cite “proportionality” instead of “reasonably calculated to lead to admissible evidence,” your strategy shouldn't change much if you are already tailoring your requests to the case. Also note that objections based on proportionality must be stated with specificity. In response to a challenge to proportionality, walk through the factors in the rule.
- Use ***requests for admissions*** sparingly or wisely: every word makes a difference in how they can be interpreted – don't give your opponent wiggle room to deny! Don't hesitate to re-word it if you think they've squirmed out of it. Or, just use the deposition to pin down the information that you want.
 - **Tip:** Use RFAs to establish authenticity of key documents to save time in depositions.
- Review responses to your requests thoroughly and ***follow up*** with any additional requests and conferral in a timely fashion. Establish in conferral which documents are being withheld pursuant to your opponent's objections. File a motion to compel and/or request a privilege log if documents are being withheld.

- Check with Judge’s chambers before filing a motion to compel – some judges require an *informal conference* with the court prior to filing the motion.

□ **Responding to Discovery Requests:**

- Be sure to make *specific objections* – ORCP 43 B(3); FRCP 34(b)(2)(B).
- Object to anything resembling a *contention interrogatory* - opposing counsel doesn’t get to ask you questions that require your legal analysis/thought process (e.g., “state all facts that support (x)...” or “identify all evidence that support (x)...”).
- Your client’s duty to respond is ongoing through pendency of action – ORCP 43 B; FRCP 26(e).
- Be prepared to make arguments (where appropriate) that plaintiff did not waive all physician-patient privilege merely by filing a lawsuit including emotional distress claims and that past and subsequent personnel records cannot lead to admissible evidence. Consider the harm to future and current employment opportunities with such inquiries to past and subsequent employers.

□ **Depositions**

- Review and make a list of proper deposition objections.
- Be sure to ask all the questions – no matter how basic – that establish your prima facie case so that you can defeat a summary judgment motion! Make an outline to help you prepare, but try not to get locked in or fixated on your outline.
 - **Tip:** Also ask your questions with an awareness of whether the testimony would be admissible under the rules of evidence.
 - **Tip:** Ask questions about punitive damages if relevant to case.
- Review the Multnomah County Deposition Guidelines - <https://mbabar.org/assets/depoGUIDE2012.pdf> or Or. Fed. Local Rule 30. Bring a copy to depositions along with the phone number for Judge’s chambers.

- Proceed very carefully and plan early for subpoenas on **out-of-state witnesses**. *See, e.g.*, FRCP 45(c) (can only be required to testify if within 100 miles from where that person resides, is employed, or regularly transacts business in person); ORCP 38B (special process for subpoenas to persons living in another state). Review rules on **perpetuation depositions or use of depositions at trial**. *See, e.g.*, ORCP 39I; FRCP 32. You may need to hire out-of-state counsel to serve subpoena depending on that jurisdiction's rules - each state has a statute or rule that addresses service of such subpoenas.
- Be sure to follow the rules on noticing **videotaped depositions** if that's how you'd like to proceed! *See, e.g.*, ORCP 39; FRCP 30.

□ **Special Federal Rules:**

- Initial disclosures under Or. Fed. Local Rule 26-7 for employment law cases, except the following instances (in which FRCP 26(a)(1) initial disclosure rules may still apply):
 - Class actions, and
 - Cases in which the allegations involve **only** the following: Discrimination in hiring; Harassment/hostile work environment; Violations of wage and hour laws under the Fair Labor Standards Act (FLSA); Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA); Violations of the Family Medical Leave Act (FMLA); and Violations of the Employee Retirement Income Security Act (ERISA).
- Deposition time limitation of 1 day of 7 hours, unless leave from court – see FRCP 30(d).
- The Federal Bar Associations puts out a handy reference manual entitled “Federal Court Practice Handbook” with all the judge’s unique “do’s and don’ts.”

□ **Special State Rules:**

- No interrogatories.
- Always pay attention to any applicable Supplementary Local Rules!!! And, the judge’s clerk should be your best friend.

- Careful to preserve all objections at perpetuation depositions - ORCP 39 I(6).
- Review ORCP 43 B(2) for required responses to discovery requests.
- **Protective Orders**
 - ORCP 36C; FRCP 26(c) - These are pretty standard for confidential information – be cooperative but firm in insisting on a process that will actually work for the parties practically when you want to resolve a dispute over whether a record is confidential. Be wary of long waiting periods and give yourself alternatives in case you’re up against a deadline and need to file the information with the court.
- **Work Product/Anticipation of Litigation/Attorney Client Privilege**
 - Fight back against assertions that an ***attorney’s mere presence*** (at a board meeting, for example) makes all the related communications privileged.
 - Careful about which documents your client reviews to ***refresh recollection*** in preparation for deposition (even if you think they are attorney-client privileged) – opposing counsel might ask to see them.
 - Careful about communications with your client with a ***third party*** present.
 - ***Documents by non-attorneys*** may also enjoy work-product protection – FRCP 26(b)(3)(A); ORCP 36 B(3); but see exceptions for “substantial need” and “unable without undue hardship” – ORCP 36 B(3); FRCP 26(b)(3)(A)(ii).
 - ***Witness statements protected*** – *see, e.g.*, ORCP 36 B(3); Multnomah County Circuit Court’s Civil Motion Panel Statement of Consensus § 2(I)(2), <http://www.courts.oregon.gov/Multnomah/docs/CivilCourt/CivilMotionPanelCivilMotionPanelStatementOfConsensus.pdf>.
 - But push back on an employer’s investigatory notes (e.g., HR interviews) prepared in the regular course of business rather than in anticipation of litigation.

□ **Trial Strategy Issues Related to Discovery**

- Don't overlook ***motions in limine*** to keep out information at trial that was not timely or appropriately produced.
- Be familiar with deposition references and discovery responses (admissions/interrogatories) for potential ***impeachment***.
- Request at trial any ***witness statement*** of witnesses who testify during the trial – *see, e.g., State v. Cartwright*, 336 Or 408, 419 n 8, 85 P3d 305 (2004).

□ **Labor Law Discovery**

- Be sure to inquire and be aware of ***pending issues under any collective bargaining agreement (CBA)*** related to your client's matter. Some CBAs specifically overlap with statutory remedies and require a careful analysis under current state court and Employment Relations Board (ERB) case law. You should be in touch with any labor lawyer retained by the union or consult with a labor lawyer if this is unfamiliar terrain for you. If there's a related grievance, see if your client or the union representative can share any information with you.
- ***Broad entitlement to information requests*** related to potential grievances, contract interpretation, and preparation for collective bargaining under Public Employee Collective Bargaining Act (PECBA). *See, e.g.,* ORS 243.672(1)(e).
- ***Costs of information requests*** – *See, e.g. AFSCME Council 75, Local 189 v. City of Portland*, UP-046-08 (Aug. 5, 2016) for “totality of circumstances” test.
- ***Discovery in arbitration proceedings*** governed by ORS 243.706 and Oregon Arbitration Act, ORS 36.675 (although specific ORS 243.706 governs over the general ORS 36.675 according to *Smith v. State Through Dep't of Human Res.*, 31 Or. App. 15, 19, 569 P.2d 677, 679 (1977)).

Discovery in Labor and Employment Cases

Talia Yasmeen Stoessel, Esq.



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Morris, & Kaplan, LLP

Client Communications

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- Advise caution re: sharing **attorney-client privileged communications!**

Opposing Counsel Communications

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Early Discovery

- Request for **personnel file** under ORS 652.750.
- **Public Records and Freedom of Information (FOIA)** requests, if applicable.
- **Independent investigations**.
- **EEOC/BOLI investigation materials**.
- **Employment Department's file** related to unemployment insurance matter.

Making Discovery Requests

- **Plan early!** Seek out samples from colleagues/resources for ideas.
- **Circumstantial evidence:**
 - timing,
 - undermining an employer's stated business rationale,
 - treatment of comparable employees, and
 - statements evidencing discriminatory or retaliatory intent.

Making Discovery Requests

- Don't send form discovery requests – **tailor** to the case.
- **Broad** discovery; admissibility is not the standard!
- Proportionality shouldn't change things if you're already acting **reasonably!**

Making Discovery Requests

- Use **requests for admissions** sparingly or wisely.
- Review responses to your requests **thoroughly and carefully**.
- Check with Judge's chambers before filing (or more importantly, drafting) a motion to compel.

Responding to Requests

- Make sure to make **specific objections**.
- Object to anything resembling a **contention interrogatory**.
- Continuing obligation.

Depositions

- Review and make a list of proper deposition objections.
- Be sure to ask all the questions – no matter how basic – that establish your *prima facie* case.
- Review the Multnomah County Deposition Guidelines.
- Proceed very carefully and plan early for subpoenas on ***out-of-state witnesses***.
- Be sure to follow the rules on ***videotaped depositions***.

Special Federal Rules

- Initial disclosures under Or. Fed. Local Rule 26-7 and FRCP 26(a)(1).
- Time limitation of 1 day of 7 hours.
- “Federal Court Practice Handbook”

Special State Rules

- No interrogatories.
- Supplementary Local Rules!!!
- Review ORCP 43 B(2) for required responses to discovery requests.

Protective Orders

- Although standard, review language carefully so that it makes sense to practically apply.
- **THINK**: what do I need to do if I realize I want to use a “confidential” document three days before my pleading is due?

Work Product

- **Documents by non-attorneys** may also enjoy work-product protection.
- **Witness statements protected** –
 - But push back on an employer's investigatory notes (e.g., HR interviews) prepared in the regular course of business rather than in anticipation of litigation.

Attorney Client Privilege

- **Attorney's mere presence** not enough!
- Careful about which documents your client reviews to **refresh recollection** in preparation for deposition.
- Careful about communications with your client with a **third party** present.

Trial Strategy Issues

- **Motions in limine.**
- Be familiar with deposition references and discovery responses for potential **impeachment**.
- **Witness statement** of witnesses who testify during the trial.

Labor Law Discovery

- If unfamiliar, consult a labor lawyer!
- Communicate with union representative about overlapping issues.
- **PECBA's broad entitlement to information requests** related to potential grievances, contract interpretation, and preparation for collective bargaining.
- **Costs of information requests.**
- **Discovery in arbitration proceedings.**



Questions?

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The Effective Plaintiff's Deposition

Prepared and Presented by:
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June 7, 2018

Part I: Preparing for the Deposition

“Plan for what is difficult while it is easy; do
what is great while it is small.”
~Sun Tzu, *The Art of War*



Know Your Goals

- You have two goals for plaintiffs' depositions or depositions of adverse witnesses:
 - Get the admissions you need for summary judgment
 - This includes closing out the world of information the plaintiff has that is relevant to the case (you do not have summary judgment admissions if you don't do this)
 - Get trial admissions

Critical Skill 1 -- Preparing: Know the Facts Better than the Witness Does

- Is an early plaintiff's deposition the best idea? Usually yes, but sometimes no.
- A thorough review of documents is critical.
- Enough prep time is essential!
- Select and know your own exhibits.

Critical Skill 2 -- Creating and Using an Outline

- **Write-out the phrasing of key questions. Why?**
 - To remember to use broad, inclusive wording on a leading question.
 - To confirm key dates that must not be messed up (e.g., a retaliation case timeline).

Example from a plaintiff depo outline:

- Is it correct that the only person employed by Kittens R Us whom you ever felt sexually harassed you was Lisa Simpson?
 - You worked with Ms. Simpson for just over two months, correct?
 - And that time period was from June 16, 2015, until August 26, 2015, correct?
- On or about August 25, 2011, Ms. Simpson was placed on an administrative leave from her job at Kittens R Us, correct?
 - And after the date Ms. Simpson went on administrative leave, you never reported to her again, correct?
 - Do you have any reason to believe that, after the date Ms Simpson went on administrative leave, she had any influence over any terms or conditions of your employment?

Why write out a question word-for-word?

- Where the precision of the language is critical:

```
Q. Did you ever learn from any source that Ms. Wilson had made negative comments about women?  
A. No.  
Q. Do you have any facts that you think that show that Ms. Wilson was biased against you because you are a female?  
A. No.
```

More on Creating and Using Outlines

- Making sure you've exhausted your lists
 - Listing facts/witnesses you might forget
 - Listing dates or possibly helpful exhibits you might want to refer to
- Consider making a second "mini"/element outline
- But, outlines should *never* be used as a script

More on Outlines -- Planning When to Ask What

- You are missing a big opportunity if you go in and ask right off the bat about hum-drum topics like the plaintiff's educational background.
- Normally, leave damages for the end.
- Benefits/drawbacks of skipping around versus moving chronologically

Part II: Taking the Deposition

"Don't stop ringing the door bell until someone comes to the door."

~Anonymous

Videotaping the Deposition

- **When videotaping is a good idea:**
 - Angry or hostile plaintiffs
 - Any case that has a reasonably high likelihood of going to trial
 - Adverse witnesses who won't be polished the first time around

Admonitions

- **Admonitions:**
 - Under oath, agrees to keep the oath
 - Only questions the witness understands
 - Not interrupting; and your agreement not to interrupt
 - Allowed to take breaks
 - Today is an appropriate day to give testimony
 - Medication/under the influence
 - Documents reviewed

Critical Skill 3 - Close the list

- Ask the witness to make a list.

Q. Is it true that [REDACTED] [REDACTED] are the only [REDACTED] employees who you believe harassed you?

A. No.

There was another one.

Q. Who was the other person?

A. I can't remember his last name, but his first name -- he was an associate. Um, Lemar, but I can't recall his last name.

Q. Okay.

Other than [REDACTED] and Lemar, is there any other [REDACTED] employee who you believe harassed you?

A. No. I can't remember.

More on Making Lists



- Repeating the list/recapping the list.
 - Example in the last slide of an easily recapped list.
 - Recapping the list for the witness is easier to use in motion practice.
- You *must* close out the list.
 - It is not a list until you close out the list, it's just a bunch of testimony.
 - In response to, "Is there anything/anyone else?" You need any of these three answers:
 - No.
 - I don't remember.
 - I don't know.

More on Making Lists - Curbing in the Witness with Lists



- If the witness is rambling, a list can be very helpful.
- When you see that the witness will take any opening to ramble, make the question very narrow.

More on Making Lists -- Plaintiff Testimony List Musts

- You have left a lot of room for a surprise declaration if you walk away from a plaintiff's deposition without:
 - An exhaustive list of every wrongdoer (broken down by harasser, discriminator, retaliator, etc.).
 - An exhaustive list of everything each wrongdoer did to harass, discriminate, retaliate, etc.
 - Dates or "I don't know/remembers" for every alleged act of wrongdoing.

Critical Skill 4 -- Get to "Yes," "No," "I don't know," or "I don't remember."

- **Rambling answers are virtually useless for cross-examination at trial.**
- **The answers you want most are:**
 - Yes.
 - No.
 - I don't know.
 - I don't remember.
- **You need this answer, in some form (E.g., Not that I can think of = No.).**
- **Then, STOP!**

Q. Do you have any reason to believe that Mr. [REDACTED] discriminated against you because you were female?

A. I'm not for sure.

Q. When you say "not for sure," that makes me think, like, there might be a little something out there that might maybe make you think it.

A. Because I'm thinking for me myself maybe, I think, he had a problem. Like, I think -- I'm going to just say no, but I'm not for -- I'm saying I'm not for sure, because I don't know if he had a problem with women or if he didn't. That's him.

Q. Okay.

So, you don't know one way or the other whether Mr. [REDACTED] was -- was prejudiced against women; is that true?

A. True.

Pop Quiz: What's wrong with these question/answer pairs?

Q. When did that happen?

A. Oh, after just a couple of months.

Q. Did you ever ask her?

A. No.

Critical Skill 5 -- Ask Stand-Alone Questions

- Stand-alone questions contain all the information needed to understand the question and answer (including exhibit numbers).

Q. Do you have any facts to dispute that after the meeting on May 27, 2009, Mr. [REDACTED] advised Ms. [REDACTED] that he would be reviewing his diversity reports and making use of the information in the reports?

A. No.

- Why is this a critical skill?

Critical Skill 6 -- Lead, lead, lead!!!!

- Lead first, ask an open-ended question later.
- Why? Leading is fast and concise. Leading keeps you in charge of the course of the testimony. And leading is better for summary judgment and trial.
 - Example – identifying and limiting wrongdoers:

Q All right. Is it correct that the only person employed by [REDACTED] whom you ever felt sexually harassed by was [REDACTED]?

A Yes.

More Examples of Effective Leading

- Use leading to get the witness to agree to the arguments/characterizations you'd like to use at trial:

Q Ms. [REDACTED] would you agree with me that sending an email in all caps is generally considered to be the equivalent of screaming in email etiquette?

A Yes.

Q Do you agree with me that it's generally considered to be rude to send an email in all caps?

A Yes.

Common Problems in Taking Depositions

What's the difference between an attorney and a pit bull?

What to Do When You Get "The Big Lie"

- Let them lie, and lie big.

Q Okay. Did you ever yell at Frank, the assistant store manager?

A No.

Q Did you ever use the words "fuckin' disgusting" in reference to his work?

A I -- not in reference to his work. To an incident, a shadow box that was missing product and was completely in shambles, I did tell him that it was "F-ing disgusting." 18 :

Q Did you say "F-ing disgusting" or "fucking disgusting"?

A I believe I said it was "F-ing disgusting."

“The Big Lie,” cont’d.

2 Q Okay. Do you think that is an appropriate way to
3 address your subordinate?

4 A I believe, at the time, that's the way I
5 approached it to one of my salaried assistant managers,

1 and the condition that it was. 18

2 Q So is it “yes” or is it “no,” do you think it's
3 appropriate to say to your subordinate that some aspect of
4 the work at [REDACTED] is “F-ing disgusting”?

5 MR. HELMER: Objection. Incomplete hypothetical.

6 THE WITNESS: At that time, that is the terminology I
used; and I obviously thought it was appropriate at that
time.

The Witness Who (Allegedly) Doesn't Understand or Recall.

- When the big lie is “I don't remember” or “I don't understand your question.”
 - Ask for their recollection no matter how vague.
 - But remember, “I don't remember” is one of the four answers *you want*.
 - Question the memory lapse.
 - Ask if there is anything that might refresh the witness' recollection.

Dealing with Opposing Counsel That Is Coaching or Obstructing

- Speak up, and do so soon.
- Change areas of inquiry.
- When to call chambers: When you are right, and they are keeping you from getting testimony.
 - Be willing to live with the standards you set or have asked the Court to impose.

Final Tips

- Be creative. Don't think about all the reasons your own question is improper. Ask!
- Ask the "Why?" or "Why not?" questions.
 - Why not report harassment to HR?
 - Why did you falsify your employment application?
- Do not reserve questions for trial, unless you don't care what the answer is (those questions are *very* rare).

Oregon Public Sector Labor Law

Jennifer Chapman, *Oregon AFSCME*

Adam Collier, *Ogletree Deakins*



Oregon Public Sector Labor Law

Adam Collier, Ogletree Deakins
Jennifer Chapman, Oregon AFSCME

Presentation Overview

- Public Employees Collective Bargaining Act (“PECBA”)
- Key differences between labor relations in the public sector vs. the private sector
- PECBA Generally
- Card Check & Elections
- Bargaining
- Unfair labor practice complaints
- Constitutional issues
- Q & A



Many differences between public & private sector

- ERB v. NLRB
- State law v. federal law
- Role of courts
- Impact of constitutional provisions
- Taxpayer interests



Many differences between public & private sector (cont...)

- Card check v. elections
- Bargaining obligations and impasse
- Strike-prohibited employees and interest arbitration



PECBA Generally



- ORS 243.650 – 243.682
- Generally enforced by Employment Relations Board absent agreement to arbitrate
- “Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.” ORS 243.662
- Right of information

Card Check & Elections

- ORS 243.682
- If a petition is filed and more than 50% of the employees have signed authorization cards (and no other labor organization is currently recognized), ERB will certify the union as the exclusive representative.
- However, if 30% of the employees in the bargaining unit request an election within 14 days after the card check, an election must be held.

Objections

- What constitutes an appropriate bargaining unit
- Fragmentation
- Objections raised by non-employers



Bargaining



- Bargaining process generally
- Mandatory vs. permissive subjects of bargaining
 - *similar but different than private sector*
- Impact bargaining
- Prohibited subjects of bargaining
 - *Broader than with private sector*
- Mediation, impasse, & final offers



Strikes & Arbitration

- Implementation
- Strikes
- Types of strike prohibited employees
- Binding arbitration
 - *How arbitrator selected*
 - *Role of arbitrator*
 - *Significance of final offers*
- Role of ERB in disputes



Unfair Labor Practices

- Different than unlawful employment practices
- Types:
 - *Employer ULPs – 243.672(1)*
 - *Labor organization ULPs – 243.672(2)*
 - *Duty of Fair Representation ULPs (DFRs)*
- Process for Complaints & Remedies



Employer Unfair Labor Practices

- (1)(a): interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662 (form, join and participate in activities of labor unions)
- Encompasses two potential violations: (a) taking action “because of” employee’s exercise of PECBA-protected rights; or (b) taking action that interferes with employee’s “in the exercise” of protected rights.

Employer Unfair Labor Practices

- (1)(b): dominate, interfere with or assist in the formation, existence or administration of any employee organization
- Union must show that employer’s actions impeded or impaired the union in performing its duties as exclusive representative

Employer Unfair Labor Practices

- (1)(c): discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization
- Similar analysis to (1)(a) “because of” claim – union needs to show that employer took adverse action because of an employee’s protected activity

Employer Unfair Labor Practices

- (1)(d): discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under ORS 243.650 to 243.782
- (1)(e): refuse to bargain collectively in good faith with the exclusive representative

Employer Unfair Labor Practices

- (1)(f): refuse or fail to comply with any provision of ORS 243.650 to 243.782
- (1)(g): violate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or accept the terms of an arbitration award, where parties have agreed to accept such awards as final and binding

Employer Unfair Labor Practices

- (1)(h): refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract
- (1)(i): violate ORS 243.670(2)

Union Unfair Labor Practices

- ORS 243.672(2)
- Interfere, restrain, coerce employee who exercises PECBA rights
- Refuse to bargain in good faith
- Refuse or fail to comply with PECBA



... more Union ULPs...

- Violate written contract involving labor relations, such as agreement to arbitrate or accept terms of arbitration award
- Refuse to reduce agreement to writing and signed the agreement
- Engage in "unconventional strike activity not protected for private sector employees" under NLRA on June 6, 1995 – e.g., rolling, intermittent, or slowdown strikes

Constitutional Issues

- Due process
- Drug Testing
 - *Safety-Sensitive employees*
 - *Non-safety sensitive employees*
- First Amendment
 - *Freedom of Religion*
 - *Establishment Clause*



And more....

- Whistleblowing
- Access to Information
 - *About employees*
 - *About investigations*
 - *About third-parties*





Nuts and Bolts of Labor Law: NLRB Overview

Jessica Dietz, *National Labor Relations Board*

National Labor Relations Board

Summary of Materials

- Who We Are – Description of the NLRB, mission, and structure
- Organization Chart – The Board, the General Counsel, and the offices that report to each
- Employee Rights – A summary of employees’ rights under the National Labor Relations Act, including union activity and protected concerted activity, as well as information on who is covered by the Act
- Employer/Union Rights and Obligations – Examples of employer conduct and labor organization conduct that violates the law, including information about rules for collective bargaining, union dues, and Right to Work states
- Jurisdictional Standards – Explanation of jurisdictional standards and statutory exclusions
- Investigate Charges – Information on how unfair labor practice charges are investigated, remedies in merit cases, temporary injunctions, and appeals of dismissal decisions
- Section 10(j) Categories – Types of cases where seeking Section 10(j) injunctive relief may be appropriate. Section 10(j) of the Act gives the Board the power to petition the United States District Court for injunctive relief or a restraining order.
- Facilitate Settlements – Explanation of Board settlement agreements and private non-Board resolutions
- Decide Cases – The post-complaint adjudicative process and information about the Alternative Dispute Resolution Program
- Enforce Orders – How the NLRB enforces Board Orders
- Charge Against Employer – Sample unfair labor practice charge form, template available at www.nlr.gov, may be filed in person, by mail, by fax, or via e-filing at www.nlr.gov
- Charge Against Labor Organization or its Agents - Sample unfair labor practice charge form, template available at www.nlr.gov, may be filed in person, by mail, by fax, or via e-filing at www.nlr.gov

- Sample Language for Basis of the Charge – Sample charge language including the section of the Act and examples of possible allegations
- Form NLRB-4541 – Procedures for parties involved in the investigation of an unfair labor practice charge
- Notice of Appearance – Sample Notice of Appearance form (for attorneys and non-attorneys)
- Questionnaire on Commerce Information – Form filled out by the employer involved in an unfair labor practice charge or representation proceeding, used to establish jurisdiction
- Conduct Elections – Overview of the representation petition and election process, information about voluntary recognition, and the Office of Representation Appeals
- Description of Representation Case Procedures in Certification and Decertification Cases – Explanation of procedures in RC, RD, and RM cases, pre-election hearing information, and voter list requirements
- Description of Election and Post-Election Representation Case Procedures – Explanation of election procedures, post-election challenges and objections, and post-election hearings
- RC Petition - Sample Certification of Representative petition, template available at www.nlr.gov, may be filed in person, by mail, by fax, or via e-filing at www.nlr.gov
- RD Petition - Sample Decertification (Removal of Representative) petition, template available at www.nlr.gov, may be filed in person, by mail, by fax, or via e-filing at www.nlr.gov
- Statement of Position Form and Instructions – Form served with petition, must be completed prior to a pre-election hearing to identify the hearing issues and employees involved in the petition
- Certificate of Service – Form proving service of petition documents and forms by the petitioner on the other parties involved in the representation case proceeding
- NLRA and the Right to Strike – Fact sheet on the right to strike, lawful and unlawful strikes, economic vs. unfair labor practice strikers, strike misconduct, and the right to picket
- The NLRB and Social Media – Fact sheet on how employees’ rights under the Act and social media intersect, summaries of the General Counsel’s memos on social media, and summaries of several Board decisions

Who We Are

The National Labor Relations Board is an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions.

The Board

The Board has five Members and primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year.

The General Counsel

The **General Counsel**, appointed by the President to a 4-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.

Division of Judges

The Division of Judges docket, hears, settles, and decides unfair labor practice cases throughout the country.

Regional Offices

The National Labor Relations Board has 26 regional offices and is headquartered in Washington, DC. Hover over the map below to find a regional office, and click to go to the regional homepage for more information, including news and upcoming events.

Careers

The National Labor Relations Board (NLRB) is comprised of a team of professionals who work to assure fair labor practices and workplace democracy nationwide. Since its creation by Congress in 1935, this small, highly respected, independent Federal agency has had daily impact on the way America's companies, industries and unions conduct business. Agency staff members investigate and remedy unfair labor practices by unions and employers. They also conduct elections to determine whether employees wish to be represented by a union, and if so, which union.

Our History

The National Labor Relations Board is proud of its history of enforcing the National Labor Relations Act. Our interactive timeline shares some of our rich history.

Contact Us

General Inquiries: 1-866-667-NLRB (1-866-667-6572) Spanish language option available.

Organization Chart



Employee Rights

Employees covered by the National Labor Relations Act are afforded certain rights to join together to improve their wages and working conditions, with or without a union.

Union Activity

Employees have the right to attempt to form a union where none currently exists, or to decertify a union that has lost the support of employees.

Examples of employee rights include:

- Forming, or attempting to form, a union in your workplace;
- Joining a union whether the union is recognized by your employer or not;
- Assisting a union in organizing your fellow employees;
- Refusing to do any or all of these things.
- To be fairly represented by a union

Activity Outside a Union

Employees who are not represented by a union also have rights under the NLRA. Specifically, the National Labor Relations Board protects the rights of employees to engage in “concerted activity”, which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for group action.

A few examples of protected concerted activities are:

- Two or more employees addressing their employer about improving their pay.
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

Who is covered?

Most employees in the private sector are covered by the NLRA. However, the Act specifically excludes individuals who are:

- employed by Federal, state, or local government
- employed as agricultural laborers
- employed in the domestic service of any person or family in a home
- employed by a parent or spouse
- employed as an independent contractor
- employed as a supervisor (supervisors who have been discriminated against for refusing to violate the NLRA may be covered)
- employed by an employer subject to the Railway Labor Act, such as railroads and airlines
- employed by any other person who is not an employer as defined in the NLRA

Employer/Union Rights and Obligations

The National Labor Relations Act forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting a labor organization for collective bargaining purposes, or from working together to improve terms and conditions of employment, or refraining from any such activity. Similarly, labor organizations may not restrain or coerce employees in the exercise of these rights.

Examples of employer conduct that violates the law:

- Threatening employees with loss of jobs or benefits if they join or vote for a union or engage in protected concerted activity.
- Threatening to close the plant if employees select a union to represent them.
- Questioning employees about their union sympathies or activities in circumstances that tend to interfere with, restrain or coerce employees in the exercise of their rights under the Act.
- Promising benefits to employees to discourage their union support.
- Transferring, laying off, terminating, assigning employees more difficult work tasks, or otherwise punishing employees because they engaged in union or protected concerted activity.
- Transferring, laying off, terminating, assigning employees more difficult work tasks, or otherwise punishing employees because they filed unfair labor practice charges or participated in an investigation conducted by NLRB.

Examples of labor organization conduct that violates the law:

- Threats to employees that they will lose their jobs unless they support the union.
- Seeking the suspension, discharge or other punishment of an employee for not being a union member even if the employee has paid or offered to pay a lawful initiation fee and periodic fees thereafter.
- Refusing to process a grievance because an employee has criticized union officials or because an employee is not a member of the union in states where union security clauses are not permitted.
- Fining employees who have validly resigned from the union for engaging in protected concerted activities following their resignation or for crossing an unlawful picket line.
- Engaging in picket line misconduct, such as threatening, assaulting, or barring non-strikers from the employer's premises.
- Striking over issues unrelated to employment terms and conditions or coercively enmeshing neutrals into a labor dispute.

What rules govern collective bargaining for a contract?

After employees choose a union as a bargaining representative, the employer and union are required to meet at reasonable times to bargain in good faith about wages, hours, vacation time, insurance, safety practices and other mandatory subjects. Some managerial decisions such as subcontracting, relocation, and other operational changes may not be mandatory subjects of bargaining, but the employer must bargain about the decision's effects on unit employees.

It is an unfair labor practice for either party to refuse to bargain collectively with the other, but parties are not compelled to reach agreement or make concessions.

If after sufficient good faith efforts, no agreement can be reached, the employer may declare impasse, and then implement the last offer presented to the union. However, the union may disagree that true impasse has been reached and file a charge of an unfair labor practice for failure to bargain in good faith. The NLRB will determine whether true impasse was reached based on the history of negotiations and the understandings of both parties.

If the Agency finds that impasse was not reached, the employer will be asked to return to the bargaining table. In an extreme case, the NLRB may seek a federal court order to force the employer to bargain.

The parties' obligations do not end when the contract expires. They must bargain in good faith for a successor contract, or for the termination of the agreement, while terms of the expired contract continue.

A party wishing to end the contract must notify the other party in writing 60 days before the expiration date, or 60 days before the proposed termination. The party must offer to meet and confer with the other party and notify the Federal Mediation and Conciliation Service of the existence of a dispute if no agreement has been reached by that time.

How is "good faith" bargaining determined?

There are hundreds, perhaps thousands, of NLRB cases dealing with the issue of the duty to bargain in good faith. In determining whether a party is bargaining in good faith, the Board will look at the totality of the circumstances. The duty to bargain in good faith is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. This implies both an open mind and a sincere desire to reach an agreement as well as a sincere effort to reach a common ground.

The additional requirement to bargain in "good faith" was incorporated to ensure that a party did not come to the bargaining table and simply go through the motions. There are objective criteria that the NLRB will review to determine if the parties are honoring their obligation to bargain in good faith, such as whether the party is willing to meet at reasonable times and intervals and whether the party is represented by someone who has the authority to make decisions at the table.

Conduct away from the bargaining table may also be relevant. For instance if an Employer were to make a unilateral change in the terms and conditions of employees employment without bargaining, that would be an indication of bad faith.

What are the rules about union dues?

The amount of dues collected from employees represented by unions is subject to federal and state laws and court rulings.

The NLRA allows employers and unions to enter into union-security agreements, which require all employees in a bargaining unit to become union members and begin paying union dues and fees within 30 days of being hired.

Even under a security agreement, employees who object to full union membership may continue as 'core' members and pay only that share of dues used directly for representation, such as collective bargaining and contract administration. Known as objectors, they are no longer full members but are still protected by the union contract. Unions are obligated to tell all covered employees about this option, which was created by a Supreme Court ruling and is known as the Beck right.

An employee may object to union membership on religious grounds, but in that case, must pay an amount equal to dues to a nonreligious charitable organization.

What about Right to Work states?

24 states have banned union-security agreements by passing so-called "right to work" laws. In these states, it is up to each employee at a workplace to decide whether or not to join the union and pay dues, even though all workers are protected by the collective bargaining agreement negotiated by the union. These states include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.

Jurisdictional Standards

The Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. Over the years, it has established standards for asserting jurisdiction, which are described below. As a practical matter, the Board's jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with "Right to Work" laws.

Retailers

Employers in retail businesses fall under the Board's jurisdiction if they have a gross annual volume of business of \$500,000 or more. This includes employers in the amusement industry, apartment houses and condominiums, cemeteries, casinos, home construction, hotels and motels, restaurants and private clubs, and taxi services. Shopping centers and office buildings have a lower threshold of \$100,000 per year.

Non-retailers

For non-retailers, jurisdiction is based on the amount of goods sold or services provided by the employer out of state ("outflow") or purchased by the employer from out of state ("inflow"). Outflow or inflow can be direct or 'indirect', passing through a third company such as a supplier. The Board takes jurisdiction when annual inflow or outflow is at least \$50,000.

Special categories

Channels of interstate commerce: For businesses providing essential links in the transportation of goods or passengers, including trucking and shipping companies, private bus companies, warehouses and packing houses, the minimum is \$50,000 in gross annual volume.

Health care and child care institutions: Hospitals, medical and dental offices, social services organizations, child care centers and residential care centers with a gross annual volume of at least \$250,000 are under NLRB jurisdiction; for nursing homes and visiting nurses associations, the minimum is \$100,000.

Law firms and legal service organizations: The minimum is \$250,000 in gross annual volume.

Cultural and educational centers: For private and non-profit colleges, universities, and other schools, art museums and symphony orchestras, the annual minimum is \$1 million.

Federal contractors: Private contractors who work for the federal government are under NLRB jurisdiction. In addition, all federal contractors are required by the Department of Labor to post a Notice of Employee Rights under the NLRA.

Religious organizations: The Board will not assert jurisdiction over employees of a religious organization who are involved in effectuating the religious purpose of the organization, such as teachers in church-operated schools. The Board has asserted jurisdiction over employees who work in the operations of a religious organization that did not have a religious character, such as a health care institution.

Indian tribes: The Board asserts jurisdiction over the commercial enterprises owned and operated by Indian tribes, even if they are located on a tribal reservation. But the Board does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions.

The following employers are excluded from NLRB jurisdiction by statute or regulation:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations.
- Employers who employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery.
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines.

Investigate Charges

The NLRB receives about 20,000 to 30,000 charges per year from employees, unions and employers covering a range of unfair labor practices described in [Section 8 of the Act](#).

Each charge is investigated by Board agents who gather evidence and may take affidavits from parties and witnesses. Their findings are evaluated by the Regional Director, and in certain novel or significant cases, reviewed by NLRB attorneys at the Division of Advice in Washington DC. Typically, a decision is made about the merits of a charge within 7 to 12 weeks, although certain cases can take much longer. During this period, the majority of charges are settled by the parties, withdrawn by the charging party, or dismissed by the Regional Director. [Click here for charts and data](#).

When the NLRB investigation finds sufficient evidence to support the charge, every effort is made to facilitate a settlement between the parties. If no settlement is reached in a meritorious case, the agency issues a complaint. Common allegations against employers in complaints include threats, interrogations and unlawful disciplinary actions against employees for their union activity; promises of benefits to discourage unionization; and, in the context of collective bargaining relationships, refusals to provide information, refusals to bargain, and withdrawals of recognition. Common allegations against unions include failure to represent an employee and failure to bargain in good faith.

The issuance of a complaint leads to a hearing before an NLRB Administrative Law Judge (unless there is a settlement). After issuing a complaint, the NLRB becomes a representative for the charging party throughout settlement discussions and the Board process. Board attorneys help gather and prepare materials, and keep the parties apprised of case developments.

It is illegal for an employer or union to retaliate against employees for filing charges or participating in NLRB investigations or proceedings.

Remedies

Under its statute, the NLRB cannot assess penalties. The agency may seek make-whole remedies, such as reinstatement and backpay for discharged workers, and informational remedies, such as the posting of a notice by the employer promising to not violate the law.

Temporary Injunctions

While the case proceeds through the Board process, the Regional Director may petition the appropriate U.S. District Court for temporary injunction orders to restore the status quo where rights have been violated, under Section 10(j) of the Act. The General Counsel must first approve the petition and the Board must authorize it. If granted by the Court, an injunction may, among other things, require a party to return to bargaining, or reinstate unlawfully discharged employees, or stop the unlawful subcontracting of union jobs. [Click here to see a list of 10\(j\) injunction activity](#), and [see a map of 10\(j\) activity here](#).

Office of Appeals

Decisions to dismiss a charge may be appealed to the Office of Appeals in Washington D.C. within two weeks of the dismissal. The Office handles about 2000 cases a year. Each appeal is assigned to an attorney and a supervisor for a review of all documents in the case, including new information submitted by the charging party. All cases in which it is proposed to reverse the Regional Director's determination are presented to the General Counsel for decision.

Significant cases may be presented for General Counsel review even where the recommendation is to uphold the Regional determination. The Office may also remand cases to the regions for further investigation where necessary. Because such decisions are not reviewable in court, there is no further recourse for parties who believe that a charge has been unfairly dismissed.

Section 10(j) Categories

1. Interference with organization campaign (no majority)
 - Includes traditional "nip in the bud" unfair labor practices, such as threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges
 - If it includes shutdown or relocation of operations, subcontracting, or transfer of operations to alter ego or single or joint employer, see Category 3
 - If it includes minority union recognition, see Category 6
2. Interference with organizational campaign (majority)
 - Includes Gissel cases where union has obtained a majority of authorization cards and employer engaged in serious and egregious unfair labor practices (see Memorandum GC 99-8 Guideline Memorandum Concerning Gissel)
 - Will include unfair labor practices similar to Category 1
3. Subcontracting or other change to avoid bargaining obligation
 - These involve an employer's implementation of a major entrepreneurial-type decision which may include shutdown or relocation of operations, transfer of operations to alter ego or single or joint employer
 - Changes may be discriminatorily motivated in violation of Section 8(a)(3) and/or independently violative of Section 8(a)(5)
4. Withdrawal of recognition from incumbent
5. Undermining of bargaining representative
 - Includes implementation of important changes in working conditions, either discriminatorily or without bargaining with the union
 - May include any of the additional types of violations listed in Category 1
 - See also successor refusal to bargain (Category 7) or conduct during bargaining (Category 8)
6. Minority union recognition
 - Includes a variety of illegal assistance to and/or domination of a labor organization
7. Successor refusal to recognize and bargain
 - Includes discriminatory refusal to hire predecessor's employees
8. Conduct during bargaining
 - Includes refusal to provide relevant information, delay or refusal to meet, insistence to premature impasse or impasse on permissive or illegal subjects of bargaining, unlawful course of conduct in bargaining, or surface bargaining
9. Mass picketing and violence
 - Includes mass picketing which blocks ingress and egress to the plant or worksite, violence and threats thereof, and damage to property
10. Notice requirements for strikes or picketing under Section 8(d) and 8(g)
 - Includes strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (federal and state mediation) and 8(g) (notices to health care institutions)

11. Refusal to permit protected activity on property
 - May include employee picketing or handbilling arising from a labor dispute, or nonemployee efforts to disseminate organizational material to employees
 - May also include a unilateral change in past practice or contractual term granting access to an incumbent union
12. Union coercion to achieve unlawful objective
 - May involve union insistence to impasse or permissive of illegal subject of bargaining, or union conduct that amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective bargaining or grievance adjustment
13. Interference with access to Board processes
 - May involve employer or union retaliation against employees for having resorted to the processes of the Board
 - Retaliation may include threats, discharges, the imposition of internal union discipline or the institution of groundless lawsuits
14. Segregating assets
 - Includes an alienation of assets which may require a protective order to preserve respondent's assets for backpay
15. Miscellaneous
 - Includes injunction against certain lawsuits, employer violence, interference with employee activities for mutual aid and protection

Facilitate settlements

The NLRB encourages parties to resolve cases by settlement rather than litigation whenever possible. In fact, more than 90% of meritorious unfair labor practice cases are settled by agreement at some point in the process, either through a Board settlement or a private agreement.

Board Settlement Agreements

When an investigation by a Regional Office finds merit to an unfair labor practice charge, the Regional Director routinely gives the charged party an opportunity to settle before issuing a complaint. Regional staff members draft a proposed settlement agreement which fully remedies all of the meritorious unfair labor practice allegations. The charged party can agree to the terms or suggest changes, subject to approval by the Regional Director.

The goal is always to reach a settlement that is acceptable to the charging party, the charged party and the Agency. On rare occasions, the Regional Director may approve a settlement that the charged party agrees with but the charging party is unwilling to sign. In these cases, it would be the Regional Director's position that the settlement substantially remedies the alleged unfair labor practices. The charging party may appeal the Director's approval of the settlement to the NLRB Office of Appeals.

If the charged party agrees and signs the settlement, no complaint will be issued and the case will be closed after full compliance with the terms of the settlement agreement. If there is no settlement, the Region will issue a complaint and a hearing will be scheduled before an Administrative Law Judge. Throughout this process, the Region will continue to pursue a settlement which substantially remedies all meritorious unfair labor practice allegations.

This type of settlement fashioned in the Region is known as an Informal Board Settlement.

Much less common is a Formal Board Settlement, which is a written stipulation approved by the Board and results in the issuance of a Board order and often a court judgment. Formal settlements are typically sought in cases where the charged party has a history of committing unfair labor practices, or where an informal settlement is otherwise not appropriate.

Private Non-Board Agreements

Unfair labor practice charges may also be resolved by private agreement between the parties. However, before allowing charges to be withdrawn, the Regional Director must review and approve of the private settlement agreement. Because the Board must enforce public interests, and not private rights, it may reject a non-Board adjustment that violates the National Labor Relations Act or Board policy.

These agreements are subject to a higher level of scrutiny in cases where a merit determination has already been made, and may not be appropriate in circumstances such as when the charged party has engaged in a history of violations of the Act or has breached previous settlement agreements. Non-Board adjustments do not have the Board's approval and are not policed by the Agency.

Decide Cases

When complaints of Unfair Labor Practices issued by regional directors do not lead to settlement, they typically result in a hearing before an NLRB Administrative Law Judge. As in any court proceeding, both parties prepare arguments and present evidence, witnesses, and experts. After evaluating the evidence, the judges issue initial decisions. [ALJ decisions](#) are subject to review by [the Board](#) in Washington D.C., composed of five Members nominated by the President and confirmed by the Senate. Any or all parties can appeal by filing exceptions.

In considering an appeal, the Board reviews the case record, including all all documents produced by the regional investigation. Often a panel of three Board Members will decide a case, but the full Board usually considers novel or potentially precedent changing cases. [The Board issues several hundred decisions per year.](#)

Board decisions may be appealed to an appropriate U.S. Court of Appeals, and ultimately to the U.S. Supreme Court.

[Click here for charts and data on decisions.](#)

Invitations to file briefs

When considering significant or potentially precedential cases, the Board may invite briefs from any interested parties to gather an array of viewpoints and experiences. [A list of recent invitations is here.](#)

Alternative Dispute Resolution Program

Since December 2005, the National Labor Relations Board's alternative dispute resolution (ADR) program has assisted parties in settling unfair labor practice cases pending before the Board. For parties who have chosen to participate in the ADR program, mediators have assisted parties in reaching settlements in approximately 60% of the cases. The Board approved the parties' settlements in each of those cases.

Participation in the Board's ADR program is voluntary, and a party who enters into settlement discussions under the program may withdraw its participation at any time. There are no charged fees or expenses for using the program. The Board will provide the parties with an experienced mediator, either a mediator with the Federal Mediation and Conciliation Service or the ADR program director, to facilitate confidential settlement discussions and explore resolution options that serve the parties' interests.

The Board established the ADR program in response to the success experienced by other federal agencies and the federal courts in settling contested cases through ADR, as well as the success of the NLRB's own settlement judge program at the trial level. ADR programs provide the parties with several benefits, including savings in time and money, greater control over the outcome of their cases, and more creative, flexible, and customized resolutions of their disputes. Settlement discussions conducted with the assistance of an ADR mediator tend to broaden resolution options, often going beyond the legal issues in controversy, and can be particularly useful where traditional settlement negotiations are likely to be unsuccessful or have already been unsuccessful.

If you have any questions regarding the ADR program, or wish to participate in the program, you may contact the ADR program director, Gary Shinnars, at (202) 273-3737.

Enforce Orders

In reviewing cases, the Circuit Courts evaluate the factual and legal basis for the Board's Order and decide, after briefing or oral argument, whether to enter a judicial decree commanding obedience to the Order. The Court may also enter an Order on the grounds that the responding party failed to oppose or had no legal basis to oppose the Board's action.

In recent years, Circuit Courts have decided about 65 cases a year involving the NLRB. The majority - nearly 80% - have been decided in the Board's favor.

Securing monetary remedies and Protecting assets:

Board attorneys conduct civil and criminal contempt litigation in the U.S. Courts of Appeals to secure monetary remedies such as back pay and to obtain protective orders to ensure that assets will not be dissipated in an effort to avoid obligations.

[Charts and data on remedies are available here.](#)

Final Review by U.S. Supreme Court:

Any Circuit Court decision can be subject to final review by the U.S. Supreme Court, if the parties or the Board seek it. Before presenting a petition asking the high court to consider a case, or grant certiorari, the Board must first receive permission from the U.S. Solicitor General.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer	b. Tel. No.
	c. Cell No.
d. Address (Street, city, state, and ZIP code)	e. Employer Representative
	f. Fax No.
	g. e-Mail
i. Type of Establishment (factory, mine, wholesaler, etc.)	h. Number of workers employed
	j. Identify principal product or service
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)	
3. Full name of party filing charge (if labor organization, give full name, including local name and number)	
4a. Address (Street and number, city, state, and ZIP code)	4b. Tel. No.
	4c. Cell No.
	4d. Fax No.
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By _____ (signature of representative or person making charge)	Tel. No.
	Office, if any, Cell No.
_____ (Print/type name and title or office, if any)	Fax No.
	e-Mail
Address _____	_____ (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
**CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS**

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT			
a. Name		b. Union Representative to contact	
c. Address (<i>Street, city, state, and ZIP code</i>)		d. Tel. No.	e. Cell No.
		f. Fax No.	g. e-Mail
h. The above-named organization(s) or its agents has (<i>have</i>) engaged in and is (<i>are</i>)engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (<i>list subsections</i>) _____ of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.			
2. Basis of the Charge (<i>set forth a clear and concise statement of the facts constituting the alleged unfair labor practices</i>)			
3. Name of Employer		4a. Tel. No.	b. Cell No.
		c. Fax No.	d. e-Mail
5. Location of plant involved (<i>street, city, state and ZIP code</i>)		6. Employer representative to contact	
7. Type of establishment (<i>factory, mine, wholesaler, etc.</i>)	8. Identify principal product or service	9. Number of workers employed	
10. Full name of party filing charge		11a. Tel. No.	b. Cell No.
		c. Fax No.	d. e-Mail
11. Address of party filing charge (<i>street, city, state and ZIP code.</i>)			
<p style="text-align: center;">12. DECLARATION</p> <p>I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.</p> <p>By _____ (<i>signature of representative or person making charge</i>) _____ (<i>Print/type name and title or office, if any</i>)</p> <p>Address _____ (<i>date</i>)_____</p>		Tel. No.	
		Cell No.	
		Fax No.	
		e-Mail	

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SAMPLE LANGUAGE FOR BASIS OF THE CHARGE

EMPLOYER UNFAIR LABOR PRACTICES

8(a)(1) Interference with employees' exercise of Section 7 rights.

Since on or about (date), the above named Employer has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights by its actions including (specify type of action – e.g. threats, promises, interrogation, creation of the impression of surveillance, etc.).

On or about (date), the above named Employer discriminated (name(s) of employee(s) by (specify type of adverse action – e.g. discharging, suspending, laying off, refusing to hire, refusing to consider for hire, disciplining etc.) (him/her/them) because of (his/her/their) protected concerted activities, or in order to (discourage/encourage) such activities.

8(a)(2) Domination of or unlawful assistance to a union.

Since on or about (date), the above named Employer

- dominated or interfered with the formation or administration of (name of the union);
- or
- contributed financial or other support to (name of the union).

8(a)(3) Discrimination to encourage or discourage union activity.

On or about (date), the above named Employer discriminated against its employee(s) (name(s) of employee(s)) by (specify type of adverse action – e.g. discharging, suspending, laying off, refusing to hire, refusing to consider for hire, disciplining etc.) (him/her/them) because of (his/her/their) union activities (and/or protected concerted activities), or in order to discourage/encourage such activity.

8(a)(4) Discrimination because of NLRA charge or testimony.

On or about (date), the above named Employer discriminated against (name(s) of employee(s) because (he/she/they) (e.g. filed charges or gave testimony) under the Act.

8(a)(5) Refusal to bargain.

Since on or about (date), the above named Employer has failed and refused to bargain in good faith with (name of Union) by:

- Refusing to meet at reasonable times and places;
- Refusing to reduce to writing and execute an agreed upon collective bargaining agreement;
- Insisting to impasse upon a permissive or illegal subject of bargaining engaging in surface bargaining;
- Engaging in surface bargaining;
- Making unilateral changes without affording the Union a meaningful opportunity to bargain;
- Refusing to provide requested information to the Union which relates to wages, hours, or working conditions of unit employees.

LABOR ORGANIZATION UNFAIR LABOR PRACTICES

8(b)(1)(A) Restraint or coercion of employee's exercise of Sec. 7 rights by a Union

On or about (date), the above named Union restrained and coerced (name(s) of employee(s)) in the exercise of (his/her/their) Section 7 rights by (describe the actions complained of)

For example:

- refusing to further process (his/her/their) grievances over (his/her/their discharge, lay off, discipline);
- refusing to refer (name(s) of employee(s)) out of the Union's exclusive hiring hall;
- failing to follow its procedures in the referral of (name(s) of employee(s)) out of its exclusive hiring hall out of order.

8(b)(1)(B) Union restraint or coercion of employer in selection of collective bargaining representatives.

Since on or about (date), the above named Union has restrained and coerced (name of Employer) in the selection of its collective bargaining or grievance representative(s).

8(b)(2) Union causing or attempting to cause employer to discriminate against employee(s) to encourage/discourage union activity.

On or about (date), the above named Union (caused or attempted to cause) (name of Employer) to (describe action against employee(s) sought by Union – e.g. discharge, discipline, etc.) (name(s) of employee(s)):

- in violation of Section 8(a)(3) of the Act.
- whose membership in the union was (denied or terminated) for reasons other than failure to tender periodic dues (and initiation fees) uniformly required as a condition of (acquiring or retaining) membership.

8(b)(3) Union's refusal to bargain

Since on or about (date), the above named Union has refused to bargain in good faith with (name of the Employer) by:

- Refusing to meet at reasonable times and places;
- Refusing to reduce to writing and execute an agreed upon collective bargaining agreement;
- Insisting to impasse upon a permissive or illegal subject of bargaining;
- Refusing to provide requested information to the Employer which relates to wages, hours, or working conditions of unit employees.

8(b)(4) Secondary boycotts and jurisdictional disputes.

(i) Since on or about (date), the above named Union has induced or encouraged (individuals employed by (name of secondary employer) or (name of secondary employer) to (engage in a strike) or (to refuse to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities) with an object of ((A), (B), (C), and/or (D) below);

(ii) Since on or about (date), the above named Union has threatened, coerced or restrained (name of secondary employer) and other persons engaged in commerce with an object of ((A), (B), (C), and/ or (D) below);

(A) forcing or requiring (name of secondary employer) or (other self-employed person) to (join (name of Union)) or (enter into an agreement which is prohibited by Section 8(e)).

(B) forcing or requiring (name of person)

- to cease using, selling, handling, transporting or otherwise dealing in the products of (name of producer, processor, or manufacturer); or
- to cease doing business with (name of other person); or

(C) forcing or requiring (name of secondary employer) to recognize or bargain with (name of Union) as the representative of its employees notwithstanding that such union has not been certified as the representative of such employees under the provisions of Section 9.

(D) forcing or requiring (name of employer(s)) to recognize or bargain with (name of union) as the representative of its employees in (name of other union or other trade, craft, or class) notwithstanding that said employer is not failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

NOTE: Any 8(b)(4) charge must be filed separately (on a separate charge form) from any other charge. 8(b)(4)(A),(B), or (C) may be combined in the same charge. 8(b)(4)(D) must be put in a separate charge.

8(b)(5) Excessive union fees.

Since on or about (date), the above named Union has required, as a condition of union membership, the payment of an excessive and discriminatory fee by (name(s) of employees) who work as (classification of employees), and who are covered by a union security agreement authorized under Section 8(a)(3) of the Act.

8(b)(6) Exaction of payment by employer for services not performed.

Since on or about (date), the above named Union has (caused or attempted to cause) (name of Employer) to (pay or deliver) (money or other thing of value) in the nature of an exaction for services which are not performed or not to be performed.

8(b)(7) Picketing by non-certified union for organizational or recognitional purposes.

Since on or about (date), the above named Union has (picketed) or (caused to be picketed) or (threatened to picket or to cause to be picketed) (name of Employer), at (address or location of work site location in question), with an object of forcing or requiring (name of Employer) to recognize or bargain with (name of Union) as the representative of its employees or select (name of Union) as their collective bargaining representative, notwithstanding that (name of Union) is not currently certified as the representative of such employees, where

(A) (Name of Employer) has lawfully recognized (name of recognized other union) and a question concerning representation may not appropriately be raised under Section 9(c) of the Act.

(B) within the preceding 12 months a valid election under Section 9(c) has been conducted.

(C) such picketing has been conducted without a petition having been filed under Section 9(c) within a reasonable period of time from the commencement of such picketing.

NOTE: Any 8(b)(7) charge must be filed separately (on a separate charge form) from any other charge.

8(d) Mid-term modification by union or employer

On or about (date), during the term of a collective bargaining agreement, (name of charged party union or employer) engaged in a (strike or lockout) against (name of charging party union or employer) in an effort to modify or terminate that agreement.

8(d)(1), (3) Strike or lockout or implementation without giving required notice.

(1) On or about (date), (name of party who reopened the contract) (specify nature of the act -- whether strike, lockout, or implemented its offer) without timely providing notice of its intent to reopen the contract to (name of other party to the contract).

(3) On or about (date), (name of party who reopened the contract) (specify nature of the act -- whether strike, lockout, or implementation of its final offer), even though prior

written notice of the existence of the dispute between it and (name of other party to the contract) had not been served on and/or to the Federal Mediation and Conciliation Service (and (name of state mediation agency, if any)).

On or about (date), (name of party who reopened the contract), commenced (specify nature of the conduct – strike, lockout, or implementation of its offer), less than (60 days in non-health care cases, and 90 days for health care providers) from service on (name of other party to the contract) of the notices required by (Section 8(d)(1) and/or Section 8(d)(3)).

8(e) Hot cargo agreements.

On or about (date(s)), the above named Union entered into contract(s) or agreement(s), express or implied, with (name, city and state of Employer), (and various other employers), whereby such employer(s) have ceased or refrained, or agreed to cease or refrain, from handling, using, selling, or otherwise dealing in the products of (name of boycotted Employer), or to cease doing business with (name of boycotted Employer).

NOTE: This is the only charge that can be filed against both an Employer and a Union. Any 8(e) charge must be filed separately from any other charge. There are separate charge forms specific Section 8(e) charges that must be used.

8(g) Strike or picketing without giving required notice

On or about (date), the above named Union engaged in (strike or picketing) without giving the required ten day notice to (name of the health care institution) in violation of Section 8(g).

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE: PARTIES INVOLVED IN AN INVESTIGATION OF AN UNFAIR LABOR PRACTICE CHARGE SHOULD BE AWARE OF THE FOLLOWING PROCEDURES:

Right to be Represented - Any party has the right to be represented by an attorney or other representative in any proceeding before the National Labor Relations Board. If you wish to have a representative appear on your behalf, please have your attorney or other representative complete Form NLRB-4701, Notice of Appearance, and forward it to the respective Regional Office as soon as a representative is chosen.

Attorneys and Service of Documents - If your representative is an attorney, such attorney will receive exclusive service of all documents, except that you and your attorney will both receive those documents described in Sec. 11842.3(a) of the Casehandling Manual. However, your attorney may consent to have additional documents or correspondence served on you by making the appropriate designation on Form NLRB-4701, Notice of Appearance.

Non-Attorney Representatives and Service of Documents - If your representative is not an attorney, you and your representative may receive copies of all documents and correspondence.

Impartial Investigation - Upon receipt of a charge, the Regional Office will conduct an impartial investigation to obtain all material and relevant evidence. Your active cooperation in making witnesses available and stating your position will be most helpful to the Region in determining whether the charge has merit. The Region may also contact and interview other relevant witnesses and parties.

If only the charging party cooperates in the investigation, its evidence may warrant issuance of complaint in the absence of the charged party's defenses. Thus, the charged party is encouraged to fully cooperate and present all available evidence and its defenses. The Region seeks such relevant evidence from all parties to reach an informed determination and help resolve the matter, whether or not the case has merit, at the earliest possible time. .

Withdrawal/Dismissal - If the Regional Director determines that the charge lacks merit, the charging party is offered the opportunity to withdraw. Should the charging party not withdraw the charge, the Regional Director will dismiss the charge and advise the charging party of the right to appeal the dismissal to the General Counsel.

Pre-Complaint Voluntary Adjustment - If the Regional Director determines that the charge has merit, all parties are afforded an opportunity to settle the matter by voluntary adjustment. It is our policy to explore and encourage voluntary adjustment before proceeding with costly and time-consuming litigation before the Board and courts.

Complaint and Voluntary Adjustment - If, following the investigation, the Regional Director determines that there is merit to the charge and a voluntary adjustment is not reached, the Regional Director will issue a complaint and notice of hearing. The hearing will be conducted before an administrative law judge who will issue a decision and recommendation to the Board in Washington, D.C. However, issuance of a complaint does not preclude voluntary adjustment by the parties. On the contrary, at any stage of the proceeding the Regional Director and staff will be available to provide any assistance in arriving at an appropriate settlement.

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

and	CASE
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REGIONAL DIRECTOR

EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

REPRESENTATIVE IS AN ATTORNEY

IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: _____
MAILING ADDRESS: _____
E-MAIL ADDRESS: _____
OFFICE TELEPHONE NUMBER: _____
CELL PHONE NUMBER: _____ FAX: _____
SIGNATURE: _____ (Please sign in ink.)
DATE: _____

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

Conduct Elections

The Board has changed its rules regarding processing election petitions. Those changes are effective April 14, 2015. For more information about those changes, click [here](#). The information on this page has been updated to describe the NLRB election process that will be in effect for petitions filed on or after April 14, 2015.

If you wish to form or join a union, or decertify an existing union, you may file an [election petition](#). Please contact an information officer at your nearest [Regional Office](#) for assistance.

To start the election process, a petition and associated documents must be filed, preferably electronically, with the nearest NLRB Regional Office showing support for the petition from at least 30% of employees. NLRB agents will then investigate to make sure the Board has jurisdiction, the union is qualified, and there are no existing labor contracts or recent elections that would bar an election. Shortly after the petition is filed, the employer is required to post a Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted. If the employer customarily communicates with employees in the petitioned-for unit through electronic means, the employer must also distribute the Notice of Petition for Election electronically to those employees.

The NLRB agents will seek an election agreement between the employer, union, and other parties setting the date, time, and place for balloting, the ballot language(s), the appropriate unit, and a method to determine who is eligible to vote. Once an agreement is reached, the parties authorize the NLRB Regional Director to conduct the election. If no agreement is reached, the Regional Director will hold a hearing and then may order an election and set the conditions in accordance with the Board's rules and its decisions.

Typically, elections are held on the earliest practicable date after a Director's order or authorization, which will vary from case to case. However, an election may be postponed if a party requests to block the petition based on charges alleging conduct that would interfere with employee free choice in the election, such as threatening loss of jobs or benefits by an employer or a union, granting promotions, pay raises, or other benefits to influence the vote. When an election is scheduled, the Employer is required to post a Notice of Election which will replace the previously posted Notice of Petition for Election.

When a union is already in place, a competing union may file an election petition if the labor contract has expired or is about to expire, and it can show interest by at least 30% of the employees. This would normally result in a three-way election, with the choices being the incumbent labor union, the challenging one, and "none." If none of the three receives a majority vote, a runoff will be conducted between the top two vote-getters.

Elections to certify or decertify a union as the bargaining representative of a unit of employees are decided by a majority of votes cast. Observers from all parties may choose to be present when ballots are counted. Any party may file objections and an offer of proof in support of its objections with the appropriate Regional Director within 7 days of the vote count. In turn, except where the parties have agreed otherwise, the Regional Director's ruling on objections may be appealed to the

Board in Washington. Results of an election will be set aside if conduct by the employer or the union created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice.

Otherwise, a union that receives a majority of the votes cast is certified as the employees' bargaining representative and is entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit. Failure to bargain with the union at this point is an unfair labor practice.

[Click here for charts and data on representation elections.](#)

Alternate path to union representation

In addition to NLRB-conducted elections, federal law provides employees a second path to choose a representative: They may persuade an employer to voluntarily recognize a union after showing majority support by signed authorization cards or other means. These agreements are made outside the NLRB process. If a union is voluntarily recognized, its status as bargaining representative cannot be challenged during a reasonable period for bargaining, which the Board defines as not less than six months (and not more than one year) after the parties' first bargaining session.

Office of Representation Appeals

Reviews of election-related decisions, including dismissals of petitions and pre-election decisions by Regional Directors, are handled by the Office of Representation Appeals in Washington, D.C. Requests for review can be filed at any time up to 14 days after a certification of representation or the results of an election or a dismissal of the petition. Each case is assigned to an attorney and a supervisor for a review of the case, which is then presented to the Board. The Board may deny review or grant review of the decision. If the Board grants review, the parties may file additional briefs on review.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DESCRIPTION OF REPRESENTATION CASE PROCEDURES
IN CERTIFICATION AND DECERTIFICATION CASES

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlr.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews both the petition and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 8 days (excluding intervening federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position. Included with the Notice of Representation Hearing are a copy of the petition, this form, a Statement of Position form, a Notice of Petition for Election, and a letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request should be filed with the regional director. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. As part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department).

Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be

used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon on the business day before the opening of the hearing. The regional director may postpone the due date for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. The Statement of Position form may be E-Filed but, unlike other E-Filed documents, will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion."

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically if the employer customarily communicates with its employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

Purpose of Hearing: The purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.

Issues at Hearing: Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; and eligibility formulas. At the hearing, the Statement of Position will be received into evidence and, prior to the introduction of further evidence, all other parties will respond on the record to each issue raised in the Statement. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

Preclusion: At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Conduct of Hearing: If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

Official Record: An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (*Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.*) All statements made in the hearing room will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

Motions and Objections: All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

Election Details: Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

Oral Argument and Briefs: Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of

law. *Post*-hearing briefs shall be filed only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. If allowed, briefs should be double-spaced on 8½ by 11 inch paper. Briefs must be filed in accordance with the provisions of Section 102.111(b) of the Board's Rules. E-Filing of briefs through the Board's website, www.nlr.gov, is encouraged, but not required. Facsimile transmission of briefs is NOT permitted.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 14 days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefor.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction.

To be timely filed and served, the voter list must be *received* by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

**DESCRIPTION OF ELECTION AND POST-ELECTION
REPRESENTATION CASE PROCEDURES**

Election – A secret ballot election will be conducted by an agent of the National Labor Relations Board on the date and at the time(s) and location(s) specified in the Notice of Election. Unless the election is conducted by mail ballot, each party is usually represented by an equal number of observers at the polls during the election. When a voter appears to vote, the voter is asked to state his or her name and is given a ballot to take to a voting booth and mark in secret. The voter folds the marked ballot and then drops it into a ballot box without showing the marking to anyone. Parties or the Board agent may challenge for good cause the eligibility of a voter to participate in the election. A challenged voter will place his or her ballot in a special envelope before placing it in the ballot box. After the time for voting has concluded but before counting the ballots, the Board agent will see if the parties can agree to resolve some or all of the challenges. The Board agent will then count the ballots and prepare a Tally of Ballots and make that Tally available to the parties. If the unresolved challenged ballots will not determine the outcome of the election, the challenged ballots are never opened and no determination is made on the voters' eligibility. If the remaining challenged ballots are determinative of the results of the election, those challenged ballots will be sealed in a special envelope in front of the parties and stored in a safe in an NLRB office.

Challenged Ballots – If the challenged ballots are determinative, the regional director will send a letter to the parties after the election, listing the challenged voters and asking the parties to submit a statement of position with respect to the challenge to the ballot of each voter listed above detailing why each of the challenged individuals is or is not eligible to vote. The regional director will then determine whether it is necessary to conduct an investigation or schedule a hearing to resolve the determinative challenges.

Objections – Within 7 days after the Tally of Ballots has been prepared, any party may file objections to the conduct of the election or to conduct affecting the results of the election. The objections must be submitted within this time frame, regardless of whether the challenged ballots are sufficient in number to affect the results of the election. The objections must contain a short statement of the reasons for the objections and be accompanied by a written offer of proof identifying each witness the party would call to testify concerning the issue and summarizing the witness's testimony. Upon a showing of good cause, the regional director may extend the time for filing the offer of proof. The party filing the objections will serve a copy of the objections, but not the written offer of proof, on each of the other parties to the case, and include a certificate of service with the objections. The objections may be E-Filed through the Agency's E-Filing system. Objections may also be submitted by facsimile transmission, but the filer must also file an original for the Agency's records.

Certification in the Absence of Objections, Determinative Challenges, and Runoff Elections -- If no timely objections are filed, no runoff election is required to be held, and the challenged ballots are insufficient in number to affect the results of the election, the regional director will issue a certification of the results of the election, including certification of representative where appropriate.

Regional Office Investigation and Decisions without a Hearing -- A Board agent may be assigned to conduct an administrative investigation of determinative challenges and objections. If the regional director determines that the evidence described in the offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director will issue a decision disposing of the objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

Notices of Hearing on Challenges and/or Objections -- The regional director will schedule the hearing on challenges and/or objections 21 days after the preparation of the tally of ballots or as soon as practicable

thereafter, unless the parties agree to an earlier date. In some cases, the regional director may consolidate the hearing concerning objections and challenges with an unfair labor practice proceeding before an administrative law judge. In any proceeding involving a consent election where the representation case has been consolidated with an unfair labor practice proceeding for hearing, the administrative law judge will, after issuing a decision, sever the representation case and transfer it to the regional director for further processing. If there was no consent election, the administrative law judge's recommendations on objections and/or challenges that have been consolidated with an unfair labor practice proceeding will be ruled upon by the Board if exceptions are filed or adopted in the absence of exceptions.

Voluntary Resolution -- An objecting party may wish to withdraw its objections. The withdrawal may be oral or written. When objections are withdrawn, the regional director may issue the appropriate certification. If the parties agree to set aside the election and conduct a new one, the Board agent will prepare a written agreement for their signature and approval by the regional director. Agreement of the objecting party is not required.

Hearing on Challenges and/or Objections -- The hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. Any party will have the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. Post-hearing briefs may be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer.

Hearing Officer's Report and Exceptions -- After the hearing, the hearing officer will prepare and serve on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the post-election issues. Within 14 days from the issuance of that report, any party may file with the regional director exceptions to that report and a supporting brief if desired. A copy of the exceptions and any supporting brief must immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief. A copy of the answering brief must immediately be served on the other parties and a statement of service filed with the regional director. Thereafter, the regional director will decide the matter or make other disposition of the case. If no exceptions to the hearing officer's report are filed, the regional director may decide the matter upon the record or make other disposition of the case. The decision of the regional director will be final unless a request for review is granted by the Board.

Briefs in support of exceptions and answering briefs may not exceed 50 pages, excluding the subject index and table of cases and authorities, unless permission is obtained from the regional director by motion, setting forth the reasons for exceeding the limit, filed not less than 5 days (including Saturdays, Sundays, and holidays) before the date the brief is due. If a brief filed exceeds 20 pages, it must contain a subject index with page references and an alphabetical table of cases and authorities. All documents filed with the regional director must be double spaced and on 8 ½ by 11-inch paper, and be printed or otherwise legibly duplicated.

Request For Review by the Board -- In stipulated and directed election cases, any party may request Board review of the regional director's post-election decision. The request for review must be filed with the Board within 14 days of the director's post-election decision and must be served on the regional director and the other parties. This may be combined with a request for review of the regional director's decision to direct an election. A statement of service must also be filed with the Board. Any party opposing the request for review may file a statement in opposition within 7 days after the last day for which the request for review must be filed. If the Board grants the request for review, the parties have 14 days from the order granting review to file briefs with the Board. A party seeking review must identify a significant, prejudicial error or some other compelling reason for Board review.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.

Date Filed

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer
2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)

3a. Employer Representative - Name and Title
3b. Address (If same as 2b - state same)

3c. Tel. No. 3d. Cell No. 3e. Fax No. 3f. E-Mail Address

4a. Type of Establishment (Factory, mine, wholesaler, etc.) 4b. Principal product or service 5a. City and State where unit is located:

5b. Description of Unit Involved
Included:
Excluded:
6a. No. of Employees in Unit:
6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes [] No []

Check One: _____ 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about _____ (Date) (If no reply received, so state).
_____ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state). 8b. Address

8c. Tel No. 8d Cell No. 8e. Fax No. 8f. E-Mail Address

8g. Affiliation, if any 8h. Date of Recognition or Certification 8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? _____ If so, approximately how many employees are participating? _____
(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name 10b. Address 10c. Tel. No. 10d. Cell No.
10e. Fax No. 10f. E-Mail Address

11. **Election Details:** If the NLRB conducts an election in this matter, state your position with respect to any such election. 11a. Election Type: ___ Manual ___ Mail ___ Mixed Manual/Mail

11b. Election Date(s): 11c. Election Time(s): 11d. Election Location(s):

12a. Full Name of Petitioner (including local name and number) 12b. Address (street and number, city, state, and ZIP code)

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)

12d. Tel No. 12e. Cell No. 12f. Fax No. 12g. E-Mail Address

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.
13a. Name and Title 13b. Address (street and number, city, state, and ZIP code)

13c. Tel No. 13d. Cell No. 13e. Fax No. 13f. E-Mail Address

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Signature Title Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RD PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RD- DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer		2b. Address(es) of Establishment(s) involved (<i>Street and number, city, State, ZIP code</i>)	
3a. Employer Representative – Name and Title		3b. Address (If same as 2b – state same)	
3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address
4a. Type of Establishment (<i>Factory, mine, wholesaler, etc.</i>)		4b. Principal product or service	5a. City and State where unit is located:
5b. Description of Unit Involved			6a. No. of Employees in Unit:
Included:			6b. Do a substantial number (30% or more) of the employees in the unit no longer wish to be represented by the certified or currently recognized bargaining representative? Yes [] No []
Excluded:			
Check One: _____ 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about _____ (Date) (<i>If no reply received, so state</i>).			
_____ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.			
8a. Name of Recognized or Certified Bargaining Agent		8b. Address	
8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address
8g. Affiliation, if any		8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (<i>Month, Day, Year</i>)
9. Is there now a strike or picketing at the Employer's establishment(s) involved? _____ If so, approximately how many employees are participating? _____ (<i>Name of labor organization</i>) _____, has picketed the Employer since (<i>Month, Day, Year</i>) _____.			
10. Organizations or individuals other than those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (<i>If none, so state</i>)			
10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address
11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.		11a. Election Type: ___ Manual ___ Mail ___ Mixed Manual/Mail	
11b. Election Date(s):	11c. Election Time(s):	11d. Election Location(s):	
12a. Full Name of Petitioner		12b. Address (<i>street and number, city, state, and ZIP code</i>)	
12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (<i>if none, so state</i>)			
12d. Tel No.	12e. Cell No.	12f. Fax No.	12g. E-Mail Address
13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.			
13a. Name and Title		13b. Address (<i>street and number, city, state, and ZIP code</i>)	
13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address
I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.			
Name (<i>Print</i>)	Signature	Title	Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed

INSTRUCTIONS: Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.

Note: Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.

1a. Full name of party filing Statement of Position	1c. Business Phone:	1e. Fax No.:
1b. Address (Street and number, city, state, and ZIP code)	1d. Cell No.:	1f. e-Mail Address

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? Yes No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? Yes No (If not, answer 3a and 3b.)

a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.	
Added	Excluded

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

5. Is there a bar to conducting an election in this case? Yes No If yes, state the basis for your position.

6. Describe all other issues you intend to raise at the pre-election hearing.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at <http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015>.
 (a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
 (b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an

State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: Manual Mail Mixed Manual/Mail

8b. Date(s)	8c. Time(s)	8d. Location(s)
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period <input type="checkbox"/> Weekly <input type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length)

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
9d. Address (Street and number, city, state, and ZIP code)		9e. e-Mail Address
9f. Business Phone No.:	9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

**REVIEW THE FOLLOWING IMPORTANT INFORMATION
BEFORE FILLING OUT A STATEMENT OF POSITION FORM**

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You may E-File your Statement of Position at www.nlr.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

Note: *Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to complete items 3, 5, 6, and 8a-8e of the form.*

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at <http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015>.

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

CERTIFICATE OF SERVICE

Employer Name:

Service on the Employer

I hereby certify that on _____ (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were served on the Employer by: (check whichever is applicable)

- e-mail to the email address shown on the petition.
- facsimile (with the permission of the Employer) to the facsimile number shown on the petition.
- overnight mail to the mailing address shown on the petition.
- hand-delivery to _____ (name of Employer's representative) at the following address: _____.

Service on the Other Party Named in the Petition

I hereby certify that on _____ (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were also served on _____ (name of party or parties) by: (check whichever is applicable)

- email to the email address shown on the petition.
- facsimile (with the permission of the party) to the facsimile number shown on the petition.
- overnight mail to the mailing address shown on the petition.
- hand-delivery to _____ (name of party's representative) at the following address: _____.

Service on the Other Party Named in the Petition

I hereby certify that on _____ (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were also served on _____ (name of party or parties) by: (check whichever is applicable)

- email to the email address shown on the petition.
- facsimile (with the permission of the party) to the facsimile number shown on the petition.
- overnight mail to the mailing address shown on the petition.
- hand-delivery to _____ (name of party's representative) at the following address: _____.

Signature

Name and Title

Date

NLRA and the Right to Strike

The Right to Strike. Section 7 of the Act states in part, “Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Strikes are included among the concerted activities protected for employees by this section. Section 13 also concerns the right to strike. It reads as follows:

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

It is clear from a reading of these two provisions that: the law not only guarantees the right of employees to strike, but also places limitations and qualifications on the exercise of that right.

Lawful and unlawful strikes. The lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers. The object, or objects, of a strike and whether the objects are lawful are matters that are not always easy to determine. Such issues often have to be decided by the National Labor Relations Board. The consequences can be severe to striking employees and struck employers, involving as they do questions of reinstatement and backpay.

Strikes for a lawful object. Employees who strike for a lawful object fall into two classes: economic strikers and unfair labor practice strikers. Both classes continue as employees, but unfair labor practice strikers have greater rights of reinstatement to their jobs.

Economic strikers defined. If the object of a strike is to obtain from the employer some economic concession such as higher wages, shorter hours, or better working conditions, the striking employees are called economic strikers. They retain their status as employees and cannot be discharged, but they can be replaced by their employer. If the employer has hired bona fide permanent replacements who are filling the jobs of the economic strikers when the strikers apply unconditionally to go back to work, the strikers are not entitled to reinstatement at that time. However, if the strikers do not obtain regular and substantially equivalent employment, they are entitled to be recalled to jobs for which they are qualified when openings in such jobs occur if they, or their bargaining representative, have made an unconditional request for their reinstatement.

Unfair labor practice strikers defined. Employees who strike to protest an unfair labor practice committed by their employer are called unfair labor practice strikers. Such strikers can be neither discharged nor permanently replaced. When the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work have to be discharged.

If the Board finds that economic strikers or unfair labor practice strikers who have made an unconditional request for reinstatement have been unlawfully denied reinstatement by their employer, the Board may award such strikers backpay starting at the time they should have been reinstated.

Strikes unlawful because of purpose. A strike may be unlawful because an object, or purpose, of the strike is unlawful. A strike in support of a union unfair labor practice, or one that would cause an employer to commit an unfair labor practice, may be a strike for an unlawful object. For example, it is an unfair labor practice for an employer to discharge an employee for failure to make certain lawful payments to the union when there is no union security agreement in effect (Section 8(a)(3)). A strike to compel an employer to do this would be a strike for an unlawful object and, therefore, an unlawful strike.

Furthermore, Section 8(b)(4) of the Act prohibits strikes for certain objects even though the objects are not necessarily unlawful if achieved by other means. An example of this would be a strike to compel Employer A to cease doing business with Employer B. It is not unlawful for Employer A voluntarily to stop doing business with Employer B, nor is it unlawful for a union merely to request that it do so. It is, however, unlawful for the union to strike with an object of forcing the employer to do so. In any event, employees who participate in an unlawful strike may be discharged and are not entitled to reinstatement.

Strikes unlawful because of timing—Effect of no-strike contract. A strike that violates a no-strike provision of a contract is not protected by the Act, and the striking employees can be discharged or otherwise disciplined, unless the strike is called to protest certain kinds of unfair labor practices committed by the employer. It should be noted that not all refusals to work are considered strikes and thus violations of no-strike provisions. A walkout because of conditions abnormally dangerous to health, such as a defective ventilation system in a spray-painting shop, has been held not to violate a no-strike provision.

Same—Strikes at end of contract period. Section 8(d) provides that when either party desires to terminate or change an existing contract, it must comply with certain conditions. If these requirements are not met, a strike to terminate or change a contract is unlawful and participating strikers lose their status as employees of the employer engaged in the labor dispute. If the strike was caused by the unfair labor practice of the employer, however, the strikers are classified as unfair labor practice strikers and their status is not affected by failure to follow the required procedure.

Strikes unlawful because of misconduct of strikers. Strikers who engage in serious misconduct in the course of a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and unfair labor practice strikers. Serious misconduct has been held to include, among other things, violence and threats of violence. The U.S. Supreme Court has ruled that a “sitdown” strike, when employees simply stay in the plant and refuse to work, thus depriving the owner of property, is not protected by the law. Examples of serious misconduct that could cause the employees involved to lose their right to reinstatement are:

- Strikers physically blocking persons from entering or leaving a struck plant.
- Strikers threatening violence against nonstriking employees.
- Strikers attacking management representatives.

The Right to Picket. Likewise the right to picket is subject to limitations and qualifications. As with the right to strike, picketing can be prohibited because of its object or its timing, or misconduct on the picket line. In addition, Section 8(b)(7) declares it to be an unfair labor practice for a union to picket for certain objects whether the picketing accompanies a strike or not.

NOTE: It must be emphasized that this document is only a brief outline. A detailed analysis of the law concerning strikes, and application of the law to all the factual situations that can arise in connection with strikes, is beyond the scope of this material. Employees and employers who anticipate being involved in strike action should proceed cautiously and on the basis of competent advice.

The NLRB and Social Media

The National Labor Relations Act protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter.

In 2010, the National Labor Relations Board, an independent federal agency that enforces the Act, began receiving charges in its regional offices related to employer social media policies and to specific instances of discipline for Facebook postings. Following investigations, the agency found reasonable cause to believe that some policies and disciplinary actions violated federal labor law, and the NLRB Office of General Counsel issued complaints against employers alleging unlawful conduct. In other cases, investigations found that the communications were not protected and so disciplinary actions did not violate the Act.

General Counsel memos

To ensure consistent enforcement actions, and in response to requests from employers for guidance in this developing area, Acting General Counsel Lafe Solomon released three memos in 2011 and 2012 detailing the results of investigations in dozens of social media cases.

The [first report](#), issued on August 18, 2011, described 14 cases. In four cases involving employees' use of Facebook, the Office of General Counsel found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five other cases involving Facebook or Twitter posts, the activity was found to be unprotected. In one case, it was determined that a union engaged in unlawful coercive conduct when it videotaped interviews with employees at a nonunion jobsite about their immigration status and posted an edited version on YouTube and the Local Union's Facebook page. In five cases, some provisions of employers' social media policies were found to be overly-broad. A final case involved an employer's lawful policy restricting its employees' contact with the media.

The [second report](#), issued Jan 25, 2012, also looked at 14 cases, half of which involved questions about employer policies. Five of those policies were found to be unlawfully broad, one was lawful, and one was found to be lawful after it was revised. The remaining cases involved discharges of employees after they posted comments to Facebook. Several discharges were found to be unlawful because they flowed from unlawful policies. But in one case, the discharge was upheld despite an unlawful policy because the employee's posting was not work-related. The report underscored two main points regarding the NLRB and social media:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

The [third report](#), issued May 30, 2012, examined seven employer policies governing the use of social media by employees. In six cases, the General Counsel's office found some provisions of the employer's social media policy to be lawful and others to be unlawful. In the seventh case, the entire policy was found to be lawful. Provisions were found to be unlawful when they interfered with the rights of employees under the National Labor Relations Act, such as the right to discuss wages and working conditions with co-workers.

Some of the early social media cases were settled by agreement between the parties. Others proceeded to trial before the agency's Administrative Law Judges. Several parties then appealed those decisions to the Board in Washington D.C.

Board decisions

In the fall of 2012, the Board began to issue decisions in cases involving discipline for social media postings. Board decisions are significant because they establish precedent in novel cases such as these.

In the first such decision, [issued on September 28, 2012](#), the Board found that the firing of a BMW salesman for photos and comments posted to his Facebook page did not violate federal labor law. The question came down to whether the salesman was fired exclusively for posting photos of an embarrassing accident at an adjacent Land Rover dealership, which did not involve fellow employees, or for posting mocking comments and photos with co-workers about serving hot dogs at a luxury BMW car event. Both sets of photos were posted to Facebook on the same day; a week later, the salesman was fired. The Board agreed with the Administrative Law Judge that the salesman was fired solely for the photos he posted of a Land Rover incident, which was not concerted activity and so was not protected.

In the second decision, [issued December 14, 2012](#), the Board found that it was unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a coworker who intended to complain to management about their work performance. In its analysis, the Board majority applied settled Board law to social media and found that the Facebook conversation was concerted activity and was protected by the National Labor Relations Act.

The National Labor Relations Board *NLRB*

We are an independent federal agency established to enforce the National Labor Relations Act (NLRA).



Brief History of the NLRA

- The National Labor Relations Act (Wagner Act) was passed by Congress in 1935
- Gave workers the right to form unions and engage in collective bargaining
- Established representation elections for employees (industrial democracy)
- Part of FDR's New Deal Legislation
- Goal was to reduce number of strikes and create government-industry cooperation

1947 Taft-Hartley Act

- Amended the NLRA to regulate unions
- President Truman vetoed the bill and Congress overrode his veto
- Gave employees the right to refrain from engaging in union activity
- Prohibited unions from engaging in secondary boycotts

The NLRB Today

Jurisdiction

- As a federal agency, the Board becomes involved only in those matters that have an impact on interstate commerce
- NLRB has jurisdiction over nearly all private sector employers

Who is Covered by the NLRA?

Nearly all private sector employers

Examples:

- Restaurant workers
- Janitors
- Nurses
- Engineers

The NLRA specifically excludes coverage for:

- Agricultural laborers
- Domestic servants
- Persons employed by a parent or spouse
- Independent contractors
- Supervisors
- Persons employed by an employer subject to the Railway Labor Act
- Federal, State or local government employees

What Are Your Rights As An Employee Under the NLRA?

Examples :

- Engaging in protected concerted activities. Generally, "protected concerted activity" is group activity which seeks to modify wages or working conditions
- Talking with other people about your wages or benefits
- Forming, or attempting to form, a union among the employees of your employer
- Assisting a union in grievance investigations
- Refusing to do any or all of these things. However, the union and employer, in a State where such agreements are permitted, may enter into a lawful union-security clause requiring employees to pay certain monies (dues and initiation fees) to the union

NLRB has Two Main Functions:

- Conducting elections to determine whether employees want a union
- Investigating Unfair Labor Practice charges and remedying violations of the Act. When necessary this involves prosecuting violations.



Selecting Union Representation

- Employees have the right to decide if they want to be represented by a union
- Once a union is selected as employees' collective bargaining representative, it will continue to represent those employees until the union or the employees want to change the relationship
- Employees can petition for an election if they want to change unions or vote out a union

NLRB Elections



- Employees have the right to a secret ballot election to determine whether or not they want union representation
- Must have 30% showing of interest to file a representation petition with the NLRB
- NLRB will arrange and run a secret ballot election
- Election typically held at employer's facility
- The majority of votes cast determines the result

Election Campaign

Examples of objectionable conduct that interferes with the rights of employees and may result in the setting aside of the election:

- Threaten employees, i.e. “you won’t get your annual pay increase if you vote union”
- Promise employees, i.e. “you’ll get a pay increase if you vote no union”
- Fire employees to discourage or encourage union activity
- Make new rules or change policies in retaliation for union activity

Unfair Labor Practices (ULPs)

- ULPs are actions by an employer or union that violate the NLRA
- Charges must be filed within 6 months of the date of the event or conduct alleged to be a violation

Examples - Employer ULPs

- Maintaining rules that prohibit employees from discussing their wages and benefits with others
- Questioning employees or job applicants about their union sympathies or activities
- Disciplining employees for expressing collective concerns
- Refusing to negotiate with a union employees have elected to represent them.

Non-Union Employers can Commit ULPs!

- Be aware that employees don't have to have a union to engage in protected concerted activity (PCA)
- Employer can have unlawful rules regardless if there is a union or not
- Threats to employees for discussing unionization are always unlawful



Examples - Union ULPs

- Threats to employees that they will lose their jobs unless they support the union's activities
- Refusing to process a grievance because an employee has criticized union officers
- Discriminating against employees because of their race, religion or gender

Unfair Labor Practices

Filing a Charge

- Any person may file a charge with the NLRB
- There is no cost for filing charges
- If you call the NLRB, an information officer will explain the process and help draft the charge
- The party filing the charge must be able to produce witnesses or other evidence in order to support the allegations in the charge

Enforcing the NLRA

- The NLRB can only act on issues that are brought before it – no independent investigatory powers
- Employees and the public are responsible for bringing problems to the NLRB's attention
- It is important to know your rights so you can stand up for them

The ULP Investigation

- An NLRB Agent will conduct an investigation of the charge, securing necessary witness statements and evidence upon which to make a decision on the allegations of the charge
- Be prepared to provide details of events, including dates, times, places, and names of witnesses
- The charged party will be requested to provide relevant information and, if the evidence warrants, will be asked to make its witnesses available for an interview
- We will complete the investigation, decide whether the case has merit, and implement our decision as promptly as possible, allowing for a thorough and complete investigation

Resolving ULP Charges

- Most cases take between 7-14 weeks for full investigation, depending on the allegations and the impact the case has on the public
- Following an investigation, the majority of all unfair labor practice charges are dismissed or voluntarily withdrawn for lack of merit
- Of the remaining charges, the NLRB is successful in achieving settlements about 90% of the time

Resolving ULP Charges

- In ULP cases where the Region finds a violation the NLRB asks the charged party to remedy the situation (Settlement)
- If necessary the NLRB will take the case to trial using one of its attorneys
- Remedies may include, as an example:

Violation: Unlawfully terminated Joe because of he talked to employees about going union.

Remedy: Reinstatement Joe to his previous job and pay Joe backpay and benefits (the wages and benefits he lost). Also post a Notice To Employees informing employees of their rights under the NLRA.

NLRB Answers Questions from the Public

- You can call the NLRB Region nearest you and an information officer will assist you and try to answer your questions.
- The phone number for the Portland NLRB office is (503)326-3085. The phone number for the Seattle NLRB office is (206)220-6300.
- Find additional information, including forms, manuals, publications, etc. at www.nlr.gov

Nuts and Bolts of Labor Law: Private Sector Labor Law; Overview of the Collective Bargaining Process

Kyle T. Abraham, *Barran Liebman LLP*

Jason Weyand, *Tedesco Law Group*

NUTS AND BOLTS OF LABOR LAW: PRIVATE SECTOR LABOR LAW

Jason Weyand



LAWYERS FOR ORGANIZED LABOR IN THE PACIFIC NORTHWEST

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NLRA & the Board

National Labor Relations Act: ("NLRA" or "the Act")

- **Jurisdiction**
 - Covers private sector
 - interstate commerce threshold
 - Excludes public sector and railway/airline industry
- **Elections**
 - Hearings on appropriate bargaining units
- **Unfair Labor Practice Charges**
 - Investigates Charge
 - Prosecutes Complaints
 - Adjudication

National Labor Relations Board ("NLRB" or "the Board")

- **5 Members**
- **Appointed by President for five (5) year terms**
- **ALJ conduct unfair labor practice hearings and issue recommended orders, which are subject to NLRB review**

National Labor Relations Act

- 1935- Established the National Labor Relations Board (NLRB)
- Extended to workers:
 - Right to organize
 - Right to bargain collectively
 - Right to engage in concerted activity
 - e.g., striking
 - Ability to bring ULPs against employers

LABOR-MANAGEMENT RELATIONS ACT (§13.1-1)

- LMRA–1947
- Rein in union rights extended under NLRA
- Amended NLRA to give:
 - Employees the right to *refrain* from engaging in concerted activities
 - Employers the right to bring ULPs against unions

LANDRUM-GRIFFIN ACT (§13.1-1)

- 1959
- Restricted certain types of picketing (organizational and recognition)
- Restricted union secondary boycotts

Protected & Concerted Activity:

Can they discipline me for that?

(§13.2-1; §20.3-2)

What is *concerted activity*?

- Section 7 of the NLRA provides:
“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all such activities.”
- NLRA applies to private employers; union and nonunion

What is *concerted activity*?

- Under § 8(a)(1) of the NLRA, it is an unfair labor practice (ULP) for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 USC § 158(a)(1)

What is *concerted activity*?

- Generally, this requires two or more employees acting together to improve wages, hours or other working conditions

What is *concerted activity*?

- But! The action of a single employee may be considered concerted if he or she involves co-workers before acting, or acts on behalf of others.
 - Example: employee consults with union members at union meeting and group decides that the employee should carry out action agreed upon by group (sending email, filing grievance, posting notice, handing out organizing cards, etc.), individual actions taken to invoke a right set forth in a collective bargaining agreement.

What is *concerted activity*?

- Does it seek to benefit other employees?
 - Will the improvements sought – whether in pay, hours, safety, workload, or other terms of employment – benefit more than just the employee taking action?
 - Example: a personal gripe/complaint which is unique to employee and does not impact group is not concerted.
- Is it carried out in a way that causes it to lose protection?
 - Reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets, may cause concerted activity to lose its protection.
 - See §13.2-1(b)

The intersection of concerted activity and discrimination

- Peir Sixty, LLC and Hernan Perez and Evelyn Gonzalez
362 NLRB No. 59.
- Kyle will now get on his soap box!

Do employees have to be organized to engage in concerted activity?

- No! The law gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union.
- Example: A construction contractor fired five employees after several of them appeared in a YouTube video complaining of hazardous working conditions. Following an investigation, the NLRB regional office issued complaint. As a hearing opened, the case settled, with the workers receiving full backpay and declining reinstatement. *Rain City Contractors*, 19-CA-31580.

Do employees have to be organized to engage in concerted activity?

- Example:

When a hotel housekeeping service announced a \$2-per-hour wage cut, employees protested in letters to managers, written with the help of a community organization. Workers who led the effort and signed the letters were later fired. After the NLRB issued complaint, both employees received full backpay and offers of reinstatement. *Hospitality Staffing Solutions*, 19-CA-31580.

Examples: Protected Concerted Activity

- Alerting a coworker of a belief that the employer refused to hire the coworker's daughter because of unlawful race discrimination, *Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 712 (1999)
- A nurse talking to various media about staffing levels and their relation to patient care, *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1254 (2007), *enforced*, 358 Fed Appx 783 (9th Cir 2009)
- Posting a sign and alerting the news media that a mysterious illness is afflicting workers, *Martin Marietta Corp.*, 293 NLRB 719, 724–725 (1989)
- Distributing a letter for signature to coworkers protesting promotion of an unpopular employee, *Atlantic-Pacific Constr. Co. v. NLRB*, 52 F3d 260, 264 (9th Cir 1995)

Section 8 & Employer Actions (§13.2-1(c))

- Employers must not take actions that might “chill” an employee’s ability to engage in such concerted activities.
 - *Lafayette Park Hotel*, 326 NLRB 824 (1998)
- No showing of actual interference, restraint, or coercion needed to be in violation of the NLRA
- Maintaining a handbook with an overly broad policy will trigger liability

ULP Process Before the Board

(§13.4)

Jessica Dietz will cover this in depth

- A charge is filed
- The Board investigates the charge
 - Requests information from the charging party and the party charged
- The Board decides whether to issue a complaint

Concerted Activity Hypo #1

Jane, the union shop steward, has been misusing the employer-provided cell phone by sending non-work related text messages to her boyfriend. Other employees have received written reprimands for this, but Jane gets a 5-day suspension without any explanation.

- Is there concerted/protected activity? What?
- How do you establish that the discipline is for such activity?
- If you establish that, what do you do about it?
- What if the employer claims it is harsher because Jane has received prior reprimands for being tardy? How do you respond?

Concerted Activity Hypo #2

Ramona wants to organize the employees at the Springfield Widget Plant. She calls a Teamsters Local to get advice, hands out cards to employees, and hosts organizing meetings. A month later, she is laid off. Two weeks after her layoff, the Widget Plant hires someone to perform her old job duties.

- She calls the Teamsters and asks you for help. You are their general counsel. What do you do?
- Can the Widget Plant layoff Ramona?

The New Standard on Workplace Rules

The Old Standard:

Lutheran Heritage, 343 NLRB No. 75 (2004)

- No evidence an employee was actually discriminated against for engaging in concerted activity necessary for a violation
- Board may find a violation if:
 - Employees would reasonably construe the language to prohibit the exercise of concerted activity;
 - Rule was promulgated in response to union activity; or
 - Rule has been applied to restrict exercise of concerted activity
- The Board admitted the “vast majority of violations are found under the first prong of the *Lutheran Heritage* test”

Application of the Old Standard:

Whole Foods Market, 363 NLRB No. 87 (2015)

- Whole Foods policy prohibited recording conversations, images or company meetings unless prior approval from leadership and all parties to give consent = facially neutral policy
- Stated justification for the policy was to eliminate a chilling effect on employee expression of views if a conversation is recorded
- No evidence anyone felt chilled in the exercise of concerted activity
- NLRB applied the *Lutheran Heritage* standard
 - Employees have the right to photograph or make recordings in workplace
 - Employees would reasonably read rules chilling the exercise of concerted activity
 - No consideration of Employer's justification for the rule

A Vigorous Dissent from Former Chairman Miscimarra: *William Beaumont Hospital*, 363 NLRB No. 162 (2016)

- “The Board needs to refrain from ***assuming*** that facially neutral policies, work rules and handbook provisions operate, first and foremost, to extinguish NLRA-protected activity.”
- Single point-of-view problem
- Miscimarra proposed a balancing test between:
 - Employer’s legitimate justifications for the rule(s); and
 - The potential adverse impact on the Employee’s Section 7 rights

Boeing Company, 365 NLRB No. 154 (2017)

- Boeing policy prohibited the use of cameras without a business need
- At the hearing, Boeing's security expert explained the rule is necessary to protect its proprietary information from espionage, including information related to the production of military aircraft, which has national security implications

The New Standard:

Boeing Company, 365 NLRB No. 154 (2017)

- The Board established a balancing test for a facially neutral policy
 - The nature and extent of the potential impact on NLRA rights, against legitimate justifications associated with the rule
- Three categories:
 - Category 1: lawful rules because (i) when reasonably interpreted, does not interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications
 - Category 2: rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications
 - Category 3: rules the Board designates as unlawful because they would prohibit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications

Robb's Agenda: Memorandum 18-02

- Robb's memorandum on what cases must be submitted for his review
 - "I have developed the following guidelines which will serve as my mandatory Advice submission list"
- The list includes:
 - Cases over the last eight years that overruled precedent and involved dissent(s)
 - Single-employee concerted activity cases
 - Common employer handbook rules found unlawful
 - Use of company email for union organizing activity
 - Off-duty employee access to property
 - Conflicts with other statutory requirements (NLRA vs Title VII of the Civil Rights Act)
 - Conduct of union stewards (e.g. *Weingarten* cases)
 - Confidentiality of workplace investigation
 - Dues check-off expiration with contract
 - Rescinded 6 Memorandums from last 2 GCs

Grievance Arbitration (§12.1; §12.5-7(a))

Example of Contract Language Defining a Grievance

- “A grievance shall be defined as a claim by the Employer, Union, or employee(s) that the terms of this Agreement have been violated or that there is a question concerning the proper application or interpretation of this Agreement.”

Grievance Processing

- Although CBAs may contain unique grievance procedures, many require a grievance be reduced to writing and discussed informally between the employee and supervisor
- If the matter is not resolved, the grievance advances through additional steps before reaching arbitration

Selecting an Arbitrator

- Mutual selection
- Permanent panels
- Selection of lists
 - American Arbitration Association
 - Federal Mediation and Conciliation Service

The Arbitration Hearing

- Varying degrees of formality
- Arbitrator know nothing about the case except in unusual circumstances
- Statement of the issue
- Allocation of burden of proof
- Exhibits
- Trial like process

“Just Cause” and Discipline

- Generally, labor contracts contain language that specifies that management can only discipline for “just cause.”

What is just cause?

- The current approach requires three elements:
 - 1. Did the employee do whatever they are accused of as the basis for discipline?
 - 2. Was the employee given due process?
 - 3. Does the punishment fit?

Who has the burden?

- The employer always has the burden of showing that the employee committed an act for which there should be discipline
- The employer must prove what is identified in the disciplinary/termination letter

Due Process

- Did the grievant have notice that the act committed would result in discipline?
- Was the work rule violated reasonable?
- Was the infraction specifically described?
- Was there a full and fair investigation?
- Did the employee have an opportunity to be heard?
- Was there fundamental fairness?

Was the punishment too severe?

- Management gets a reasonable range of discipline
- Some factors to consider:
 - Employment history of employee
 - Length of employment
 - “Progressive discipline”
 - Discipline of other employees in similar situations– disparate treatment

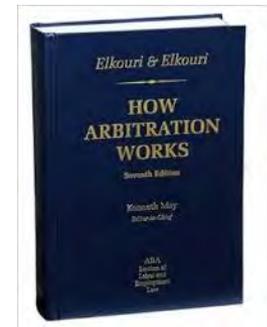
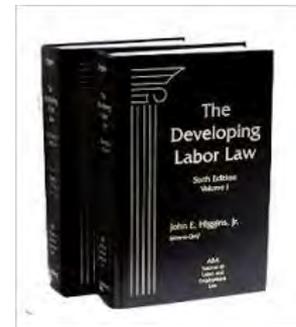
Arbitration Remedies

- Make-whole
- Reinstatement
- Back Pay
 - Duty to mitigate
 - Overtime?
- Benefits
- Unique remedies

Labor Law Resources

Key Reference Materials

- Oregon State Bar Book
- The Developing Labor Law
 - Covers the legal rights and duties of employees, employers, and unions, as well as procedures and remedies under the National Labor Relations Act (NLRA)
 - Cumulative supplements too
- How Arbitration Works- Elkouri & Elkouri
 - The standard text on labor arbitration
- BNA's website



NLRB Website: Reports and Guidance

- Rules & Regulations
- General Counsel Memos
- Manuals
 - ULP proceedings
 - Representation Proceedings
- Forms
 - ULP Charge against Employer
 - ULP Charge against Union
 - Petition
 - Commerce Questionnaire



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NUTS AND BOLTS OF LABOR LAW: OVERVIEW OF THE COLLECTIVE BARGAINING PROCESS

Jason Weyand



Kyle Abraham



Doctrine of Exclusivity

- Collective rights > individual rights
- Union = exclusive representative of individuals in bargaining unit
- Exclusive representative → right to bargain for the unit of employees
- Reduces the right of the individual employee to bargain for himself/herself

PRINCIPLE OF EXCLUSIVITY

- Power of the collective
 - Power in numbers
 - Power of concerted activity – i.e., power of collective action
- Far stronger than the power of the individual

PRINCIPLE OF EXCLUSIVITY

- Employer must bargain with the union
- No individual contracts between employer and employee
- No side deals without union's involvement
- Union has a duty to fairly represent all bargaining unit members
 - Even non-members/fee payers

UNFAIR LABOR PRACTICES

- Bad faith bargaining
 - Failure to meet and bargain
 - Failure to provide information and documents
 - Surface Bargaining
 - Failure to give the chief negotiator sufficient authority to make agreements
 - Attempting to bargain directly with the membership
- Discrimination based on union activities

THE DUTY TO BARGAIN IN GOOD FAITH

(OSB Bar Book; Private Sector, §11.2)

DUTY TO BARGAIN IN GOOD FAITH

- Required by the NLRA; applies to both union and management
 - It is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 USC §158(a)(5) (NLRA §8(a)(5)). Unions must also bargain in good faith with employers. 29 USC §158(b)(3) (NLRA §8(b)(3))

DUTY TO BARGAIN IN GOOD FAITH

- Requirement is not to make a deal, but to work towards one:
 - “[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.” 29 USC §158(d) (NLRA §8(d))

TYPES OF BARGAINING SUBJECTS (§11.9)

- Mandatory
- Permissive
- Illegal

MANDATORY SUBJECTS

- The parties have an obligation to bargain in good faith over mandatory subjects of bargaining
 - *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 US 342, (1958).
- The parties are not required to make a deal

MANDATORY SUBJECTS

- Wages/monetary benefits
- Hours
- Other terms and conditions of employment
 - 29 USC §158(d) (NLRA §8(d)).

WHAT ARE WAGES AND MONETARY BENEFITS?

- \$\$\$
 - Premium pay (e.g., hazard pay)
 - Differential pay (e.g., lead workers)
- Overtime
- Health insurance
- Sick leave
- Vacations and holidays
- Pensions
- Incentive pay
- Merit pay

WHAT ARE HOURS?

- Number of hours in a day or week
 - i.e., work schedules
- Not the starting time
- Not the number of shifts
- Not the number of days the business is open per week

WHAT ABOUT WORKING CONDITIONS?

- Drug, alcohol, physical testing of existing employees
- Grievance and arbitration procedures
- Discipline standards
- No-strike and no-lockout clauses
- Layoffs that are motivated by labor costs rather than necessitated by business needs
- Recall rights
- Changes in working conditions for strikers returning to work
- Logistics of negotiating process

WHAT ABOUT WORKING CONDITIONS?

- Major business changes, such as selling or relocating business
- Subcontracting motivated by labor costs rather than business needs/direction of company
- Safety
- Seniority
- Smoking rules and restrictions
- Strike settlement agreements
- Surveillance cameras in workplace

WHAT ABOUT WORKING CONDITIONS?

- Union security and check off clauses
- Waiver of bargaining or zipper clauses
- Work assignments and workload
- Work rules
- Non-discrimination provisions
- Duration of collective bargaining agreement

PERMISSIVE SUBJECTS

- It's OK to discuss the permissive subject
- It's OK to agree to a proposal regarding a permissive subject
- But the party proposing the permissive subject cannot take it to the point of strike

Examples of Permissive Subjects

Subjects that aren't mandatory are usually permissive (except for illegal subjects)

- Automation
- Application of labor agreement to after-acquired facilities
- Contract ratification procedures
- Alcohol and drug testing of applicants
- Internal union affairs, including internal union discipline
- Interest arbitration
- Indemnity clauses
- Scope of appropriate bargaining unit
- Supervisor's working conditions
- Working conditions of strike-replacement workers

ILLEGAL SUBJECTS

- You can refuse to discuss them
- You can't agree to them
- If you agree to them, the contract provision is without effect

ILLEGAL SUBJECTS

- Contrary to Federal Law
 - Limit concerted activity rights under NLRA
- Unconstitutional
 - Attempts to muzzle free speech
 - e.g., social media policies

DECISION AND EFFECTS BARGAINING

- A management decision is sometimes mandatory for bargaining
- Sometimes, management is not required to bargain the decision, but only the effects of that decision
- Sometimes, management is not required to bargain either the decision or the effects

DECISION AND EFFECTS BARGAINING

- Example: **Subcontracting**
 - Decision = permissive (unless motivated by labor costs)
 - Effects = mandatory
 - Severance pay
 - Health insurance
 - Bumping rights
 - Preferential hiring at other facilities
 - Job search or retraining assistance

GETTING STARTED – NOTICE REQUIREMENTS (§11.3-2)

- Initiating party—usually the union—must give notice of intent to bargain successor contract to the other party—usually the employer—60 days prior to contract expiration
- Must notify FMCS within 30 days by filing form F-7 (otherwise strike could be illegal)
- Parties cannot use economic weapons (strikes and lockouts) until 60 days after the 60 day notice is given

GETTING STARTED – DUTY TO MEET AND CONFER (§11.8)

- Both union and management have an affirmative duty to meet and confer at reasonable times regarding wages, hours, and other terms and conditions of employment
- Failure to do so = ULP

GETTING STARTED – DUTY TO MAINTAIN *STATUS QUO* (§20.7-4(b))

- Management is obligated to maintain the *status quo* regarding mandatory subjects even after the collective bargaining agreement expires
- Obligation exists until:
 - New agreement is reached with union, or
 - Impasse is reached in negotiations
- Failure to maintain the *status quo* = ULP

Management Rights During Hiatus

- After a contract expires, some provisions expire with the contract, and the Employer is required to continue the practice of some provisions
- *Courier-Journal*, 342 NLRB 1093, 342 NLRB 1148 (2004)
- Remains:
 - Wages, hours, and working conditions (other mandatory subjects)
 - Union fees and dues check-offs
 - Employer must continue grievances through arbitration filed before expiration
- Expires:
 - Employer need not observe union shop provisions
 - No-strike or lockouts clauses + no notice required
 - Management Rights article?

Management Rights During Hiatus

- Bargaining obligations required before implementing unilateral “change”
- Actions do not constitute change if:
 - Similar in kind & degree with established past practice
- Principle applies regardless of whether
 - a CBA was in effect when the past practice was created, and
 - no CBA existed when the disputed actions were taken
- Actions consistent with established practice \neq change requiring bargaining merely because they may involve some degree of discretion
 - ***Raytheon Network***, 365 NLRB No. 161 (2017)

GETTING STARTED – DUTY TO MAINTAIN *STATUS QUO*

- Exceptions to duty to maintain *status quo*:
 - Union security
 - No strike clauses
 - Arbitration provisions if violation occurred after expiration of contract
 - Permissive subjects
 - Changes necessary to maintain status quo

INFORMATION REQUESTS (§11.10)

- Powerful tool → information is key
- Union advocates should make the requests early and often
- If made verbally at the bargaining table, follow up in writing
- Request must be:
 - Made in good faith
 - Specific and not overbroad or unduly burdensome
 - Seeking relevant information

INFORMATION REQUESTS

- Employer's response must:
 - Be timely
 - Include information in useful form
- Not limited to documents
- If employer claims inability to pay (as opposed to unwillingness to pay) ...
 - ... union can request in depth employer financial information

INFORMATION REQUESTS

- Employer can request information from union
 - e.g., Union hiring hall procedures if employer obligated to use them
 - Arbitration awards
 - Other labor contracts
- Union's or management's failure to provide information = ULP

How does a union put pressure on the employer during bargaining? (§13.2-1(a))

- Picketing
- Handbilling
- ULP strikes

PICKETING: a form of union pressure (§14.1)

- Generally triggered by a labor dispute.
- Patrolling by one or more persons, generally but not necessarily with a picket sign, at or near a business or residence.

PICKETING

- Primary picketing is picketing by a labor organization of an employer with which the labor organization has a direct labor dispute
- In itself, primary picketing activity is protected lawful activity
- Primary picketing may involve organizing efforts, protests over unfair labor practices, or campaigns to inform the public that an employer lacks a union contract, is failing to meet “area standards” for wages and benefits, or is otherwise allegedly harming employees or the public

Handbilling

(§13.2-1(d)(2); §14.1-7)

- Handbilling is protected through the publicity proviso in 29 USC §158(b)(4) (NLRA §8(b)(4))
- Generally, absent patrolling, massing, blocking an ingress or egress, violence, physical intimidation, or similar coercive or confrontational conduct, a union's truthful consumer-boycott handbilling has generally been held lawful
 - *See, e.g., George v. National Ass'n of Letter Carriers, Local 1037*, 185 F3d 380 (5th Cir 1999) (letter-writing urging boycott of neutral employer protected)

ULPs DURING BARGAINING

(see Chp.13)

- *Per se* (lower threshold to prove)
 - Failure to provide information
 - Failure to meet and confer
 - Insisting on permissive subjects
- Totality of circumstances (higher threshold to prove)
 - Most other bad faith bargaining charges
 - e.g., surface and regressive bargaining

ULPs DURING BARGAINING

- Don't hold your breath
 - Unless the charge is a blocking charge, need to continue bargaining while ULP is being processed
 - Takes time for ULP to be adjudicated → usually, bargaining already completed
- NLRB can get an injunction (“10(j) Order”) from federal court, but rare

ULPs DURING BARGAINING

- Moral of the story:
 - Don't expect a ULP to solve your problems at the table.

ULPs DURING BARGAINING

- Other reasons to file a ULP
 - Politics
 - Bring Pressure
 - Other reasons?

LENGTH OF BARGAINING

- No legal requirement to bargaining for certain period of time
- Obligation: bargain in good faith to an agreement or to impasse
- Compare to Oregon public sector's 150-day requirement

MEDIATION

- No legal requirement to mediate a bargaining dispute or bargaining impasse
- Parties can voluntarily enter mediation
- FMCS = Federal Mediation & Conciliation Service
- Shuttle diplomacy
- Confidential process

IMPASSE (§11.8-3)

- Gone as far as the parties can; no movement on mandatory subjects
 - Reached deadlock
- Can't take a permissive subject to impasse

IMPASSE

- Factors to determine if impasse reached:
 - Parties' bargaining history;
 - Good faith of the parties in negotiations;
 - Length of negotiations;
 - The importance of the issue or issues as to which there is disagreement; and
 - The contemporaneous understanding of the parties' as to the state of negotiations.
- Very fact-specific analysis; no bright-line rules.

IMPASSE

- What prevents an impasse from occurring?
 - Pending ULP where the impasse is caused by the employer's bad faith bargaining
 - Employer's own bad faith bargaining caused the impasse
 - Employer insisted on permissive or illegal subjects of bargaining

IMPASSE

- Can the union break impasse?
 - Union can change its bargaining position
 - Employer's improved financial position

IMPASSE

- What happens if the union is still willing to bargain?
 - Employer commits a ULP by prematurely declaring impasse
 - If either party declares impasse verbally at the bargaining table, get them to say so in writing too

AFTER IMPASSE

- What happens after impasse is reached?
 - Employer can implement its last and final offer
 - Employer can lockout
 - Union can live with it
 - Union can strike

AFTER IMPASSE

- Ongoing duty to bargain in good faith
 - Impasse doesn't relieve parties from continuing to try and resolve dispute through good faith bargaining
 - Even if employer implements or locks out
 - Even if union on strike

LOCKOUTS (§11.7-2; §13.2-2(d))

LOCKOUTS

- Employer temporarily closes all or portion of its business
 - Employees are essentially laid off
 - Pressure tactic
- Lockouts can occur pre-impasse.
 - Although more likely to be unlawful

LOCKOUTS

- Legal lockout:
 - Defensive measure against operational problems, hazards, or economic loss resulting from imminent employee strikes
 - Offensive measure used by employer to resist employee demands or trying to gain employee concessions
- Illegal lockout:
 - Primarily motivated by antiunion considerations

STRIKES (§14.3; §20.7-4(e))

- The term “strike” includes any strike or other concerted stoppage of work by employees and any concerted slowdown or other concerted interruption of operations by employees

Types of Strikes

- Two types of strikes:
 - Economic
 - ULP
- Difference is monumental

ECONOMIC STRIKES

- Economic strike = parties are simply unable to reach agreement on the terms of a contract
- The employer can hire permanent replacement workers
- Employer does not need to remove a permanent replacement to make room for a returning economic striker who has unconditionally offered to return to work
- Replaced employees merely have recall rights

ULP STRIKES

- ULP strike = results from or is prolonged by an employer ULP
- The employer can hire temporary replacement workers
- Employer must remove a temporary replacement to make room for a returning ULP striker who has unconditionally offered to return to work
- Failure to reinstate employee could lead to back pay award

ULP ↔ ECONOMIC STRIKES

(§11.11-3)

- An economic strike can become a ULP strike if employer commits a ULP(s) after the economic strike commences
 - e.g., employer prolongs economic strike by refusing to return to table after union tries to break impasse by moving on an issue
- A ULP strike can also become an economic strike if the underlying ULP charge is resolved and the employees continue to strike

ULP STRIKES

- If an employer prematurely declares an impasse, union could file a ULP
 - This will make the strike a ULP strike and not an economic strike
- Unanswered information request could lead to a ULP
 - Serve as a basis for a strike

Restrictions on the right to strike/lockout

- “Cooling off” period
 - Section 8(d) of the NLRA requires that if a party seeks to modify or terminate an existing CBA, it must give 60 days notice to the other party and continue work during this period without resort to a strike or lockout
 - The party desiring modification or termination must also notify the FMCS and the state mediation agency within 30 days after giving the other party notice of the existence of a dispute
- The notification requirement is not applicable to ULP strikes

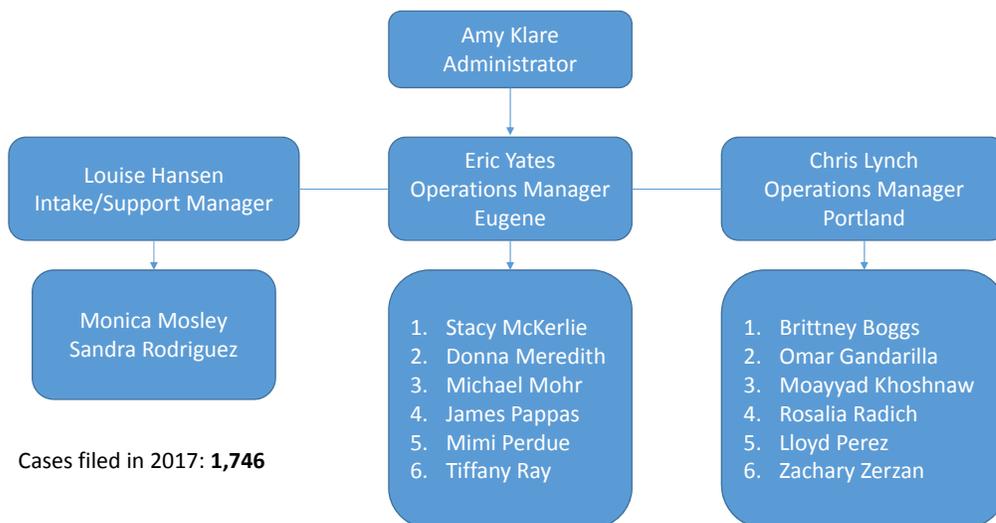
BOLI Civil Rights Process Overview

Chris Lynch, *Oregon Bureau of Labor and Industries*

BOLI Investigations *Insights for Attorneys*

Presented by:
Chris Lynch
Portland Operations Manager
Civil Rights Division

GENERAL OVERVIEW OF CRD INVESTIGATION UNIT



ACRONYMS

- APU
- CATTY
- FEPA
- LNDR
- LOD
- NJ
- PRAN
- RFI
- RTS
- SED
- RATTY

BEGINNING - INTAKE

Drafting the complaint

Process for filing: Attorney-drafted vs. BOLI-drafted

BEGINNING - INTAKE

Drafting the complaint

- Jurisdictional requirements

- (a) Gives the name and address of the aggrieved person and the respondent;
- (b) Identifies the protected class basis of the complaint;
- (c) Is signed by the aggrieved person;
- (d) Describes the actions complained of, including:
 - (A) The date(s) of occurrence;
 - (B) What the action was and how it harmed the aggrieved person; and
 - (C) The causal connection between the aggrieved person's protected class and the alleged harm.

OAR 839-003-0005(5)

BEGINNING – INTAKE

For complainants

Drafting the complaint

OAR 839-003-0005(5)(d)(B) What the action was and how it harmed the aggrieved person;

Discussion



- How much narrative?
- How many protected classes?
- Obfuscation vs clarity
- How much medical information?
- Bad actor(s)
- Aiders/abettors
- Names of comparators
- Names of witnesses
- Identification of supporting evidence

BEGINNING – ANSWERING

For respondents

Answering the complaint

Discussion



- Address each allegation
- Avoid hyperbole
- Avoid omissions
- Obfuscation vs clarity

BEGINNING

Understanding the ABCs

Request for information (CP)

Copies of all **written information in your client's possession** relevant to the allegations in the charge. This includes, but is not limited to, medical records, personnel records, handwritten notes, e-mails, text messages, voicemails, and/or written declarations or affidavits of your client or witnesses.

A list of **witnesses** offered in support of your client's claims, including last known contact information if available. Please also include a brief statement (i.e. a few sentences at most) describing the information each witness possesses and its relevance to one or more of your client's claims.

A list of any individuals who you consider to be **comparators** and include a brief statement addressing (a) the degree to which the comparator is similarly or dissimilarly situated to your client; and (b) the extent to which the comparator was treated in either a similar fashion or differently than your client.

A brief statement identifying and describing the nature and probable source of other evidence not in your client's possession which may be relevant to your client's claims (e.g. evidence in the employer's possession).

Request for information (RP)

OAR 839-003-0065(8) The division representative may make written request to the respondent for documents, records, files or other sources of evidence. The respondent will provide such information within 21 days of the date of the division's written request. The division may grant the respondent additional time in which to respond.

MIDDLE

Amending the complaint

OAR 839-003-0040(2) The division may **amend a complaint to correct technical defects and to add additional persons as respondents**. The division may amend a complaint on its own initiative or at the aggrieved person's request (with the division's agreement) at any time prior to the issuance of formal charges, except that respondents may only be added during the course of investigation. Examples of technical defects include: **clerical errors, additions or deletions, name and address corrections, and statute or rule citation errors**.

(3) *A complaint may be amended to add a protected class only if the addition is supported by facts already alleged. New facts may not be added.* If new facts are alleged, the aggrieved person must file a new complaint meeting the standards provided in OAR 839-003-0005(5).

(4) Amended complaints need not be verified or signed by the aggrieved person.

MIDDLE

• Identifying evidence and sources (Complainants and Respondents)

If you want BOLI to interview a witness, tell us why.

- What info can they provide?
- How do they have that info?
- Is there reason to believe they will cooperate?
- Be aware of appearing to influence witness statements

If you have relevant evidence or information, don't wait for us to ask for it.

If you don't have it and can't get it, tell us where it can be found.

OED, WCD, OSHA, Police reports, medical verifications, etc? Go get em!

MIDDLE

- Presenting arguments

Don't expect the investigator to engage in legal argument.

(Even if an investigator seems to agree on or concede some point, their opinion is not determinative.)

If you genuinely believe an argument or case citation is relevant, submit it in writing.

MIDDLE

- Status inquiries
- Requesting a transfer

MIDDLE

- Conciliation – OAR 839-003-0055

(1) The division encourages aggrieved persons and respondents to resolve complaints by mutual agreement at any time. The division will facilitate settlement negotiations between the aggrieved person and respondent, as provided in this rule, at any time during the investigation.

(2) If the aggrieved person and respondent agree upon settlement, the division will draft a settlement agreement that states:

(3) The settlement agreement will not include release language that applies to any forum other than the Civil Rights Division.

(5) The division may allow the aggrieved person and the respondent to enter into a private agreement with release language in addition to the division's agreement. The division will not be a party to nor enforce private agreements and they do not become part of the agency record.

MIDDLE

- Interviews – complainants, respondents and witnesses

Discussion

- Option to waive right to have attorney present for interview
- Expect the unexpected
- Representation vs performance
- Over-prepping

MIDDLE

- Requests for information / releases / subpoenas
 - Responding in stages
 - “Friendly” subpoenas
 - “Unduly burdensome” vs document dumps – let’s talk.

MIDDLE

- Anticipating the outcome

Investigators are not required or expected to give complainant attorneys advance notice of intent to recommend dismissal.

An investigator’s demeanor during interviews and correspondence may or may not be an indication of their assessment.

The best indication of the investigative findings are the questions asked and not asked.

END

- Closure types

Withdrawal vs dismissal

Failure to cooperate

END

- Case closed – adding to the record

Investigators are instructed not to engage in post-closure discussions regarding the specifics of a case.

If you believe it is important to document some additional information or objection, *submit it in writing with a request that it be added to the case file (include case number).*

END

- Post-cause conciliation
- Running the clock – ORS 659A.880(2) and 90-day RTS.
- Side agreements and private settlements

OAR 839-003-0055(5)

The division may allow the aggrieved person and the respondent to enter into a private agreement with release language in addition to the division's agreement. The division will not be a party to nor enforce private agreements and they do not become part of the agency record.

END – NOT!

- Notice of Substantial Evidence Determination (SED)
 - Authority to investigate continues. ORS 659A.830(3)
- Referrals to the Administrative Prosecution Unit (APU)

END.

Questions?

Chris.Lynch@state.or.us

Overview of Oregon and Federal Leave Laws

Karen Davis, *Senior Employment Attorney, Vigilant*

VIGILANT
● counsel for employers

OREGON AND FEDERAL LEAVE LAWS
June 8, 2018 (Updated July 5, 2018)

Presented by Karen Davis
Senior Employment Attorney

VIGILANT
● counsel for employers

We counsel companies across the Northwest & California on complex employment issues

This presentation is not intended to be legal advice.

Introduction

VIGILANT

What we'll cover

- Family & medical (FMLA, OFLA, Title VII, FLSA, sick leave, ADA, WC)
- Military (USERRA, state mil, FMLA, OMFLA)
- Religious leave
- Crime victims
- Other statutory leaves (jury duty, bone marrow donation, Olympic athletes)
- Employer-initiated leaves
- Useful free websites

VIGILANT

Family & medical leaves

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Federal Family & Medical Leave Act

- Covered employer: At least 50 employees
- Eligible employee:
 - Employed at least 12 months (need not be consecutive);
 - Worked at least 1,250 hours in 12 months before leave begins; and
 - Works at worksite with at least 50 employees within 75 miles

VIGILANT

FMLA family & medical reasons for leave

- Employee's own serious health condition;
- Care for serious health condition of employee's spouse, child (<18 or disabled) or parent; or
- Birth, adoption or foster care of employee's newborn or newly placed child (w/in 12 months)
- (Also time off with military family members...more on this later)

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FMLA serious health condition

- Inpatient care (overnight stay); or
- Continuing treatment by health care provider:
 - Incapacity >3 consecutive calendar days that also involves 2 treatments or treatment + care;
 - Pregnancy or prenatal care;
 - Chronic conditions;
 - Permanent or long-term conditions; or
 - Conditions requiring multiple treatments

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No FMLA coverage for these conditions

- Routine physical, vision, or dental exams
- Cosmetic treatments **UNLESS** treatment is inpatient or complications develop
- Common cold, the flu, ear aches, upset stomach, minor ulcers, non-migraine headaches, routine dental or orthodontia problems, periodontal disease, etc. **UNLESS** they meet criteria for serious health condition
- Incapacity from drug or alcohol use

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FMLA protections

- Up to 12 weeks unpaid leave in 12-month period
 - May be intermittent or reduced schedule
- Any available paid leave may run concurrently
- Continuation of health benefits on same basis as if working
- No discipline for FMLA-covered absences
- Gets bonus based on achievement of goal if EEs on equivalent non-FMLA leave get bonus
- Reinstatement to same or equivalent job

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FMLA notices

- General notice (poster)
- Notice of eligibility
- Notice of rights and responsibilities
- Designation notice

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FMLA traps

- Consideration of FMLA leave in discipline or termination
- Failure to maintain health insurance during leave
- Failure to immediately reinstate health insurance upon prompt return from leave
- Failure to issue COBRA notice if employee doesn't return promptly from leave

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More FMLA traps

- Failure to give proper FMLA notices
 - Retroactive notice OK if employee unharmed
- Requiring employee to pay cost of any required medical exams (Okay under FMLA but not ORS 659A.306!)
- Failure to consider staffing agency employment in eligibility calculations

VIGILANT

Still more FMLA traps

- Failure to establish or understand 12-month period in policy. May be:
 - Calendar year;
 - Other fixed leave year (anniversary date, etc.);
 - Year measured forward from first date of leave; or
 - Rolling 12-month period measured backward

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Oregon Family Leave Act

- Regs: OFLA interpreted consistent with FMLA unless conflicting language
- Covered employer: At least 25 employees
- Eligible employee:
 - Continuously employed during 180-day period before leave begins; and
 - Worked an average of at least 25 hours/week during 180-day period before leave begins (except for parental (bonding) leave)

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OFLA reasons for leave

- Employee's own *serious health condition* (but not WC unless employee refused light duty);
- *Serious health condition* of family member;
- *Parental leave* (w/in 12 months of arrival);
- *Sick child leave* (<18 or disabled child with non-serious condition requiring home care); or
- *Bereavement leave* (max 2 weeks per family member per 12-month period, and must be taken within 60 days of learning of the death)

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OFLA family member

- Spouse or Oregon registered same-sex domestic partner;
- Child (any age) or child (any age) of Oregon registered same-sex domestic partner;
- Parent, parent-in-law, or parent of Oregon registered same-sex domestic partner;
- Grandparent; or
- Grandchild (any age)

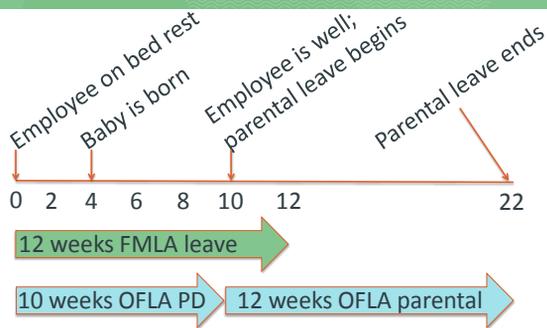
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OFLA amount of leave

- *Basic rule*: 12 weeks for any OFLA-covered reason (except bereavement leave is limited)
- *Pregnancy disability*: Up to an additional 12 weeks for disability related to pregnancy or childbirth
- *Sick child bonus*: If all 12 weeks under basic rule are spent on parental leave (bonding), then up to 12 more weeks are available for sick child leave (non-serious condition requiring home care)

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Example of concurrent FMLA and OFLA



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OFLA traps

- Failure to reinstate to exact same job
- Failure to maintain health insurance during leave
- Requiring medical certification for first 3 days/absences of sick child leave (non-serious) in 12-month period
- Docking pay of exempt employee for missing partial day due to OFLA, when employee is eligible for OFLA but not FMLA
- Failing to pay bonus when employee was otherwise qualified (different from FMLA)

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Pregnancy disability leave - Title VII

- Covered employer: At least 15 employees
- General rule: Treat leave for temporary disability due to pregnancy or childbirth the same as leave for other disabilities
 - **UNLESS** leave policy is so limited that it has an adverse impact on women
- Supreme Court: Right to light duty (upon request) depends on how employer treats non-pregnant workers

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Breaks to express breast milk - FLSA

- Fair Labor Standards Act:
 - Covered employer: All (but if <50 employees may use undue hardship exception)
 - Eligible employee: Nonexempt (eligible for OT)
 - Reasonable breaks for up to 12 months after birth
 - Breaks may be unpaid if they extend longer than usual paid breaks
 - Private location, other than restroom

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Breaks to express breast milk - Oregon

- Covered employer: At least 25 employees (but may use undue hardship exception)
- Eligible employee: All female employees
- May take breaks up to 18 months after birth
- 30 minutes for every 4-hour work period or major part thereof, approximately in middle
- Breaks may be unpaid for nonexempt workers if they extend longer than usual paid breaks
- Private location, other than restroom

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Oregon sick leave coverage

- Applies to all Oregon employers
- Unpaid sick leave for very small employers
- Sick leave is paid if employer has at least:
 - 10 employees anywhere in Oregon; or
 - 6 employees if it has a location in Portland

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Oregon sick leave reasons for leave

- Employee's health condition, including preventative medical care;
- Family member's health condition;
- Any OFLA-covered reason;
- Address domestic violence, harassment, sexual assault, or stalking of employee, employee's child (<18 or disabled), or someone for whom employee is a guardian; or
- Public health emergency

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Oregon sick leave policy choices

- Employer may comply by incorporating Oregon sick leave requirements into existing PTO or sick leave policy
- Employer may select accrual method or front-loading method

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Oregon sick leave accrual method

- Earn 1 hour of sick leave per 30 hours worked
- Earn up to 40 hours of sick leave per year
- May carry over up to 40 hours each year
- May limit accrual to maximum of 80 hours and may limit use to max of 40 hours per year
- New hires earn immediately but cannot begin using sick leave until 91st calendar day of employment

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Oregon sick leave front-loading method

- Front-load at least 40 hours at beginning of year
- No carry-over
- For new hires, front-load by 91st calendar day of employment
 - May pro-rate based on number of months or days remaining in year

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Oregon sick leave misc. provisions

- Minimum increment of 1 hour (but if undue hardship, employer may require 4 hours if it allows up to 56 hours leave per year and gives undue hardship notice)
- No value upon termination of employment but must reinstate unused balance if employee returns within 180 days

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Oregon sick leave traps

- Failure to comply with limits on verification of need for leave (including medical certification)
 - Generally cannot ask for verification unless sick leave is requested for >3 consecutive scheduled workdays
 - Exception: Public health emergency

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Paid sick leave for federal contractors

- Applies only to certain federal construction and services contracts
- Solicitations issued on or after January 1, 2017
- Employees working directly or indirectly on the federal contract
- Accrue and use up to 56 hours per year, based on accrual rate of 1 hour of sick pay per 30 hours of work

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Americans with Disabilities Act (ADA)

- Covered employer: At least 15 employees
- Disability = Substantially limited in a major life activity, not taking into account corrective measures other than ordinary eyeglasses
- Leave of absence may be a reasonable accommodation if it would allow employee to recover enough to return and perform essential functions of job
 - May be continuous or intermittent

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ADA traps

- Requiring employee to be 100% healed before returning from leave

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Oregon workers' compensation leave

- 3-year right to be reinstated (to job at injury) or reemployed (in available suitable job) unless:
 - Attending physician says worker cannot return;
 - Worker participates in vocational assistance;
 - Worker accepts other suitable employment after becoming medically stationary;
 - Worker refuses suitable light/modified duty before becoming medically stationary; or
 - 7 days elapse after Dr. says worker can return

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Military leaves

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USERRA leaves of absence

- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Applies to all employers
- Allows workers to take leave from civilian employment for voluntary or involuntary military service under federal authority
- Generally cumulative total of 5 years of leave per employer

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USERRA rights during leave

- Same nonseniority rights (e.g., holiday pay) as others on comparable leave
- Group health plan benefit continuation:
 - If leave <31 days, employee can only be charged as if actively at work
 - If longer, employee may continue benefits on a self-pay basis for up to 24 months

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USERRA application for reemployment

- *Service up to 30 days*: Report for next regularly scheduled work shift that occurs on first full calendar day following 8-hour rest period after safely traveling home
- *Service of 31 to 180 days*: Apply no later than 14 days after service ends
- *Service over 180 days*: Apply within 90 days
- Additional recovery period up to 2 years if temporarily disabled, hospitalized, or recovering from a service-related injury

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USERRA rights upon return from leave

- USERRA leave counts as continuous employment for purposes of seniority-based rights
- Must make/allow retroactive contributions to pension plans, including 401(k)
- Reinstatement to “escalator” position generally required (but if military service is >90 days, also okay to reinstate to another position of like seniority, status, and pay for which employee is qualified)

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USERRA traps

- Terminating veteran without cause soon after return from USERRA leave:
 - For military service of 31 to 180 days, veteran is protected for 180 days after return
 - For military service over 180 days, veteran is protected for 12 months after return
- Failure to recognize exceptions to 5-year leave limit, including periodic National Guard and Reserve training, and necessary/allowable time immediately before/after service

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Oregon military leave

- Applies to all Oregon employers
- Allows workers to take leave from civilian employment for voluntary or involuntary military service under state authority (e.g., governor orders National Guard to help with flood control)
- Construed consistently with USERRA

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FMLA military family leave

- Same FMLA rules for covered employer/eligible employee
- Two types of FMLA military family leave:
 - Military caregiver leave; and
 - Qualifying exigency leave

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FMLA military caregiver leave

- Applies to employee who is the spouse, child, parent, or next of kin of a covered military servicemember with a serious injury or illness incurred or aggravated in line of duty
- May take up to a total of 26 workweeks of unpaid leave during a “single 12-month period” to care for the servicemember (12 month period begins on first day of leave for this purpose)

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FMLA qualifying exigency leave

- Counts toward normal 12-week FMLA leave total
- Available if employee’s spouse, child, or parent is in the Armed Forces (including the National Guard or Reserve) and has an urgent need for the employee to take leave for a qualifying exigency related to their covered active duty or impending call to covered active duty on a foreign deployment

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FMLA qualifying exigency leave reasons

- Up to 7 days for short-notice deployment;
- Military events and related activities;
- Childcare and school activities;
- Financial and legal arrangements;
- Counseling;
- Up to 15 calendar days for temporary rest & recuperation leave during deployment
- Post-deployment activities (90 days after end); or
- Care for a parent of the military member

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Oregon Military Family Leave Act

- Covered employer: Same as OFLA
- Eligible employee: Works an average of at least 20 hours per week (no minimum service period)
- Applies during period of military conflict
- Up to 14 calendar days of leave when military spouse or same-sex registered domestic partner is called to or is on leave from active duty.
- OMFLA leave counts against 12 weeks available under basic OFLA leave

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Religious leave

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Religious leave – Title VII and Oregon

- Covered employer:
 - At least 15 employees (Title VII)
 - At least 1 employee (Oregon)
- Must reasonably accommodate employee’s sincerely held religious beliefs and practices
- Unless undue hardship
 - More than *de minimis* cost (Title VII)
 - Significant difficulty or expense (Oregon)

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Religious leave traps

- Concerns that granting requested religious accommodation will start a slippery slope of other requests
- Evaluating reasonableness of the religious belief

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Crime victims leave

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Leave to attend court proceedings

- Covered employer: At least 6 employees
- Eligible employee: Worked an average of >25 hours per week for at least 180 days immediately before leave begins

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Leave to attend court proceedings, cont.

- Employee may attend court proceedings if employee or family member (spouse, domestic partner, parent, sibling, child, stepchild, or grandparent) suffered a “person felony”
- Leave is unpaid but employee may use accrued paid vacation or PTO
- Employer may limit leave if undue hardship to business

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Leave to address domestic violence, etc.

- Covered employer: At least 6 employees
- No minimum period of employment or number of hours worked to be eligible

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Leave to address domestic violence, etc.

- Employee may take reasonable leave to address domestic violence, (criminal) harassment, sexual assault, or stalking
- Victim is employee or employee’s child or dependent (<18 or disabled, or any other person for whom employee is a guardian)
- Leave is unpaid but employee may use accrued paid vacation or PTO
- Employer may limit leave if undue hardship to business

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Other statutory leaves

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Jury duty

- Employer must allow and not discourage leave for jury duty
- Employers with at least 10 employees must continue health, disability, life or other insurance coverage if employee elects to continue it
 - Appears that employee may still be required to pay usual contribution
- If employee is exempt from overtime, full salary must continue unless jury duty is full workweek

VIGILANT

Time off to donate bone marrow

- Eligible employee: Works average of at least 20 hours per week
- May take up to 40 hours or amount of accrued paid leave available, whichever is less

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Olympic athletes

- Time off to train or compete in Olympic events
- Event must be sanctioned by national governing body of that sport as recognized by U.S. Olympic Committee

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Employer-initiated leaves

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Suspension pending investigation - FLSA

- Paid versus unpaid depends on:
 - Employer policy; and
 - If employee is exempt from overtime, whether suspension is for a full or partial workweek (if partial, it must be paid)
- BOLI follows FLSA approach in FAQs (no regs)

VIGILANT

Disciplinary suspension - FLSA

- If employee is exempt from overtime, disciplinary suspension must be paid unless:
 - Suspension is for a full workweek; or
 - Suspension is for a full day and is for serious infraction of workplace conduct rules (sexual harassment, workplace violence, etc.) pursuant to written policy

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Business closure for inclement weather

- Nonexempt employees only need to be paid for time actually worked
- Employees who are exempt from overtime must be paid if available and willing to work but business closes for less than full workweek

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WARN Act

- WARN = Worker Adjustment and Retraining Notification
- Generally applies to employers with at least 100 employees
- Must provide at least 60 calendar days' notice of a covered plant closure or mass layoff at single site of employment
- Penalty: Value of wages & benefits for remainder of notice period, plus attorney fees and up to \$30,000 (\$500 per day) for failure to notify state

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WARN Act triggering events

- **Plant closure:** Shutdown of single site of employment or complete operating unit within that site that causes at least 50 employees to suffer an employment loss.
- **Mass layoff:** Reduction in force (not a plant closing) that causes employment loss for at least 50 employees at a facility, and at least 33% of the workforce. If 500 or more employees, it automatically qualifies as a mass layoff.

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WARN Act employment loss

- Employment separation other than a discharge for cause, voluntary quit, or retirement;
- Layoff exceeding six months; or
- Reduction in an individual employee's work hours of more than 50% during each month of any consecutive six-month period

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WARN Act notice

- Must include specified information in writing
- Must be given to:
 - Each affected employee;
 - If applicable, chief elected officer of the representative union (usually, local union president);
 - State dislocated worker unit; and
 - Chief elected official of community where layoff or closure occurs

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Useful free websites

VIGILANT

www.ecfr.gov

Electronic Code of Federal Regulations

e-CFR data is current as of **May 3, 2018**

USER NOTICE
The Electronic Code of Federal Regulations (e-CFR) is a currently updated version of the Code of Federal Regulations (CFR). It is not an official legal edition of the CFR. The e-CFR is an editorial compilation of CFR material and Federal Register amendments produced by the National Archives and Records Administration's Office of the Federal Register (OFR) and the Government Publishing Office. The CFR updates the material in the e-CFR on a daily basis. The current update status appears at the top of all e-CFR web pages. View.

Browse: Select a title from the list below, then press "Go".

Title 29 - Labor

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Electronic Code of Federal Regulations

<https://secure.sos.state.or.us/oard/displayChapterRules.action>

Oregon Secretary of State

Bureau of Labor and Industries

Chapter 839

- Division 1 - WAGE COLLECTION MATTERS
- Division 2 - PROCEDURAL RULES
- Division 3 - CIVIL RIGHTS COMPLAINT PROCEDURES
- Division 4 - DISCRIMINATION FOR ACTIVITY PROTECTED BY THE OREGON SAFE EMPLOYMENT ACT
- Division 5 - DISCRIMINATION
- Division 6 - INJURED WORKERS; DISABILITY; VETERANS AND PERSONS IN UNIFORMED SERVICES

https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx

Oregon State Legislature

Oregon Revised Statutes (ORS) 2017 Edition

Purchase Publications

The Oregon Revised Statutes are the codified laws of the State of Oregon.

The ORS is published every two years. Each edition incorporates all laws, and changes to laws, enacted by the Legislative Assembly through the odd-numbered year regular session referenced in the volume titles for that edition.

2017 ORS - Select Volume below, then Chapter

- Volume 01 - Courts, Oregon Rules of Civil Procedure - Chapters 1-55 (48)
- Volume 02 - Business Organizations, Commercial Code - Chapters 59-89 (34)
- Volume 03 - Landlord-Tenant, Domestic Relations, Probate - Chapters 90-130 (40)

Conclusion

VIGILANT

Tips

- Read the regulations/statute (see accompanying list of resources)
- Additional guidance may be not only in cases but also opinion letters and FAQs
- Ask a colleague to review preliminary conclusions

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Useful References for Federal and Oregon Leave Laws

Federal Family and Medical Leave Act (FMLA)	29 CFR Part 825 and DOL FMLA forms web page [Caution: see also ORS 659A.306 re: employer’s duty to pay for required medical exams]
Oregon Family Leave Act (OFLA)	ORS 659A.150 to 659A.186 and OAR 839-009-0200 to -0320
Pregnancy disability leave - Title VII	29 CFR 1604.10
Breaks to express breast milk - federal Fair Labor Standards Act (FLSA)	29 U.S.C. 207(r), added by Section 4207 of the Patient Protection and Affordable Care Act (P.L. 111-148, HR 3590). See DOL web page on break time for nursing mothers .
Breaks to express breast milk - Oregon	ORS 653.077 and OAR 839-020-0051
Oregon sick leave	ORS 653.601 to 653.661 and OAR 839-007-000 to -0120 .
Paid sick leave for federal contractors	Executive Order 13706 and 29 CFR Part 13
Americans with Disabilities Act (ADA)	29 CFR Part 1630
Oregon workers’ compensation leave	ORS 659A.043 (reinstatement) and 659A.046 (reemployment) and OAR 839-006-0100 to -0150
Uniformed Services Employment and Reemployment Rights Act (USERRA)	20 CFR Part 1002
Oregon military leave	ORS 659A.082 to 659A.089
FMLA military family leave	29 CFR Part 825
Oregon Military Family Leave Act (OMFLA)	ORS 659A.090 to 659A.099 and OAR 839-009-0370 to 839-009-0460
Religious leave - Title VII	29 CFR 1605.2
Religious leave - Oregon	ORS 659A.033 and OAR 839-005-0140
Oregon crime victims leave - time off to attend court proceedings	ORS 659A.190 to 659A.198
Oregon crime victims leave - Leave to address domestic violence, sexual assault, (criminal) harassment, or stalking	ORS 659A.270 to 659A.285 and OAR 839-009-0325 to 839-009-0365
Other statutory leaves	ORS 10.090 to 10.092 (jury duty); ORS 659A.312 (bone marrow donation); ORS 659.865 (Olympic athletic training & competitions)
Suspensions pending investigation, disciplinary suspensions, and business closure for inclement weather – FLSA rules on pay for exempt workers	29 CFR 541.602
WARN Act	20 CFR Part 639

