MICHIGAN COMMUNITY COLLEGE
HUMAN RESOURCES ASSOCIATION

May 2015 Conference

at

THE DEARBORN INN

EMPLOYMENT LAW CASE UPDATE
Focusing on MCCHRA’s Requested Topics

Presented by: Elizabeth L. Peters, BS, MA, JD

© 2015 Masud Labor Law Group. All rights reserved
INDEX OF PRESENTATION

I. RETALIATION CLAIMS
II. I-9s
III. COBRA
IV. FMLA
V. TITLE IX/VAWA/CLERY
VI. ADA/ADAAA
VII. EEOC RULINGS
VIII. MISCLASSIFICATION OF EMPLOYEES
IX. FLSA
I. RETALIATION CLAIMS

A. The Definition of Retaliation

[The following comes from the EEOC website]

Retaliation occurs when an employer, employment agency, or labor organization takes an adverse action against a covered individual because he or she engaged in a protected activity.

 ► Adverse Action--An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding.

Examples of adverse employment actions include, but are not limited to:

- termination, refusal to hire, demotion, and denial of promotion,
- other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and
- any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against him for pursuing an EEO charge against a former employer.

Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.

 ► Covered Individuals--Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his spouse participated in employment discrimination litigation.

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination
retaliation laws. For example, "whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.

► Protected Activity--Protected activity includes:

♦ Opposition to a practice believed to be unlawful discrimination--Opposition is informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law; and the manner of the opposition is reasonable.

Examples of protected opposition include:

- Complaining to anyone about alleged discrimination against oneself or others;
- Threatening to file a charge of discrimination;
- Picketing in opposition to discrimination; or
- Refusing to obey an order reasonably believed to be discriminatory.

Examples of activities that are NOT protected opposition include:

- Actions that interfere with job performance so as to render the employee ineffective; or
- Unlawful activities such as acts or threats of violence.

♦ Participation in an employment discrimination proceeding--Participation means taking part in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:

- Filing a charge of employment discrimination;
- Cooperating with an internal investigation of alleged discriminatory practices; or
- Serving as a witness in an EEO investigation or litigation.

A protected activity can also include requesting a reasonable accommodation based on religion or disability.

B. Whistleblower’s Claim

The difference between a claim for retaliation and a whistleblower claim:

Under Michigan law, the Whistleblower’s Protection Act states in relevant part:
15.362 Discharging, threatening, or otherwise discriminating against employee reporting violation of law, regulation, or rule prohibited; exceptions.

Sec. 2. An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. History: 1980, Act 469, Eff. Mar. 31, 1981. 1

Thus, under the Whistleblower Protection Act, an employee must make a report to a public body. The statute of limitations for a whistleblower complaint is 90 days.

### Retaliation-Based Charges
**FY 1997 - FY 2014**

The following chart represents the total number of charges filed and resolved under all statutes alleging retaliation-based discrimination.

The data are compiled by the Office of Research, Information and Planning from data compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.

<table>
<thead>
<tr>
<th></th>
<th>FY ’97</th>
<th>FY ’98</th>
<th>FY ’99</th>
<th>FY ’04</th>
<th>FY ’05</th>
<th>FY ’06</th>
<th>FY ’07</th>
<th>FY ’08</th>
<th>FY ’11</th>
<th>FY ’12</th>
<th>FY ’13</th>
<th>FY ’14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Receipts</td>
<td>18,198</td>
<td>19,114</td>
<td>19,694</td>
<td>22,740</td>
<td>22,278</td>
<td>22,555</td>
<td>26,663</td>
<td>32,690</td>
<td>37,334</td>
<td>37,836</td>
<td>38,539</td>
<td>37,955</td>
</tr>
<tr>
<td>Resolutions</td>
<td>22,112</td>
<td>23,053</td>
<td>24,246</td>
<td>24,704</td>
<td>22,514</td>
<td>22,006</td>
<td>22,265</td>
<td>25,999</td>
<td>41,743</td>
<td>42,025</td>
<td>38,831</td>
<td>36,907</td>
</tr>
<tr>
<td>Settlements</td>
<td>788</td>
<td>928</td>
<td>1,329</td>
<td>2,340</td>
<td>2,160</td>
<td>2,426</td>
<td>2,624</td>
<td>2,777</td>
<td>3,547</td>
<td>3,484</td>
<td>3,272</td>
<td>2,966</td>
</tr>
<tr>
<td>---------------</td>
<td>-----</td>
<td>-----</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3.6%</td>
<td>4.0%</td>
<td>5.5%</td>
<td>9.5%</td>
<td>9.6%</td>
<td>11.0%</td>
<td>11.8%</td>
</tr>
<tr>
<td>Withdrawals w/Benefits</td>
<td>914</td>
<td>827</td>
<td>1,005</td>
<td>1,170</td>
<td>1,268</td>
<td>1,275</td>
<td>1,322</td>
<td>1,673</td>
<td>2,213</td>
<td>2,138</td>
<td>2,288</td>
<td>2,312</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4.1%</td>
<td>3.6%</td>
<td>4.1%</td>
<td>4.7%</td>
<td>5.6%</td>
<td>5.8%</td>
<td>5.9%</td>
</tr>
<tr>
<td>Administrative Closures</td>
<td>8,074</td>
<td>7,866</td>
<td>7,577</td>
<td>5,027</td>
<td>4,424</td>
<td>4,206</td>
<td>4,604</td>
<td>2,777</td>
<td>8,115</td>
<td>7,526</td>
<td>7,206</td>
<td>7,331</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>36.5%</td>
<td>34.1%</td>
<td>31.3%</td>
<td>20.3%</td>
<td>19.6%</td>
<td>19.1%</td>
<td>20.7%</td>
</tr>
<tr>
<td>No Reasonable Cause</td>
<td>11,550</td>
<td>12,238</td>
<td>12,803</td>
<td>14,649</td>
<td>13,157</td>
<td>12,674</td>
<td>12,443</td>
<td>14,905</td>
<td>26,161</td>
<td>27,077</td>
<td>24,611</td>
<td>23,219</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>52.2%</td>
<td>53.1%</td>
<td>52.8%</td>
<td>59.3%</td>
<td>58.4%</td>
<td>57.6%</td>
<td>55.9%</td>
</tr>
<tr>
<td>Reasonable Cause</td>
<td>786</td>
<td>1,194</td>
<td>1,532</td>
<td>1,518</td>
<td>1,505</td>
<td>1,425</td>
<td>1,272</td>
<td>1,330</td>
<td>1,707</td>
<td>1,800</td>
<td>1,454</td>
<td>1,079</td>
</tr>
<tr>
<td></td>
<td>3.6%</td>
<td>5.2%</td>
<td>6.3%</td>
<td>6.1%</td>
<td>6.7%</td>
<td>6.5%</td>
<td>5.7%</td>
<td>5.1%</td>
<td>4.1%</td>
<td>4.3%</td>
<td>3.7%</td>
<td>2.9%</td>
</tr>
<tr>
<td>---------------------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td><strong>Successful</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conciliations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>211</td>
<td>273</td>
<td>337</td>
<td>377</td>
<td>375</td>
<td>396</td>
<td>368</td>
<td>356</td>
<td>471</td>
<td>589</td>
<td>538</td>
<td>351</td>
<td></td>
</tr>
<tr>
<td><strong>Unsuccessful</strong></td>
<td>575</td>
<td>921</td>
<td>1,195</td>
<td>1,141</td>
<td>1,130</td>
<td>1,029</td>
<td>904</td>
<td>974</td>
<td>1,236</td>
<td>1,211</td>
<td>916</td>
<td>728</td>
</tr>
<tr>
<td>Conciliations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.6%</td>
<td>4.0%</td>
<td>4.9%</td>
<td>4.6%</td>
<td>5.0%</td>
<td>4.7%</td>
<td>4.1%</td>
<td>3.7%</td>
<td>3.0%</td>
<td>2.9%</td>
<td>2.4%</td>
<td>2.0%</td>
<td></td>
</tr>
<tr>
<td><strong>Merit</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Resolutions</td>
<td>2,488</td>
<td>2,949</td>
<td>3,866</td>
<td>5,028</td>
<td>4,933</td>
<td>5,126</td>
<td>5,218</td>
<td>5,780</td>
<td>7,467</td>
<td>7,422</td>
<td>7,014</td>
<td>6,357</td>
</tr>
<tr>
<td>11.3%</td>
<td>12.8%</td>
<td>15.9%</td>
<td>20.4%</td>
<td>21.9%</td>
<td>23.3%</td>
<td>23.4%</td>
<td>22.2%</td>
<td>17.9%</td>
<td>17.7%</td>
<td>18.1%</td>
<td>17.2%</td>
<td></td>
</tr>
<tr>
<td><strong>Monetary Benefits</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Millions)*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$41.7</td>
<td>$41.1</td>
<td>$70.4</td>
<td>$90.5</td>
<td>$88.8</td>
<td>$96.9</td>
<td>$124.8</td>
<td>$110.7</td>
<td>$147.3</td>
<td>$177.4</td>
<td>$169.4</td>
<td>$140.5</td>
<td></td>
</tr>
</tbody>
</table>

* Does not include monetary benefits obtained through litigation.

The total of individual percentages may not always sum to 100% due to rounding.

EEOC total workload includes charges carried over from previous fiscal years, new charge receipts and charges transferred to EEOC from Fair Employment Practice Agencies (FEPAs). Resolution of charges
each year may therefore exceed receipts for that year because workload being resolved is drawn from a combination of pending, new receipts and FEPA transfer charges rather than from new charges only.

C. Recent Case Law:

1. EEOC v New Breed Logistics, 2015 U.S. App LEXIS 6650 (CA 6, 4/22/15). In this case the individual that the employee complained to was also the same person who was allegedly sexually harassing her. Because the perpetrator later fired the victim, the Sixth Circuit ruled that the victim engaged in protected conduct to support a retaliation claim.

This case went to a jury, who ultimately held that Calhoun, a supervisor, sexually harassed three women (Hines, Pearson, and Pete), retaliated against them after they objected, and further retaliated against a male employee (Partee) who verbally opposed Calhoun’s sexual harassment and supported the women’s complaints. The evidence at trial was that Calhoun laughed and responded “that he wasn’t going to get in trouble, that he ran the area and that anybody who went to HR on him would be fired.” Calhoun then fired each of the four employees, claiming performance and attendance issues.

On appeal, the Sixth Circuit was asked to determine whether complaints or objections made to the accused harasser constitute protected activity to support a retaliation claim. The Court concluded that the four employees had engaged in protected activity:

We conclude that a demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII. Sexual harassment is without question an “unlawful employment practice.” If an employee demands that his/her supervisor stop engaging in this unlawful practice—i.e., resists or confronts the supervisor’s unlawful harassment—the opposition clause’s broad language confers protection to this conduct. Importantly, the language of the opposition clause does not specify to whom protected activity must be directed…. Here, at the very least, all four complainants requested that Calhoun stop his sexually harassing behavior before their terminations. Consistent with our holding today, these complaints constitute protected activity.

Perhaps an important lesson to be drawn from this case is that HR managers may want to make sure they have all the facts before approving termination decisions. Simply going along with the supervisor’s termination recommendation without an understanding of the reasons could lead to employer liability.

2. Satterwhite v City of Houston, 2015 U.S. App LEXIS 3370 (CA 5, 3/3/15). The Fifth Circuit recently affirmed a judgment against a City of Houston employee who claimed that he was demoted for reporting another employee’s racially offensive comment made during a workplace meeting. According to the court, the employee had not engaged in a protected activity by reporting the single, isolated remark.
Courtney Satterwhite and Harry Singh were both employed by the City of Houston. During a meeting, Singh made a comment referencing Hitler. After the meeting, Satterwhite informed Singh that another employee was offended by his comment, and Singh apologized to that employee. Satterwhite then reported the comment to the City’s HR Department, who verbally reprimanded Singh.

Several months later, Singh was promoted into a position in which he supervised Satterwhite. Singh disciplined and reprimanded Satterwhite on multiple occasions. Satterwhite told Singh that he believed that his reprimands were retaliation for having reported the Hitler comment. Singh later recommended that Satterwhite be demoted, resulting in his demotion and a decrease in his salary.

Satterwhite filed a complaint with the EEOC and later filed suit in federal court alleging retaliation under Title VII. The trial judge granted summary judgment in favor of the City, and Satterwhite appealed. On appeal, the Fifth Circuit found that “no reasonable person would believe that the single ‘Heil Hitler’ incident is actionable under Title VII.” The Court took note of the precedent in the Supreme Court that all circumstances must be looked at in determining a Title VII claim, including the frequency of the discriminatory conduct, severity, whether it interferes with work performance, etc. The Court also highlighted that "isolated incidents (unless extremely serious)" do not amount to actionable conduct under Title VII.

While this is a favorable case for employers, it is still important to take each workplace complaint seriously. This case does not extend so far as to allow employers to turn their heads to single, isolated incidents.

II. Form I-9

A. Recent Case Law

During the first quarter of 2015, the Office of Chief Administrative Hearing Officer (OCAHO) issued five decisions related to employers violating I-9 Forms. In one of those decisions, U.S. v Liberty Packaging, 2/24/15, the OCAHO found that the employer committed systematic and deliberate falsification in Section 2 of the I-9 Form, after an audit revealed the company’s HR manager backdated numerous forms between 2 and 20 years from the actual date of hire. The agency stated in its decision that the company did not act in good faith in handling its I-9 program and subsequent inspection. The employer’s penalty for noncompliance was $11,700.

In a similar decision, U.S. v Horno MSJ, LTD, 4/3/15, the OCAHO likewise determined that the employer failed to maintain I-9 Forms for various employees and ordered the employer to pay a penalty of $14,600.

B. Penalties for noncompliance with the I-9 verification process vary depending on the type of violation involved. Violations are categorized as technical or substantive and further
depend on whether the violation was willful. A list of the various violations are attached to this outline. Also included is the most recent I-9 Form, which has been in effect since May 2013. Use of this form is available until March 31, 2016, or whenever the USCIS issues a revised form.

III. COBRA

A. Recent Changes in Model Form

B. Recent Case Law

1. Cole v Trinity Health Corp., 774 F3d 423 (CA 8, 12/15/14). The Eighth Circuit affirmed a lower court’s decision to dismiss a claim for COBRA notice penalties. Due to an administrative error, a qualified beneficiary received COBRA coverage at no cost for 11 months after her employment termination date. This same error also resulted in the employer’s failure to provide a COBRA election notice. Upon discovering the error, the employer terminated coverage but did not ask for reimbursement of premiums paid on the individual’s behalf. The federal district court held that no penalties should be assessed because the qualified beneficiary was not harmed by the notice failure. To the contrary, she received 11 months of free health coverage and only incurred $1,307 in unreimbursed claims.

Comment: This case reminds us that mistakes are bound to occur during COBRA compliance. When they do, the employer or administrator’s response will affect potential damages and statutory penalties. Taking a good faith and reasonable approach in resolving the errors can go a long way toward mitigating, or even eliminating, potential penalties and damages.

2. Most employers recognize that under COBRA employees must be informed they have the right to maintain healthcare coverage after experiencing a “qualifying event.” A “qualifying event” generally occurs when an employee is laid off or terminated from employment and thus experiences a “loss in coverage.” However, as one employer learned the hard way, a “qualifying event” can occur in other unexpected ways.

In Green v Balt. City Bd. of Sch. Comm., 2015 U.S. Dist. LEXIS 32523 (Dist. MD, 3/17/15) two employees were placed on unpaid leave pending investigation until a final determination was made as to their employment status. The employees’ working hours were adjusted to zero, but both employees remained eligible to participate in the employer’s healthcare plan and were automatically enrolled into the plan. However, the employer stopped paying any share of the employees’ healthcare premiums.

During the pendency of the leave, both employees effectively resigned their employment. Because the employees’ employment was formally terminated, they became ineligible for coverage. At the time the employees were removed from coverage, the healthcare plan
discovered their premiums had not been paid during the ensuing months. Therefore, both employees received bills for the total cost of the unpaid premiums.

The employees sued the employer under COBRA. The employer argued that a reduction in hours was not a “qualifying event” requiring COBRA notice. The employees argued they experienced a “loss in coverage” when their hours were reduced to zero because they became responsible for the entire healthcare premium.

The court sided with the employees and reasoned that a “loss in coverage” occurs when an employee ceases “to be covered under the same terms and conditions as in effect immediately before the qualifying event.” Since the reduction in hours caused the employees to suffer increased premium costs, the court found the reduced hours constituted a “qualifying event” that required COBRA notice. As a result, the court held that all bills received by the employees were null and void.

Comment: Employers who fail to ensure appropriate COBRA notices are provided to employees can be subjected to significant monetary penalty for premiums and healthcare costs. Therefore, employers are strongly cautioned to seek out legal advice any time an employee’s access to healthcare benefits is altered.

IV. Family and Medical Leave Act (FMLA)

A. Recent Changes

- On February 25, 2015, the U.S. Department of Labor’s Wage and Hour Division issued a final rule to revise the definition of “spouse” under the FMLA. The revised definition comes in response to the recent U.S. Supreme Court decision which held that Section 3 of the Defense of Marriage Act (which defines “spouse” as a person of the opposite sex who is a husband or wife), is unconstitutional.

  The new regulation includes a broader definition of “spouse,” thus expanding the availability of FMLA leave to individuals in lawful same-sex or common law marriages, regardless of the employee’s state of residence. The new rule adopts the “place of celebration” as the determining factor as opposed to the “place of residence.”

  On March 26, 2015, one day before the new regulations were scheduled to take effect, a federal judge in Texas issued a preliminary injunction staying the application of the final rule for the states of Texas, Arkansas, Louisiana, and Nebraska. Texas v U.S., No. 15-CV-00056 (3/26/15). Although the stay of the final rule is pending a full determination of the issue on the merits, the U.S. Supreme Court’s decision in Obergefell v. Hodges likely will expedite and shape the outcome of the Texas court’s final ruling.

  In Obergefell, the Supreme Court will address whether a state is constitutionally compelled under the Fourteenth Amendment to recognize as valid a same-sex marriage lawfully licensed in another jurisdiction and to license same-sex marriages. Oral
arguments in *Obergefell* were held on April 28, 2015. A final ruling is expected in late June of this year.

Comment: In the meantime, employers should become familiar with the various state laws regarding same-sex marriage as such information will dictate the administration of spousal leave under the FMLA. While Michigan does not currently recognize same-sex marriage, if an employee became married in a state that does recognize same-sex marriage, the marriage would need to be recognized for FMLA purposes.

B. Recent Case Law

1. *Gostola v Charter Communications*, 2014 U.S. Dist LEXIS 173980 (ED Mich, 12/17/14). Plaintiff Dixie Gostola worked as an account executive at Charter until her termination in December 2013 for poor job performance. In January 2012, Gostola had been placed on a “managed action plan” because of what the company considered declining performance. From August 1 to September 8, 2013, Gostola, while still under scrutiny for declining productivity, took FMLA leave to help care for her mother who was recovering from back surgery. When Gostola returned, she requested intermittent leave with permission to work only half days in September. Charter denied the request and instead permitted Gostola to attend her mother’s doctor and pain management appointments, for which she missed six hours of work in September.

From September through November 2013, Gostola failed to meet certain productivity goals and her revenue-to-budget sales figures dropped below 85%. Consistent with the company’s policy, Charter terminated Gostola for poor performance. She then sued Charter for FMLA violations.

The Eastern District found “undisputed” evidence that Gostola’s leave was a factor in her termination, primarily because her exercise of FMLA leave, a time in which she could not undertake activities that would increase her revenue measure, played a part in her negative performance evaluations. The judge opined that “Gostola’s absence in August and the first week of September had a greater impact on her revenue-to-budget measure than merely lowering her August and September results.”

Comment: The lesson to be learned is that while FMLA leave should afford an employee no greater protection than if he/she had not taken leave, an employee on leave cannot be penalized for taking leave either.

2. *Tilley v Kalamzoo County Road Commission*, 777 F3d 303 (CA 6, 1/26/15). Can an employer’s statement regarding the availability of leave under the FMLA provide employees with rights even if the FMLA doesn’t apply? According to the Sixth Circuit Court of Appeals, the answer is “yes.”

In *Tilley, supra*, the employer maintained an employee handbook which stated that “employees covered under the Family and Medical Leave Act are full-time employees who have worked for the Road Commission and accumulated 1,250 work hours in the previous 12 months.” Although the FMLA only applies to employers who employ 50
employees within a 75 mile radius, the employee handbook did not contain any qualifying language which placed employees on notice that they might not be covered by the FMLA, or that other conditions would have to be met to qualify for FMLA coverage. The employee, Tilley, missed work and sought leave under the FMLA based upon the language of the employee handbook, but was told that the FMLA did not apply because the Road Commission did not meet the 50/75 requirement. After the employee was terminated from employment, he filed suit alleging that the employer had interfered with his rights under the FMLA.

The Sixth Circuit Court of Appeals agreed with Tilley. It held that given the employer’s statements regarding the applicability of the Act and the availability of FMLA leave, the employee had properly relied upon the employer’s representations regarding coverage. Thus, the employer was prevented from arguing that FMLA leave was not available even though the Act clearly did not apply to the employer.

Comment: This case demonstrates the importance of maintaining handbooks and policies which are specific to each employer’s situation. Policies and employee handbooks should be tailored to the employer based upon size, operations, and many other considerations. When it comes to employee handbooks, one size does not fit all!

V. TITLE IX/The Violence Against Women Act (VAWA)/The CLERY Act

A. Recent Changes

On April 24, 2015, the Department of Education’s Office for Civil Rights published new guidance aimed to help colleges understand the requirements and expectations of their Title IX coordinators. Under the Educational Amendments of 1972, schools that receive federal funding are required to designate a Title IX coordinator to help the school ensure that all individuals affected by its operations are aware of their legal rights under Title IX, which prohibits sex discrimination in educational programs and activities.

The new guidance includes a new Dear Colleague letter reminding institutions to hire a coordinator and explaining what their duties would be, a separate, more detailed letter addressed to coordinators, and a Title IX resource guide providing an overview of topics frequently handled by coordinators, including recruitment, admissions, financial assistance, gender-based harassment and violence, treatment of pregnant students, and counseling.

The Office for Civil Rights is currently investigating more than 100 colleges and universities over allegations that they have failed to meet the requirements of Title IX. These investigations have revealed that many funding recipients have not designated a Title IX coordinator, especially in K-12 schools.
B. Recent Case Law

1. On March 31, 2015, a federal judge in Michigan ruled that Forest Hills School District failed to train school workers on responding to complaints of sexual assault and harassment. The judge granted a motion for summary judgment in favor of a former 15-year-old sophomore student who in 2010 reported being sexually assaulted in the school band room by a prominent athlete. The amount of damages for that particular issue has not been determined. The judge rejected an argument, however, that school officials retaliated against the girl. The case goes to trial this June 2015 on other issues, such as whether school officials were deliberately indifferent.

In reaching his decision, the judge noted that the superintendent had admitted the school district did not provide any training on responding to sexual assault claims. The assistant superintendent at the time, who was also the Title IX coordinator, along with the principal, did not have training on how to handle the allegations. "Just like failing to train a police officer on when to use his or her gun, failing to train a school principal on how to investigate sexual assault allegations constitutes deliberate indifference. It is inevitable that these situations would arise at some point, and the complex Title IX requirements virtually ensure than any investigation without any formal training would be deficient," the judge wrote. He also noted that had the school done an independent investigation quickly, the issue would have “blown over” much more quickly. He found that the district’s complete failure to train its employees on how to respond to sexual assault complaints and sexual harassment was deliberately indifferent and caused the student’s injury. The school’s delay with the investigation led to rumors about the girl. She was harassed at school and online, and left a basketball game when students started chanting.

Comment: This case highlights the importance of ensuring that Title IX coordinators are adequately trained and know how to respond to complaints. Schools and colleges could face significant liability without a knowledgeable Title IX coordinator in place. Doe v Forest Hills School District, Case No. 13-CV-00428

2. On April 10, 2015, a union representing a group of professors at Bard College in New York filed a lawsuit calling on the college to go to arbitration over what they say was an unfair removal of a professor from his department chair position. An internal Title IX complaint had been filed against the chemistry professor which led to his removal as department chair after eight years due to a “pattern of workplace harassment.”

The union’s complaint alleges that the college should be compelled to arbitrate the matter per its collective bargaining agreement and rules of the faculty handbook. The complaint asserts that Bard never shared a copy of its original internal investigation report; that the professor has not been permitted to know the evidence against him nor the opportunity to fully defend himself. The union’s lawyer has stated that there is no carve-out in the collective bargaining agreement that exempts a Title IX complaint from arbitration. (Case No. 15-CV-02790-CS)
VI. ADA/ADAAA

A. Recent Changes

On April 20, 2015, the EEOC issued a proposed rule on wellness programs and how they can be structured so as to not violate the ADA. The proposed rule would amend existing ADA regulations and guidance insofar as they apply to programs that use incentives to encourage employee participation in programs that may include disability-related questions and/or medical examinations.

In recent years, there has been an increase in the number of employers using wellness programs as a method of controlling health care costs while improving their employees’ health. Some employers offer participation only wellness plans, where employees simply participate in the activities offered by the employer (typically health assessments, seminars, etc.) in order to receive discounted health insurance. Employers may also offer outcome based wellness plans, which condition the reward on meeting certain benchmarks (not smoking, maintaining a certain cholesterol level, etc.). When the Affordable Care Act was passed, it specifically stated that wellness plans were acceptable. Subsequent regulations provided that the incentives offered to an individual under a wellness plan cannot exceed 30% of the total cost of employee-only coverage under the health plan or 50% to the extent that the additional coverage is ascribed to tobacco prevention.

Not surprisingly, the EEOC has been critical of employer wellness plans. The agency filed several lawsuits against employers in 2014 claiming their wellness plans violated the ADA. Congress responded to the EEOC lawsuits with disapproval, introducing legislation that would clarify that wellness programs are not violative of the ADA if they meet the requirements of the Affordable Care Act.

The EEOC’s recent proposed rule is an attempt to clarify what does and does not constitute a permissible wellness program, while taking into account the protections offered by the ADA. Some of the noteworthy items in the proposed rule are as follows:

- A wellness program, including any disability-related inquiries and medical examinations that are part of such a program, must be reasonably designed to promote health or prevent disease. To meet this standard, the program must have "a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease."

- In order for the wellness program to truly be voluntary an employer cannot require an employee to participate in the program and may not deny coverage under any of its group health plans or particular benefits packages within a group health plan, generally may not limit the extent of such coverage, and may not take any other adverse action against employees who refuse to
participate in an employee health program or fail to achieve certain health outcomes.

- If the wellness program is part of a group health plan, the employer must provide a notice clearly explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the covered entity uses to prevent improper disclosure of medical information.

- Offering limited incentives to participate in a wellness program that is part of a group health plan and includes disability-related questions or examinations does not render a program involuntary, provided the total allowable incentive available under all programs does not exceed 30 percent of the total cost of employee-only coverage, which generally is the maximum allowable incentive available under HIPAA and the Affordable Care Act for health-contingent wellness programs.

- The medical information collected through an employee health program may only be provided to a covered entity under the ADA in aggregate terms that do not disclose the identity of specific individuals.

B. Recent Case Law

1. EEOC v Ford Motor Company, 2015 U.S. App LEXIS 5813 (CA 6, 4/10/15). This is a case with a long history, but in essence the EEOC claimed that Ford should have allowed an employee (Harris) who had a severe case of irritable bowel syndrome to telecommute most of the time, even though her job duties required in-person contact with suppliers and computer work that could not be easily done from a remote location. Because Ford believed that regular attendance at work was an essential function of the job, it argued that telecommuting was not a reasonable form of accommodation.

When the Sixth Circuit initially heard the case approximately a year ago, the three-judge panel ruled that the EEOC and Harris were entitled to a jury trial on the issue of whether Ford was obligated to offer telecommuting as a reasonable accommodation. Thereafter, a full panel of judges for the Sixth Circuit voted to vacate that decision and ordered an “en banc” hearing (a hearing in front of all the judges as opposed to only three). The full Sixth Circuit ended up siding with Ford and dismissed the EEOC’s claims. The Court emphasized that while the decision of whether a particular accommodation should be granted under the ADA depends on the facts of each particular situation, the facts at issue in this case established that Ford acted reasonably and did not violate the ADA. In doing so, the court emphasized the “common sense” notion that “regular, in person attendance is an essential function… of most jobs, especially the interactive ones.”

The court further rejected the EEOC’s contention that Ford’s past allowance of telecommuting for other employees created a factual dispute as to whether Harris’s specific request was reasonable, by pointing out that unlike other telecommuting
arrangements, under which no one actually telecommuted more than one set day per week and agreed in advance to come into work on their telecommuting day if needed, was a “far cry” from Harris’s request that she be allowed to work from home up to four days per week.

The court also pointed out that Harris’s performance and attendance had been substandard when she had been granted a more limited telecommuting and flex-time arrangement in the past, and that it was appropriate for Ford to consider her prior performance in denying Harris’s request. This latter point is particularly significant, as the court explicitly noted that an individual’s performance may be a relevant factor in determining whether a particular accommodation is reasonable.

Finally, the court rejected the “common sense” charm of the EEOC’s contention that technology had advanced enough for employees to support “at least some job functions at home.” The court found that despite the undeniable advancements in technology, the record in the case failed to show that a great technological shift had made Harris’s highly interactive job one that could be performed at home.

2. Jacobs v N.C. Administrative Office of the Courts, 780 F3d 562 (CA 4, 3/12/15). This case serves as an important reminder as to how much the ADA Amendments of 2009 broadened the definition of disability under the law. Prior to ADAAA, federal courts routinely dismissed disability discrimination claims on the basis that the claimed impairment was not recognized as a qualifying disability. Recently, the Fourth Circuit Court of Appeals demonstrated the wide array of covered medical conditions under the ADA.

In Jacobs, supra, the plaintiff was a deputy courthouse clerk who had been diagnosed with social anxiety disorder. She claimed that her mental illness prevented her from working at the courthouse’s front counter, where she would have to deal with members of the public. She requested an accommodation that would excuse her from such duties. According to the plaintiff, the clerk of court refused this request, and terminated her for alleged performance issues shortly after she made the accommodation request. She sued, claiming failure to provide a reasonable accommodation under the ADA, and retaliatory termination.

At the lower court level, the plaintiff’s claims were dismissed. The Court reasoned that Jacobs was not disabled and that the employer did not fire her because of her disability but for performance reasons. On appeal, the Fourth Circuit reversed. It noted that under the ADA a disability consists of a physical or mental impairment that “substantially limits” one or more “major life activities,” and that interacting with others is a “major life activity.” The employer had argued that Jacobs could not have been limited in her ability to interact with others because she interacted with others every day in the normal course of her duties when not at the front counter. But the Fourth Circuit dismissed this argument, stating “. . . (a) person need not live as a hermit in order to be ‘substantially limited’ in interacting with others.”
VII. EEOC NEWS

A. New Trends

On April 13, 2015, the EEOC announced it had settled the first of two lawsuits ever filed alleging sex discrimination against a transgender individual. A Lakeland, Florida eye clinic agreed to settle the case for $150,000.

The EEOC had claimed that the eye clinic discriminated based on sex by firing an employee after she began to present as a woman and informed the clinic she was transgender. In addition to the monetary settlement, the clinic agreed to adopt a new gender discrimination policy that prohibits discrimination against an employee because the employee is transgender, because the employee is transitioning from one gender to another, and/or because the employee does not conform to the clinic’s sex- or gender-based preferences, expectations, or stereotypes. The clinic further agreed to provide training to its managers and employees explaining the prohibition against transgender/gender stereotype discrimination under Title VII, and to provide its management with guidance on handling transgender/gender-stereotype complaints.

EEOC General Counsel David Lopez touted the settlement as significant, noting, "It not only is one of the first two lawsuits ever filed by the Commission alleging sex discrimination against a transgender individual, but it also solidifies the EEOC's commitment to enforcing the rights of transgender employees secured by Title VII."

Employers should beware that the EEOC is expected to increase enforcement efforts on behalf of transgendered individuals.

B. Statistics

In Fiscal Year 2014, the EEOC’s total number of charges filed reached the lowest level since 2007. However, retaliation charges made up 42.8 percent of all charges in the same time period, the highest percentage ever. Retaliation-related issues are one of the six priority areas in the EEOC’s Strategic Enforcement Plan for fiscal years 2013-2016. The EEOC describes this priority as “targeting policies and practices which discourage or prohibit individuals from exercising their rights under the employment discrimination statutes or that impede EEOC’s enforcement efforts.” An example publicized by the EEOC is its lawsuit against CVS Pharmacy, which alleged that the company’s standard separation agreement unlawfully deterred departing employees from later filing discrimination charges or participating in EEOC investigations. The case was dismissed by the District Court of Illinois but is on appeal to the Seventh Circuit Court of Appeals.
VIII. MISCLASSIFICATION OF EMPLOYEES

A. Recent Developments

On April 1, 2015, David Weil, the administrator for the Department of Labor’s Wage and Hour Division, spoke at a construction industry seminar in Phoenix and stated that “The misclassification of employees as independent contractor presents one of the most serious problems facing affected employees, employers and the entire economy.” Weil said the Department of Labor's strategy is to offer incentives for businesses that comply with rules, use "vigorous, strategic enforcement" of businesses that don't, and to continue with outreach/collaboration efforts. ”We are aggressively expanding efforts to combat misclassification and are targeting sectors where we know workers are vulnerable and violations are rampant,” he said. Weil noted that the strategy is making a difference, with investigations resulting in more than $79 million in back wages in 2014. Not only are employees being misclassified as volunteers, but they are also increasingly being misclassified as interns and/or volunteers.

B. Recent Case Law

In March 2015, the Tampa Bay Buccaneers agreed to settle a class action lawsuit brought by its cheerleaders. Pierre-Val v. Buccaneers Ltd. Partnership, No. 14-cv-01182 (M.D. Fla.). The Buccaneers agreed to pay a total of $825,000 to settle the claim.

The cheerleaders alleged violations of federal and state wage laws for failure to pay cheerleaders minimum wage. They were paid $100 per home game, as well as additional compensation for corporate events. The complaint alleged the cheerleaders were required to work unpaid hours including practice time, charity events, clinics, posing for calendars, and for other work performed.

Similar lawsuits have been brought against the other teams, including the Oakland Raiders, Cincinnati Bengals, Buffalo Bills, and New York Jets. The Oakland Raiders settled its lawsuit this past fall for $1.25 million. The Raiders’ cheerleaders had earned $125 per game. The other lawsuits are pending.

IX. Fair Labor Standards Act (FLSA) --What’s coming?

On May 5, 2015, Secretary of Labor Thomas Perez announced that the department had submitted a proposed rule on the white collar FLSA overtime exemptions to the Office of Management and Budget (OMB). Submission of the proposed rules to the OMB is oftentimes a mere formality prior to releasing them to the general public. Although specifics of the proposed rule are not known at this time, they are expected to make it more difficult for employers to claim that certain salaried workers are exempt from the overtime requirements of the FLSA.

The proposed rule is being issued in response to President Obama’s March 13, 2014 memorandum, in which he directed the Secretary of Labor to update the current rules, with a focus on limiting those employees who are exempt from receiving payment for overtime.