




506:Labor & Employment Law Year in Review

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I. Recent Decisions from the United States Supreme Court

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A. ERISA

Central Laborers' Pension Fund v. Heinz, June 7, 2004

- Held: ERISA "Anti-Cutback" Rule prohibits pension plan amendment that reduces accrued benefits
- Facts
 - Heinz accrued sufficient pension credits for early retirement under a "service only" plan
 - When Heinz retired, the plan prohibited post-retirement employment as a construction worker
 - 2 years later, plan modified to prohibit any job "in any capacity in the construction industry," disqualifying Heinz, who had taken a previously allowable job as a construction supervisor
- Note: Upheld plans that condition benefits on execution of covenant not to compete

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Yates v. Hendon, March 2, 2004

- Working owner of a business qualifies as a "participant" in ERISA pension plan
- Plan must cover one or more employees besides owner and spouse

Aetna Health v. Davila, June 21, 2004

- ERISA completely preempts HMO's negligent medical necessity decisions
 - HMO refused to cover medical services
 - Plaintiff sued in state court alleging HMO had violated duty to "exercise ordinary care" under Texas Health Care Liability Act
 - HMO removed cases to federal court, arguing ERISA preemption because coverage offered through employer's ERISA plan
 - Court found preemption

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B. ADEA

General Dynamics Land Systems v. Cline, February 24, 2004

- Court rejects “reverse” age discrimination claims
 - In CBA, the union and company eliminated company’s retiree medical obligation for future retirees, except as to employees 50 or older
 - Those between age 40 and 49 sued under ADEA
 - EEOC agreed with the younger group
- Court: Permissible to favor an older employee over a younger one

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C. Section 1981 Claims

Jones v. R. R. Donnelly & Sons, May 3, 2004

- Time Limits – *Section 1981(b)* race discrimination claims are governed by 4-year, “catch-all” statute of limitations
 - Claim filed between 2 and 4 years after termination
 - Trial court found 4 year SOL (§1658 “catch-all”)
 - 7th Circuit ruled 2 year Illinois SOL applied
- Supreme Court found that the 4-year “catch all” applied because Jones’ §1981 race discrimination claims for hostile environment, failure to transfer, and wrongful termination were made possible by the 1991 *Civil Rights Act*, passed after §1658

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D. Americans with Disabilities Act

Tennessee v. Lane, May 17, 2004

-
- Congress did not exceed its power under Section 5 of the 14th Amendment in enacting ADA Title II
 - Plaintiffs sued Tennessee under Title II because they were paraplegics in wheelchairs and could not gain access to second floor courtrooms
- Court disagreed with state's 11th amendment claim, finding Title II valid because due process clause requires that states give litigants the opportunity to be heard by removing obstacles to their full participation in judicial proceedings

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Raytheon Co. v. Hernandez, Dec. 2, 2003

- No ADA violation by not rehiring recovered cocaine addict
 - Facts: Plaintiff forced to resign after positive drug test (cocaine) and admitted violation of workplace conduct rules
 - Over 2 years later, he sought rehire, with letters from AA and church to support recovery, but was not hired because of company policy against rehiring employees terminated for misconduct
 - Plaintiff sued under ADA, alleging history of disability and/or perceived as having a disability
 - New theory presented in reply to MSJ brief: Neutral no-rehire policy violated ADA based on 'disparate impact' theory, which trial court and 9th Cir. found untimely
- Supreme Court ruled that the no-rehire policy was a legitimate, non-discriminatory reason for not hiring him, negating disparate treatment claim

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E. Title VII

Pennsylvania State Police v. Sanders, June 14, 2004

- Holding: The *Faragher/ Ellerth* affirmative defense to harassment claims is available in constructive discharge situations.
 - Key: Whether the tangible employment actions resulting in the constructive discharge were an “official act” of the employer. If not, no strict liability, and the company may assert the affirmative defense.
 - Affirmative defense not available where plaintiff suffers a “tangible employment action” such as termination, failure to promote, or reassignment.
- Supreme Court ruled that where an “official act” does not underlie, the *Faragher/ Ellerth* defense is available.
 - What is an “official act”?
 - Actions that typically are reflected in a company’s records, such as demotion or reduced pay, when the supervisor clearly used his or her controlling position to the employee’s disadvantage.
 - Not the telling of offensive jokes or engaging in offensive touching.

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F. Cases Pending This Term

Smith v. Jackson, Mississippi (5th Cir. 2003)

- ADEA – does ‘disparate impact’ theory apply in age discrimination claims?
 - Circuit court split on this issue:
 - Yes: 2nd, 8th, 9th
 - No: 1st, 5th, 7th, 10th, 11th
 - Facts involve pay plan, where employees with 5 or less years of tenure receive proportionately greater raises than those with over 5 years, resulting in older employees receiving lower raises than younger ones.

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***Commissioner of Internal Revenue v. Banks,
(6th Cir. 2003, cert. granted)***

- Issue: Is the attorneys' fees portion of a settlement of an employment claim taxable to the plaintiff?
 - IRS view: It is all taxable income
 - Tax Court: Agreed with IRS
 - 6th and 9th Circuits: Reversed, holding that fee amounts are not part of plaintiff's taxable income
- New Legislation:
 - *American Jobs Creation Act of 2004*, passed October 18, 2004 (awaiting Presidential signature)
 - Contains a section ending "double taxation" of lawyers' contingent fees in specific types of litigation listed in the statute
 - Overturns the disputed policy at the heart of the *Banks* case, throwing the case's outcome into uncertainty

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***Jackson v. Birmingham Board of Education
(11th Cir. 2002, cert. granted)***

- Issue: Does Title IX allow private action for retaliation?
 - Jackson, a girls' basketball coach, sued under Title IX claiming retaliation because he complained about practices that he believed violated Title IX.
 - Trial Court and 11th Circuit dismissed, finding no retaliation cause of action for complaints about gender discrimination suffered by others.

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Spector v. Norwegian Cruise Line, (5th Cir. 2004, cert. granted)

- Issue: whether foreign cruise lines sailing in U.S. waters must comply with Title III of the ADA?
 - Disabled travelers, who boarded a Norwegian Cruise Line in Houston, sued, claiming they were not given adequate access to ship pools, restaurants, and emergency equipment and were forced to pay additional fees for wheelchair accessible rooms.
 - 5th Circuit ruled that foreign-flag cruise ships are not covered by the ADA.

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II. The Sarbanes-Oxley Act: Employment Law Aspects

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SOX Employment Law Aspects

- **Whistleblowing**
 - Prohibition of retaliation for internal or external reporting about financial wrongdoing by whistleblowers, informers and certain employees of private contractors, subcontractors or agents
 - (§ 806 (protection of employees in public companies) and §1107 (retaliation against informants))
- **Record Retention/Destruction**
 - Penalties for destroying, altering or falsifying records in pending or “contemplated” federal investigations and bankruptcies (§ 802)
- **Benefits and Compensation**
 - CEO & CFO reimbursement requirements after restating financial reports (§ 304)
 - No trading by insiders during pension fund blackout periods (§ 306)
 - Prohibited loans and credit to officers and directors (§ 402)
- **ERISA**
 - Pension fund blackout periods for all participants and advance notice requirements (§ 306)
 - Enhanced Penalties for violations (§ 904)
- **Mandatory Compliance Programs and Audit Committees** (§ 404 (management assessment of internal controls) and § 301 (audit committees))

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Litigating a SOX Claim

Section 806: “Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud”
DOL Regulations at: 29 C.F.R. Part 1980

- **Administrative exhaustion** is required
- The DOL (OSHA) is the jurisdictional agency in charge of investigations and adjudications
 - Procedural Manual released in August 2004 available at:
http://www.osha.gov/dls/oshmsch/om/adsp/shom_documents?table=FEDERAL_REGISTER&p_id=17845
- Private rights of action are permitted
- **Burden of proof** - New regulations specify that once plaintiff proves *prima facie* case, employer must prove by “*clear and convincing evidence*” that same action would have been taken absent protected conduct by employee. (29 CFR 1980.104(c))
 - This is potentially much higher standard than other discrimination laws
- Securities law defenses may be applicable (materiality, e.g.)
- **Remedies and Penalties**
 - Reinstatement with seniority retroactive to termination date, including a *preliminary order of reinstatement, absent exceptional circumstances.*
 - Backpay with interest
 - Attorneys’ Fees, Experts’ Fees & Litigation costs
- No preemption of stronger state laws

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Developing SOX Case Law

- SOX whistleblower complaints make up the leading category of complaints at the DOL
- A large majority of the cases are dismissed
 - But mostly on legal/procedural grounds
 - Decisions on the merits are about evenly split
 - Public & private companies are the respondents
 - Subsidiaries of public companies, for example
- All ALJ opinions and decisions are available at:
 - <http://www.oalj.dol.gov/public/wblower/refrnc/sox1list.htm>

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Welch v. Cardinal Bankshares Corp.

- *DOL ALJ No. 2003-SOX-14 (Jan. 28, 2004)*
- The first DOL SOX ruling against an employer *on the merits*
- Facts alleged by the complainant CFO Welch:
 - Financial accounting practices were inappropriate
 - Welch refused to certify certain financial statements
 - Welch refused to meet with company's attorney and outside attorney unless he had an attorney
 - Cardinal suspended then terminated him
- Process
 - OSHA investigated and ruled for Cardinal
 - Welch appealed to ALJ
- Ruling gives little deference to employer
 - Due to **proximity in time** between protected activity and termination, the ALJ found that Welch's alleged misconduct was a pretext and the protected conduct was a "contributing factor" in the suspension and discharge
- Remedy
 - Reinstatement
 - Back pay with interest
 - Purging of all termination references in his personnel file
 - Litigation costs and expenses
 - Attorney's fees
 - Expert witness fees

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Civil Court Forum

-
- ALJ hearing and final decision by DOL must be within 180 Days of filing of complaint
- Otherwise, complainant may abandon administrative proceeding and proceed *de novo* directly to court
 - Must give 15 days' advance notice
 - Approximately ¼ of complainants in DOL opt out and go to court.
- Court remedy unavailable if the delay was due to complainant's *bad faith* conduct
- **Stone v. Duke Energy Corp.**
 - Complaint filed with **DOL** on October 30, 2002 (2003-SOX-00012)
 - **District Ct.** stayed **DOL** proceedings & assumed jurisdiction on June 10, 2003
 - **DOL** issued final order on June 19, 2003
 - **Dept. of Justice** Investigation ended in March 2004
 - **District Ct.** dismissed complaint without prejudice (03-CV-256, W.D.N.C.)
 - New complaint filed August 6, 2004 (3:04-CV-277-MU) (W.D.N.C.)
 - Motion to dismiss is now pending (filed in September 2004)

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III. The FMLA & The ADA

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The Family and Medical Leave Act



- Regulatory change: ‘*Much ado about nothing*’
 - The issues under FMLA arise not under the statute but under the broad regulations that consider any illness a “serious health condition”
 - Bush administration initially discussed amending regulations but FLSA regulatory amendments took priority and no changes were made

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Significant FMLA Cases in 2004

Notice Issues:

- *Aubuchon v. Knauf Fiberglass*, 359 F.3d 950 (7th Cir. 2004)
 - Seventh Circuit holds that burden of notice that absence might be FMLA-qualifying falls to employee
- *Bones v. Honeywell*, 366 F.3d 869 (10th Cir. 2004)
 - Termination for three-day no call/no show rule does not violate FMLA despite employee's request for FMLA leave
- *Brenneman v. MedCentral Health System*, 366 F.3d 412 (6th Cir. 2004)
 - Statements by employee that he “wasn’t doing well and would not be in today” and, separately, that his insulin pump was malfunctioning do not constitute sufficient notice to employer of potential FMLA qualifying absence.

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FMLA: Medical Certification Req't.

-
- *Dry v. The Boeing Company*, 2004 WL 309323, (10th Cir. 2004)
 - Employee who provided documentation 6 weeks following employer's request for a medical certification was untimely
 - Significance: ambiguity in the regulations regarding ability to deny for untimely submission of documentation and position of certain regional DOL
- *Conoshenti v. Public Services Elec. & Gas*, 364 F.3d 135 (3d Cir. 2004)
 - Summary judgment not appropriate for attendance dismissal where employee was absent longer than FMLA entitlement, as employee entitled to an opportunity to demonstrate he was prejudiced by employer's failure to designate leave
 - "Prejudice" gate opened by *Ragsdale* decision

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DEPARTMENT OF LABOR OPINION LETTERS OF NOTE

- September 2001:
 - While three years old, still little known but of significance: creates "**conditional eligibility**"
 - What is conditional eligibility? If an employee is eligible (1250 hours worked) for leave at one point, and later in the same FMLA leave year must be absent for the same condition but does not have 1250 hours worked in the year preceding the second absence, the employee is, nonetheless, eligible.
- May 2004: ***Monday-Friday migraine headaches***
 - If an employee's absence pattern is suspicious (i.e. the migraines occur only on Fridays or Mondays), then the employer may seek a recertification, as this is sufficient to "cast doubt on an employee's stated reason for the absence." Moreover, the employer may provide to the physician on the medical certification form the absence pattern or record of absences.

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The Americans with Disabilities Act

● Significant Cases

- Reasonable Accommodation:
 - *Hedrick v. Western Reserve Care System, 355 F.3d 444 (6th Cir. 2004)*: Sixth Circuit becomes third to find that the ADA does not require preferential reassignment rights (contrast with Tenth Circuit that does require preferential reassignment)
- Does the ADA require an employer to permit an employee's lawyer to become involved in the interactive process?
 - **NO**
 - *Ammons v. Aramark Uniform Services, Inc., 368 F.3d 809 (7th Cir. 2004)*: Duty to discuss accommodations does not extend to permitting an employee's attorney to participate in discussions.

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The ADA: Attendance

- Attendance is still an essential function:
 - *Oestringer v. Dillard Store Services, 2004 WL 259737 (7th Cir. Feb. 9, 2004)*: request for leave without defined end is not reasonable.
 - *Brenneman v. MedCentral Health System, 366 F.3d 412 (6th Cir. 2004)*: decrease in morale among other employees & increased payroll costs all support company claim that attendance is essential function.

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The ADA: Production Standards

- Employees with disabilities must still meet production standards:
 - *Hoffman v. Caterpillar, Inc.* (7th Cir. May 11, 2004): Employee not entitled to training on new process where employee could not demonstrate not only that she could operate process but also that she could operate to employer's production standards.

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The ADA: Conduct Standards

- Disability does not require modifying conduct standards
 - *Ray v. The Kroger Co.*, 2003 WL 23018292 (11th Cir. Dec. 17, 2003): Employee with Tourette Syndrome who blurted out slurs and obscenities not qualified because could not interact with customers.
 - *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, (7th Cir. 2004): Disability "does not insulate an unruly employee for consequences of his misdeeds."

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The ADA: Substance Abuse Policies

- *Hernandez v. Hughes Missile Systems Corp.*, 362 F.3d 564 (9th Cir. 2004)
 - On remand to 9th Circuit of *Raytheon v. Hernandez*, question for jury whether employer's decision to deny re-employment to someone terminated for prior violation of company drug policy was ADA violation in light of, *inter alia*, fact that employer did not have written policy on reemployment of employees under those circumstances
 - Practice pointer: Clarify policy !

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The ADA: "Regarded As..."

- "Regarded As" claims, a growing trend
 - *Pegram v. Honeywell*, 361 F.3d 272 (5th Cir. 2004): transfer to another position did not establish that employer regarded employee as disabled because conclusion that an employee cannot perform a certain position, without more, does not mean employer regarded employee as disabled.
 - *Carruthers v. BSA Advertising, Inc.*, 357 F.3d 1213 (11th Cir. 2004): employer who required employee with restrictions to work full-time does not mean employer regarded employee as disabled.

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The ADA: Association Discrimination

- *Larimar v. IBM*, 370 F.3d 698 (7th Cir. 2004):
Employee could not establish that termination was related to the medical condition of his children.

- *Judge Posner's three part analysis:*
 - "Expense"
 - "Disability by Association"
 - "Distraction"

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IV. EEOC Update

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A. High Profile Settlements

Morgan Stanley Sex Discrimination Lawsuit

- Title VII class action alleging sex discrimination in promotion, pay, etc. by female officers and women eligible for officer promotion in Institutional Equity Division
- Settlement Terms
 - \$54 million; \$2 million for diversity programs regarding compensation & promotion for female employees
 - Consent Decree:
 - Appoint internal ombudsperson & outside monitor
 - Management training
 - Promotion & compensation analysis
 - Maintain a compliant database
 - Programs to address the promotion and retention of women
- Other financial industry players?

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A. High Profile Settlements (cont'd)

- **Home Depot:** \$5.5 million settlement alleged hostile environment in Colorado based on gender, race, & national origin, and that the company retaliates against employees who complained about discrimination.
- **Carl Buddig:** \$2.5 million settlement following 2 ½ years of litigation alleging race discrimination.

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B. Selected EEOC Statistics

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EEOC Charge Filing Statistics – FY 1999 Through FY 2003

	FY 1999	FY 2000	FY 2001	FY2002	FY 2003
Total Charges	77,444	79,896	80,840	84,442	81,293
Race	28,819	28,945	28,912	29,910	28,526
	37.3%	36.2%	35.8%	35.4%	35.1%
Sex	23,907	25,194	25,140	25,536	24,362
	30.9%	31.5%	31.1%	30.2%	30.0%
National Origin	7,108	7,792	8,025	9,046	8,450
	9.2%	9.8%	9.9%	10.7%	10.4%
Religion	1,811	1,939	2,127	2,572	2,532
	2.3%	2.4%	2.6%	3.0%	3.1%
All Statutes	19,694	21,613	22,257	22,768	22,690
	25.4%	27.1%	27.5%	27.0%	27.9%
Title VII	17,883	19,753	20,407	20,814	20,615
	23.1%	24.7%	25.2%	24.6%	25.4%
Age	14,141	16,008	17,405	19,921	19,124
	18.3%	20.0%	21.5%	23.6%	23.5%
Disability	17,007	15,864	16,470	15,964	15,377
	22.0%	19.9%	20.4%	18.9%	18.9%
Equal Pay Act	1,044	1,270	1,251	1,256	1,167
	1.3%	1.6%	1.5%	1.5%	1.4%

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EEOC Litigation Statistics

	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003
All Suits Filed	464	328	430	364	393
Direct Suits	437	290	385	332	361
Title VII	325	222	269	246	277
ADA	51	23	62	41	46
ADEA	41	27	32	29	21
EPA	3	3	5	2	0
Concurrent	17	15	17	14	17

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C. New Customer Service Initiative: National Contact Center

- Pearson Government Solutions will launch a pilot National Contact Center, beginning operations in spring 2005
 - The Center is expected to respond to the estimated one million or more unsolicited inquiries received by EEOC each year.
 - The public will gain a central EEOC point of contact offering:
 - Expanded hours of operation
 - Informed customer service personnel
 - Support for up to 150 languages
 - Option of speaking with an EEOC staff member or listening to automated responses to FAQs
 - Ability to submit e-mail inquiries
 - Tracking of inquiries for follow-up
 - Will identify and respond to workplace trends and emerging patterns of employment discrimination.
 - Slightly controversial with
 - EEOC employee union because of training concerns
 - Lawmakers because of funding issues

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V. Dispute Resolution

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The Ups & Downs of Dispute Resolution

- Mediation Picks Up Steam
- Arbitration Loses Steam
- Employment Practices Liability Insurance Picks Up Steam

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VI. Developing Discrimination Issues

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Developing Discrimination Issues

- **Sex/Gender Discrimination**
 - *Wal-Mart* Litigation
 - *Costco* Litigation
 - Concerns by companies about implications
- **Government Contractor Issues**
 - Guidance on Definition of “Applicant”
 - OFCCP Enforcement/Audits
- **Diversity in Law Firms – EEOC Report**
(October 22, 2003)

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VII. The FCRA & The FACTA

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Fair Credit Reporting Act Update

- The Fair and Accurate Credit Transaction Act of 2003
 - Wide ranging changes in the areas of identity theft, enhanced requirements of accuracy and consumer access, and continued preemption of state laws.
 - Relevance to employment: New exemption for investigations of suspected employee misconduct, although still requires a summary of the report to be shared with the employee, no prior notice of investigation required.

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VIII. The Electronic Workplace

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Electronic Issues in the Workplace

- **Electronic Crimes**
 - ◆ External threat from hackers
 - Internal threat from employees
- **Handheld Technology**
 - Mobile Camera Phones
 - ◆ "Keychain Storage Devices"
- **Privacy**
 - ◆ Employee & Customer Information
 - Keystroke logging
 - April, 2004 – Alleged whistleblower planted keystroke logger on company VP's computer
 - Numerous federal and state anti-spyware bills pending
- **"Independent Browser Devices"**
 - Preventing employers from tracking of computer use

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IX. The Fair Labor Standards Act (FLSA)

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A. White Collar Exemptions

- Final Regulations Effective August 23, 2004
- Legislative Efforts to Quash
- Categories of Exemptions:
 - Executive
 - Administrative
 - Professional
 - Outside Sales
 - Certain Computer Employees

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Salary Basis Test

- General: Minimum Salary Level - \$455 per week
- Highly Compensated Test:
 - Total annual compensation of at least \$100,000
 - At least \$455 per week paid on salary/fee basis
 - Perform office or non-manual work
 - Customarily and regularly perform any one or more of the exempt duties for the executive, administrative, or professional exemptions

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Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period;
- Salary not reduced because of variations in the quality/quantity of work;
- Employee is paid full salary for any week in which any work is performed (no need to pay for week when no work performed)

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Exceptions From The “No Pay-Docking” Rule

1. Absence *for one or more full days** for personal reasons, other than sickness or disability
 - Absence due to sickness or disability if deductions made under plan, policy, or practice of providing wage replacement benefits for such absences
 - Offsets for jury fees, witness fees, or military pay
 - Violations of safety rules of “major significance”
 - Disciplinary suspension for violating workplace conduct rules
 - Proportionate part of salary for time worked in the first and last weeks of employment
 - Unpaid FMLA leave

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Safe Harbor

- The exemption *will not be lost* if the employer:
 - Has a clearly-communicated policy prohibiting improper deductions and including a complaint mechanism
 - Reimburses employees for improper deductions; and
 - Makes a good faith commitment to comply in the future
- *Unless* the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints
- DOL has sample policy at www.dol.gov
- But: Be aware of state wage and hour laws that may differ; safe harbor may not exist for those claims.

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Executive Exemption

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion, or other change of status of other employees are given particular weight.

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Administrative Exemption

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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Management or General Business Operations

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration

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Learned Professional

- Generally:
 - Work requiring advanced knowledge
 - In a field of science or learning (e.g. law, medicine, chemical/biological sciences, etc.)
 - Customarily acquired by a prolonged course of specialized intellectual instruction
- Also, Employees in Learned Professions who:
 - Have substantially the same knowledge level, and
 - Perform substantially the same work as the degreed professionals,
 - But attained the advanced knowledge through work experience and intellectual instruction
 - *E.g.*, Lawyer who did not attend law school; Chemist who does not have a chemistry degree

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Creative Professional Duties

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
 - Music (musicians, conductors)
 - Writing (essayists, novelists, screenplay writers)
 - Acting
 - Graphic Arts (painters, photographers, cartoonists)

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B. Representative Actions Under FLSA

- Increase in Number of Lawsuits Nationwide
- Multiplier Effect
- Attorneys Fees Awards
- Two-Step Process
 - Low Threshold for Notice (Magistrate)
 - "Opt-In" Procedure
 - Must be "Similarly Situated"
 - "Decertification" Petitions after Discovery
- Fact Specific Matters on Exempt Status

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X. Labor Law

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NLRB UPDATE

- Board fully staffed
 - Chairman Battista (R)
 - Members Schaumber (R), Meisburg (R), Walsh (D) and Leibman (D)
 - Not many significant cases decided due to vacancies throughout Bush administration

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NLRB Significant Decisions

- ***IBM Corp.***, 341 NLRB No. 148 (June 9, 2004)
 - Board overruled *Epilepsy Foundation*. No *Weingarten* rights for nonunion employees.
- ***Brown University***, (July 15, 2004)
 - Board overruled *New York University* decision. Graduate students are not employees as their primary relationship is education and not economic.

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- Recent Q&A session of General Counsel Rosenfeld with an ABA group may be found at <http://www.nlr.gov>
- On the horizon?
 - *Email: Solicitation or distribution? Permissible parameters of workplace regulation of employee use?*
 - *Neutrality Agreements: Any developments in near term?*

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XI. Selected State Law Developments

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Selected State Law Developments

- ◆ **California**
 - ◆ **Bounty Hunter Law** (a/k/a the "Sue Your Boss" Law) (*Cal. Labor Code Section 2698 as amended.*)
 - ◆ **Paid Family Leave Law** (a/k/a the "Kin Care" Law) (*Cal. Labor Code Section 233 – effective January 1, 2004*)
 - ◆ **Third Party Harassment Law** (*AB76*)
 - Liability for harassment by vendors/customers/clients/suppliers, or any third party
- ◆ **California, Connecticut & Maine**
 - ◆ **Mandatory Sexual Harassment Training for Supervisors**
- ◆ **Illinois**
 - ◆ **New mini-WARN Act** – could apply to site with as few as 25 layoffs if that equals 1/3 or more of fulltime workforce
 - ◆ Opting out of Federal FLSA
- ◆ **New York's "Faithless Servant" Doctrine**
 - ◆ (*Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184 (2d Cir. 2003)*)
 - ◆ Employee required to forfeit compensation due to disloyal conduct during employment.
- ◆ **New Jersey's Whistleblowing Law (CEPA)**
 - ◆ Protects complaints about clogged toilets & unlit exit sign (*Hernandez v. Montville T'ship Bd. Of Ed., 2004 WL 353260*)
 - ◆ NEW! Mandatory annual notice and posting requirements
- ◆ **Gender Identity Discrimination**
 - ◆ CA, MN, NM, RI, Chicago, Buffalo, Boston, Phil., Louisville & Lexington, KY

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XII. The Year Ahead

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Hot Topics in the Year Ahead

- Same Sex Marriage & Domestic Partner Benefits
- Revised ADA Accessibility Guidelines
- Privacy Issues including Identity Theft
- National Origin/Religion/Color Discrimination Claims
- Claims for Failure to Provide ERISA Plans Timely
- “Time Off to Vote” Laws
 - State by state guide available at: http://www.toolkit.cch.com/text/P05_4335.asp
- “Mobbing”

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