

2019 | THE ACADEMY  
Legal & Regulatory  
Conference



# Employment Law Update

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October 21, 2019

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# Overview

- I. 2019 and Anticipated Decisions from the U.S. Supreme Court
- II. Legislative Developments
- III. EEOC Developments
- IV. DOL Developments
- V. State Law Developments and Trends

# I. U.S. Supreme Court 2019 Decisions

## A. Lamps Plus, Inc., et al. v. Frank Varela

**Holding:** Arbitration agreements must explicitly authorize class arbitration in order for an employees to be able to use arbitration in this form.

# I. U.S. Supreme Court 2019 Decisions

## B. Davis v. Fort Bend County

**Holding:** Failing to file an EEOC Charge prior to filing suit may provide a jurisdictional basis to have the lawsuit dismissed. However, this remains true only if the defendant/sued party remembers to assert this defense.

# Two Bonus Slides

*An interesting lower federal Court of Appeals decision –  
Kleber v. Carefusion, Inc.*

**Holding:** The ADEA does not apply to applicants who wish to file disparate impact (unintentional discrimination) claims.

This decision was issued by the 7<sup>th</sup> Circuit Court of Appeals (which covers IL, IN and WI).

# Two Bonus Slides

*An interesting lower federal Court of Appeals decision –*

Richardson v. Chicago Transit Auth.

**Holding:** Obesity is not a disability unless the applicant or employee can prove it is caused by a physiological disorder.

The 7<sup>th</sup> Circuit (covering IL, IN, WI) is not alone regarding this holding. The Second, Sixth and Eighth Circuits also agree (covering AR, CT, IA, KY, MI, MN, MO, ND, NE, NY, OH, SD, TN, VT).

# I. Anticipated U.S. Supreme Court Decisions in 2020

- A. Altitude Express, Inc. v. Zarda and Bostock v. Clayton County, Georgia (sexual orientation) and EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. (gender identity)  
**Issue:** Clarification as to whether sexual orientation and gender identity are protected classes under Title VII.



## II. Legislative Developments

### *Good or Bad News --*

Congress has not been, and is not anticipated to be, very active in the employment law arena.

This creates a “power vacuum” which the U.S. Supreme Court and federal agencies like the EEOC and DOL are more than happy to fill.

This may change, however, if the Supreme Court decides that sexual orientation and/or gender identity are protected classes under Title VII. Congress may try to get involved in amending Title VII in order to “undo” this development.

# III. EEOC Developments

- A. The new EEO-1 component 2 involving pay data reporting requirement (was due September 30, 2019 if you have at least 100 employees).
- B. Pay equity is a new focus.
- C. Pregnancy and disability accommodations remain a focus.
- D. Retaliation claims remain at the “head of the class” regarding the most common form of EEOC Charge.
- E. \_\_\_\_\_ and \_\_\_\_\_ remain second and third.
- F. Be increasingly mindful concerning age discrimination and harassment, as with multiple generations now in the workforce, it is becoming more pervasive and is anticipated to become a more common claim in the next few years.

# III. EEOC Developments

- G. Additional hot topics: service/emotional support animals and settlement contracts.
- H. The prior exceptions to the HIPAA/ADA/GINA discrimination provisions which previously applied to employer wellness programs based on a 2016 EEOC Guidance have been withdrawn; this means that incentives which were offered by many insurers and/or employers in order to reward certain positive employee behaviors, such as joining a gym, lowering their cholesterol, their body fat index and/or overall weight, in response to the insurer and/or the employer's wellness initiatives or which penalized negative employee behavior such as smoking no longer are permitted.

## IV. DOL Developments

- A. The salary requirement for the “white collar” exemptions will increase from \$23,660 to \$35,568 as of January 2020.
- B. The salary basis for highly-compensated employees also will increase from \$100,000 to \$107,432.

# IV. DOL Developments

- C. Position concerning independent contractors is evolving (although the DOL is still, for now, using the same six factors to distinguish between IC's vs. EMP'ees).
1. Nature and degree of control over worker
  2. Permanency of worker relationship
  3. Worker investment in equipment and facilities
  4. Worker skill, initiative and business judgment
  5. Worker opportunity for profit or loss
  6. Integral nature of worker's services to business

# IV. DOL Developments

- D. Interestingly, there have been several FMLA DOL Opinion Letters issued in the past 12 months.
1. IED school meetings are covered by FMLA leave per the DOL.
  2. As is organ donorship.
  3. Employers must designate time off as FMLA leave once they become aware that the reason the employee is using it is covered by the FMLA.

# IV. DOL Developments

- D. Interestingly, there have been several FMLA DOL Opinion Letters issued in the past 12 months (cont.).
4. Employers may “freeze” employee attendance points during a period of continuous FMLA leave.
  5. Employers do not have to pay employees for breaks which are shorter than 20 minutes, if the reason they are taking the break is covered by the FMLA/the break constitutes FMLA leave.

# IV. DOL Developments

## E. Regarding Pay Computation

1. If you pay hourly employees non-discretionary bonuses on either a quarterly or annual basis, you need to get on the DOL.gov website and review DOL Opinion Letter FLSA2019-7.
2. Similarly, if you use rounding to compute hourly employees' time worked, you need to review DOL Opinion Letter FLSA2019-9.



# IV. DOL Developments

- E. Regarding Pay Computation (cont.)
  - 3. Employers do not have to pay employees for time spent engaging in wellness activities, unless they can show the employer coerced or otherwise pressured them to do so.
  - 4. Someone may agree to “volunteer” their time even if this means performing work they used to be paid for (but be careful ...)

# IV. DOL Developments

- F. Current position regarding Joint Employment
- G. Continued focus on the misclassification of exempt vs. non-exempt employees and independent contractors vs. employees

# V. State Law Developments and Trends

## A. Legalization of Medical and Recreational Marijuana



# V. State Law Developments and Trends

## A. Legalization of Medical and Recreational Marijuana (cont.)

### New “Club” Members

Illinois (recreational)

Michigan (recreational)

Ohio (medical)

Oklahoma (medical)

Utah (medical – in 2020)

Vermont (recreational)

# V. State Law Developments and Trends

- B. New state paid leave of absence laws (most of them exempt governmental employers).
- C. Due to the fact that we do not currently have a uniform federal definition of independent contractor vs. employee, some individual states are now defining these roles for themselves.

Even if a uniform federal standard is issued at some point, states still will be free to independently define these roles for the purposes of state law governed benefits such as unemployment and workers' compensation.

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