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# Welcome to 2014 Employment Law Breakfast

Presented by:  
Jeff Worley  
Dwight Yoder  
Lindsay O'Neil



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# EEOC STATISTICS 2013

- Total EEOC charges for 2013: 93,727  
- Compare 2012: 99,412
- Race 33,068
- Gender 27,687
- Disability 25,957
- Age 21,396
- Retaliation (all charges) 38,539



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# True/False

John works at the Greasy Spoon Restaurant. John asked his supervisor if he could leave early on Friday to watch his daughter play soccer. John's supervisor told him, "No. The schedule is set and I don't make changes to it."

John posts on Facebook: Any other Greasy Spoon employees sick of working for these unfair jerks? Anyone else have time off requests denied? The working conditions are awful! 8 other employees post comments to John's post.



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# True/False

The Employer can terminate John for making the post. While John can talk about his workplace conditions, he cannot post it on Facebook for all the world including its customers to see.

True or False?



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# NLRB

- National Labor Relations Board
- Engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection
- This includes, and goes beyond employees' right to form unions

# Social Media & the NLRB

- Employees may engage in “protected concerted activity” – discussions about the terms and conditions of their employment
- Individual employee rants are not protected
  - However, the fact that another employee comments on the “rant” may transform the rant into a discussion

# Affordable Care Act

- Requires an employer with 50 or more full-time employees to provide basic healthcare coverage for those workers or face a tax penalty
- Full-time: 30+ hours per week
- Deadline to implement has been pushed back:
  - January 1, 2015 for employers with 50-99 employees
  - January 1, 2016 for employers with 100+ employees



# ACA's Impact on Small Employers

- ACA will impact employers with fewer than 50 employees, as coverage under a state or federal exchange may be more beneficial to both employer and employee
- Result: Employer eliminates healthcare coverage and points employees to Exchange
- Example: Western PA Electrical Contracting Co.

# ACA & SHOP

- ACA requires each state to establish Small Business Health Options Program (“SHOP”) exchange
- Mechanism for small employers to be able to continue offering healthcare coverage (even though not mandated to under ACA)
- State Deadline to establish SHOP:
  - Jan. 1, 2015 for employers with 1-49 F-T employees
  - Jan. 1, 2017 for employers with 50-99 F-T employees

# SHOP cont.

- Uncertainty how SHOP will play out
- Goal is to allow small employers to have access to lower premiums like those available on the individual exchange market
- If successful in producing lower premiums, SHOP exchanges may be expanded to allow larger employers to participate

# ACA & *Hobby Lobby*

- Hobby Lobby challenged ACA's mandate that employer's healthcare coverage must include coverage for certain types of contraceptives based on religious grounds
- Different from cases brought by Catholic institutions, as Hobby Lobby is for-profit corporation
- Supreme Court heard oral argument on March 25, 2014
- Pending decision



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# *United States v. Windsor*

Marriage is within the exclusive realm of the states to define and regulate

The incidents, benefits and marriage are uniform for all married couples within each state (although they may vary from one state to another)

DOMA imposed restrictions and disabilities on the very class of individuals certain states seek to protect

Section 3 of DOMA is unconstitutional because it violates the equal protection clause of the United States Constitution by treating differently same-sex marriages that are made lawful by the authority of the States

Did not directly address whether States could constitutionally prohibit same-sex marriage



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# *United States v. Windsor*

**Windsor + Federal Employment Laws + Federal Tax Laws = MASS CONFUSION!**

**Family and Medical Leave Act** – covers care of a family member (spouse, child, parent). Fact Sheet #28F defines “spouse” as follows:

Spouse means a husband and wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including “common law” marriage and **same-sex marriage**.

Employers should follow same-sex marriage laws of the state where an employee resides

Must become familiar with the laws of neighboring states if employees reside out of Pennsylvania



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# *United States v. Windsor*

## **Employee Benefit Plans governed by Employee Retirement Income Security Act (ERISA)**

Department of Labor issued Technical Release 2013-04

Plan Sponsors are required to interpret the term “spouse” to include a same-sex spouse based on the **state of celebration**

Appears that *Windsor* decision applies only to self-insured plans regulated by ERISA, not all health insurance plans

IRS has stated in Revenue Ruling 2013-17 that legally married same-sex couples will be treated as married for purposes of the Internal Revenue Code based on the “**state of celebration**”, regardless of where the couple resides.



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# Romance in the Workplace





# EEOC Statistics

## Sexual Harassment

- 1997 total number of EEOC charges alleging sexual harassment: 15,889
- 2011: 11,364
  - Percentage of charges filed by males
    - 1997: 11.6%
    - 2011: 16.3%

# Harassment Policy

## Prohibition:

All team members should be able to work in an environment free from harassment by team members or other individuals. It is the employer's policy to prohibit harassment of one team member by another team member, supervisor, or anyone else on the basis of sex.



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# Harassment Policy

- Definition:
- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

# Harassment Policy

- Reporting:
- Any team member who feels that he or she is a victim of sexual harassment or any other form of harassment should immediately report the matter to their supervisor, the Director of Human Resources or other management team member. Violations of this policy will be considered serious team member misconduct and may result in discipline up to and including discharge. Sexual harassment and any other harassment of a team member will not be tolerated. All complaints of harassment will be investigated immediately and kept confidential to the extent possible. It is our policy that no team member shall suffer retaliation or adverse consequences as a result of reporting violations of this policy or participating in the investigation of such violations.

# Non-Fraternization

- Supervisors should not be romantically involved with subordinates
- Issues:
  - Unfair treatment
  - Complications
  - Harassment

# Vicarious Liability

- A supervisor's actions can hold an employer directly liable- as if the employer has committed the act
- Regardless of whether a complaining employee has followed the proper reporting procedure

# Vicarious Liability

- To be considered a supervisor that individual must have the power to hire, fire, or promote those working in positions under them

# Non-Fraternization Policy

- A supervisor shall report any relationship with subordinate or direct report
- If there are questions as to the nature of the relationship, the supervisor shall ask HR
- HR will determine how to address the situation



# Non-Fraternization Policy

- A supervisor should be removed from all supervisory roles with respect to the employee and the supervisor and the employee should not work on projects together

# BOLLINGER v. LANCASTER, LLC

- Justin Bollinger: Terminated former employee
- Jolee Van Horn: Bollinger's former supervisor
- Lindsay O'Neil: Lancaster LLC's corporate representative

# JURY QUESTIONS

**1. Was Mr. Bollinger subjected to sexual harassment/sex discrimination?**

**2. Did Lancaster LLC retaliate against Mr. Bollinger?**



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## QUESTIONS & ANSWERS

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