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WORKPLACE TRENDS – WHAT IS HOT AND
WHAT IS NOT

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In today’s business world employers are faced with many challenges and an ever-evolving legal landscape, such as new pregnancy rules under the ADA, ban-the-box proposals relating to criminal convictions on employment applications, franchisees and franchisors being found to be joint employers, protests to increase the minimum wage, and social media issues. This article discusses recent court and administrative decisions, along with pending and proposed legislation and enforcement guidance issued by various governmental agencies, and discusses their effect on employers. It also provides some practical advice for employers in dealing with the difficulties and uncertainty they face in the ever changing work environment.

I. The Use of an Applicant’s Criminal History

The EEOC’s Guidance of 2012

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued an updated Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII (the “Guidance”). Although the Guidance purported to build on the EEOC’s long-held positions, it made several key changes that affected how employers were to inquire about and treat an applicant’s criminal history in making employment decisions. More specifically, the Guidance refused to accept policies that automatically excluded an applicant and tasked employers with conducting

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an individualized assessment of an individual’s criminal history. According to the Guidance, there are two ways that an employer’s use of arrest or conviction records can violate Title VII:

1. **Disparate treatment:** A violation may occur when an employer treats criminal history information differently for different applicants or employees based upon their race or national origin.

2. **Disparate impact:** An employer’s neutral policy of excluding applicants based upon certain criminal conduct may disproportionately impact some individuals protected under Title VII. This would violate Title VII if the exclusion is not job related and consistent with business necessity. CITATION?

The EEOC takes the position that national data supports a finding that criminal record exclusions have a disparate impact on race and national origin, and that a policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity. The Guidance further states that there are two circumstances in which employers may demonstrate that a neutrally-applied exclusion based on criminal history records is “job related and consistent with business necessity.”

1. **Validation:** An employer may validate its criminal conduct exclusion for a position under the EEOC’s Uniform Guidelines on

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2 *Id.* at Sec. V.B.9.

3 *Id.* at Sec. V.B.4.
Employee Section Procedures. Validation is possible if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors. The Guidance, however, notes that such studies are presently rare and acknowledges that this method will not be feasible for most employers.

2. **Targeted Screening with Individual Consideration:** In the absence of formal validation, an employer may develop a targeted screening process for candidates or employees with a criminal history that considers at least the nature of the crime, the time elapsed since the crime, and the nature of the job. For those employees who are excluded by a targeted screen, the employer should then provide an opportunity for an individual assessment to determine whether the policy as applied to a particular person is job related and consistent with business necessity.

A suggested individualized assessment requires an employer to provide an applicant the opportunity to demonstrate that the exclusion from employment should not apply based upon the individual’s particular circumstances. The employer should also consider other factors, such as:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Whether the person was of an older age at the time of the conviction or release from prison;
• Whether the person performed the same type of work after his/her conviction without incident;
• The length and consistency of employment history before and after the offense;
• Any rehabilitation efforts, e.g., education and training;
• Employment or character references that relate to fitness for the position; and
• Whether the individual is bonded under a federal, state, or local bonding program.\textsuperscript{4}

While the Guidance does not mandate the individual consideration step, it states that doing so can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees.\textsuperscript{5} Nevertheless, even if an employer is able to establish job relatedness and business necessity under one of the above two approaches, an individual may still prevail in a disparate impact case by showing that the employer refused to adopt a less discriminatory “alternative employment practice” that was available and that serves the employer’s legitimate goals “as effectively as the challenged practice.”

A. “Ban-the-Box” Legislation

Following the EEOC’s issuance of its 2012 Guidance regarding the use of an applicant’s criminal history, the Commission has been aggressively pursuing employers who utilize

\textsuperscript{4} \textit{Id.} at Sec. V.B.9.
\textsuperscript{5} \textit{Id.}
an applicant’s criminal history in making hiring decisions. Some states, such as New York, also aggressively pursue employers who use an applicant’s criminal background history in hiring decisions. Furthermore, at least twelve states and more than 66 municipalities have adopted “ban-the-box” legislation, which prevents employers from employer a checkbox on job applications that asks whether the applicant has a criminal history. Such legislation has been referred to as “compassionate legislation”, and proponents of such measures state that removing the boxes allows convicts fair consideration for jobs that will help them reintegrate into society after completing their criminal sentences.

It is estimated that approximately seventy million people in the United States have criminal records and that nearly 700,000 of them return to communities on an annual basis after being released from jail or prison. Advocates of “ban-the-box” note the stigma associated with having a criminal record and that “marginalizing ex-offenders helps none of us.”6 Such legislation has been referred to as a “foot-in-the-door” legislation, not “hire ex-felons” legislation.

The states that have adopted “ban-the-box” legislation include: California, Colorado, New Mexico, Nebraska, Minnesota, Illinois, Maryland, Delaware, Connecticut, Rhode Island, Massachusetts, and Hawaii. Some of the legislation extends to private employers, while some is restricted to public employers.

In addition to these states, several municipalities have also adopted varying forms of legislation, such as Baltimore, Maryland; Louisville, Kentucky; and Washington, D.C.

II. The NLRB’s Joint Employer Test and Franchisees

In June, 2014, the National Labor Relations Board (“NLRB” or the “Board”) filed amicus briefs in the matter of *Browning-Ferris Industries of California, Inc.*, which is a representation case raising joint employer issues.\(^7\) While stating that it took no position regarding the merits of the representation case at issue, NLRB General Counsel Richard F. Griffin urged the Board to adopt a new standard for determining whether a joint employer relationship exists. The Board is advocating that a joint employer relationship should be found if, under the totality of the circumstances, including the way the separate entities structured their commercial relationship, the putative joint employer wielded sufficient influence over the working conditions of the other entity’s employees such that meaningful bargaining could not occur in its absence. Griffin went on to state that current law unfairly precludes local employees from dealing with national companies that may effectively control many of their working conditions, and that the current standard ignores Congress’ intent that the term “employer” be broadly construed in light of economic realities and the underlying goals of the National Labor Relations Act, which inhibits meaningful collective bargaining with respect to the contingent workforce and other nontraditional employment arrangements.

In the amicus brief filed by General Counsel Griffin, he argued that some franchisors are really the employers of a franchisee’s employees, as they keep track of data on sales, inventory and labor costs, they calculate the labor needs of their franchisees, they set and police employee work schedules, track wages paid, and how long it takes

\(^7\) *Browning-Ferris Industries of California, Inc.*, NLRB No. 32-RC-109684
employees to fill customer orders, and they accept employment applications for franchisees through their systems and even screen applicants. Griffin argued that all of these go beyond the protection of the franchisor’s product or brand.

Following the filing of his amicus brief in June, in July, 2014, General Counsel Griffin announced that he had authorized regional directors of the NLRB to issue complaints in 43 of 181 unfair labor practice cases pending against McDonald’s USA LLC. The complainants in these cases have alleged that McDonald’s was a joint employer with its franchisee. McDonald’s has approximately 2,500 independent franchisees.

After efforts to resolve some of the matters, on December 19, 2014, the NLRB issued 13 unfair labor practice complaints against McDonald’s and some of its franchisees in Region 2, Manhattan, Region 4, Philadelphia, Region 7, Detroit, Region 10, Atlanta, Region 13, Chicago, Region 14, St. Louis, Subregion 17, Kansas City, Region 15, New Orleans, Region 18, Minneapolis, Region 20, San Francisco, Region 25, Indianapolis, Region 28, Phoenix, and Region 31, Los Angeles. Hearings have been set before administrative law judges, with some of the matters being consolidated into one hearing.

Unions and their supporters are extremely happy with the efforts of General Counsel Griffin. The Service Employees International Union is particularly pleased, as its officials have been targeting workers at McDonald’s, and other brands that use the franchise model, for top-down organizing, including the use of coercive card check organizing that bypasses a secret ballot vote.

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8 Richard F. Griffin, National Labor Relations Board Office of the General Counsel (July 29, 2014).
Opponents of General Counsel Griffins’ efforts on the joint employer standard for franchisors and franchisees have stated that it is nothing more than a thinly veiled attempt to increase union membership, and that the NLRB’s stance provides a “Happy Meal” for union bosses hungry for union dues. They also argue that expanding joint employer liability will require franchisors to decide whether to become more involved in a franchisee’s day-to-day operations and employment decisions, or whether to back off completely. If franchisors are not involved in a franchisee’s day-to-day operations, they risk some of the uniformity in products and services that enhance the value of the franchisor-franchisee relationship by giving customers a uniform product.

III. Developments in Protections for LGBT Employees

In July, 2014, President Barack Obama issued Executive Order 13,672, which prohibits federal contractors from discriminating against lesbian, gay, bisexual, and transgender (“LGBT”) employees and job applicants. In mid-August, 2014, the Department of Labor Office of Federal Contract Compliance Programs (“OFCCP”) released a directive clarifying that sex-based job discrimination includes bias based on gender identity and transgender status, and on December 9, 2014, the OFCCP issued a final rule that implements the President’s July, 2014 Executive Order.⁹

In September, 2014, the Equal Employment Opportunity Commission (“EEOC” or the “Commission”) filed two landmark suits, one against a funeral home in Michigan and the other against an eye clinic in Florida, in which it alleged discrimination against male-to-

⁹ 79 Federal Register 72,985 (Dec. 9, 2014).
female transsexual workers in violation of Title VII of the 1964 Civil Rights Act. This followed a 2012 administrative ruling in which the EEOC held that Title VII’s ban on sex discrimination prohibits bias based on transgender status and gender identity, Macy v. Holder, EEOC No. 0120120821, and is the latest in a growing list of legal developments that recognize civil rights for transgender workers.

For example, in October, 2014, the EEOC filed an amicus brief with the U.S. Court of Appeals for the Seventh Circuit in which it urged the Court to reconsider a decision in which it held that Title VII does not bar sexual-orientation discrimination. This brief set forth the Commission’s broad view of the gender-stereotyping theory that it had developed in federal sector cases.

This theory and these cases arise out of the U.S. Supreme Court’s decision in Price Waterhouse v. Hopkins. In Price-Waterhouse, the Court held that job actions taken on the belief that an employee does not conform to society’s expectations for persons of that gender are prohibited under Title VII. Although Price Waterhouse was not a gender identity or sexual orientation case, it has been used by the EEOC and courts to increase protections for the LGBT community.

In October, 2014, the Commission announced that it was adding two new charge categorization codes for charges filed with the EEOC, specifically, “GO” for gender orientation bias and “GT” for gender identity bias. This stems from the fact the

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Commission received 834 charges alleging gender orientation discrimination and 199 charges alleging gender identity bias in 2013. As of June, 2014, it had received 459 and 81 charges.

On December 18, 2014, Attorney General Eric Holder announced that he had issued a memorandum to the Department of Justice stating that the department will no longer assert that Title VII’s prohibition against sex discrimination excludes discrimination based on gender identity per se, including transgender discrimination. Thus, the Department of Justice will now take the position that Title VII’s prohibition against sex discrimination includes bias based on gender identity and transgender status.

Seventeen states and the District of Columbia now ban gender identity bias in the workplace. In addition, the Employment Nondiscrimination Act, which would cover private employers nationwide and prohibit employment discrimination based on gender identity or sexual orientation, has been pending before Congress for many years. It has passed the Senate, but has failed to gain sufficient support in the House of Representatives.

While these developments mark huge advancements for the LGBT community, some proponents have argued that being openly gay or lesbian may actually be harmful to a legal claim under Title VII. If the applicant is openly gay or lesbian, the courts can then find that any bias resulted from sexual orientation, which remains unprotected under federal law. Hence, it is better to bring a claim stating that a person was discriminated against due to his/her failure to conform to gender stereotypes.
Some best practices advocated for employers in order to avoid claims of discrimination on the basis of gender identity or transgender status include:

- Update nondiscrimination policies to expressly include LGBT bias;
- Provide training on LGBT bias to all employees and managers;
- Provide equal employee benefits to same-sex couples, potentially including coverage of gender reassignment surgery;
- Form diversity and inclusiveness committees and implement diversity and inclusiveness initiatives;
- Permit and encourage LGBT workers to form workplace affinity groups;
- Ensure that nondiscrimination policies provide best practices for workers who are transitioning from male to female or vice versa, including policies regarding name changes, restroom use, and dress codes;
- Ensure that manager performance is linked to LGBT diversity metrics;
- Have employee data collection include voluntary self-disclosure of LGBT status;
- Actively recruit LGBT workers;
• Provide financial and other support to the LGBT community; and
• If and where appropriate, retain a diverse group of suppliers.

IV. Social Media Developments and the NLRB

Prior to the Obama Administration, the National Labor Relations Board ("NLRB") was a fairly low-key federal agency with little public name recognition. However, since the recess appointment in June 2010 of Acting General Counsel Lafe Solomon, the NLRB has been anything but low-key. We can expect that trend to continue with the Senate confirmation of Richard F. Griffin as General Counsel and the confirmation of President Obama’s nominees for all five positions on the Board. Griffin, former general counsel of the International Union of Operating Engineers, also served a brief term as a recess appointee to the NLRB before such appointments were ruled invalid by the Supreme Court.

Griffin shows every intention of continuing to assert the application of the National Labor Relations Act ("NLRA") in non-union settings, as the agency had done under Acting General Counsel Solomon. Nowhere has that effect been more prominent than in the Board’s assertion of jurisdiction in cases involving non-union employers’ social media policies.

Beginning in the Fall of 2010, the NLRB began issuing unfair labor practice complaints against employers for taking adverse employment actions, including termination, against employees making derogatory remarks about coworkers and supervisors on the
employees’ personal Facebook pages, and other social media settings, in violation of the employers’ social media policies. In many of the complaints, the NLRB has alleged that the employer’s social media policy is overbroad and the application of the policy interferes with the employee’s rights under the NLRA provision protecting employees’ right to engage in “concerted, protected activity,” which includes communicating with coworkers about the terms and conditions of employment.\footnote{See 29 U.S.C. § 157 (“Employees shall have the right … to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”).}

The opening salvo came with the issuance of the ALJ’s opinion in Hispanics United of Buffalo, Inc.\footnote{NLRB No. 3-CA-27872, 2011 WL 3894520 (Div. of Judges Sept. 2, 2011).} in 2011. In that case, five employees engaged in a Facebook discussion after a coworker posted that the company’s employees were not sufficiently helpful to the company’s clients. The ensuing discussion included some derogatory remarks toward the original poster, including “What the f. ..Try doing my job I have 5 programs,” and “Tell her to come do [my] f--king job n c if I don’t do enough, this is just dum [sic].” The employer terminated the posting employees on the ground that the posts constituted “bullying and harassment” of the original poster and violated the company’s harassment policy. The ALJ determined that the employees were terminated in violation of their right to engage in protected concerted activity. The ALJ noted the employees “have a protected right to discuss matters affecting their employment amongst themselves.”

The NLRB has shown a willingness to go over employers’ social media policies line-by-line and invalidate those it deems to chill workers’ rights to engage in protected
concerted activity under Section 7 of the NLRA. Policy provisions that no longer pass muster include:

- General prohibitions on disparaging, ridiculing or defaming the company on social media;
- Blanket prohibitions against displaying photos of the workplace or using the company logo on social media;
- Broad bans on criticizing company management, even by name and/or by using intemperate language;
- Blanket prohibitions on the disclosure of “confidential” information on social media unless sufficient examples are given to demonstrate that information about working conditions, pay, benefits, supervisors and co-workers are not covered by the policy;
- Prohibition of “inappropriate” conduct or language on social media, as that term is thought to be too vague for employees to know whether it includes protected activity;
- Requiring employees to include a disclaimer on every social media post about the company stating that the employee is not speaking for the company, as this requirement is thought to unduly burden the exercise of Section 7 rights.

The Board has approved an employer’s social media policy that prohibited the use of social media to post or display comments about co-workers or supervisors, and those that are “vulgar, obscene, threatening, intimidating, harassing, or a violation of the
Company’s workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.”

The Board has also made clear that mere vulgarity in social media postings does not deprive such postings of the protection of the Act, as long as they discuss working conditions. In *Triple Play Sports Bar & Grille*, employees’ posts on Facebook that including calling their supervisor an “asshole” and repeated use of the “F” word did not lose the protection of the NLRA because the comments were made in a discussion of the employer’s errors in its tax withholding policy.

In light of the growing popularity of social media and the NLRB’s recent activity, employers should carefully review their social media policies, or consider whether to develop a social media policy if they do not have one in place. Employers should also take into account all possible implications before engaging in adverse action against an employee for conduct on social media sites. A proper social media policy should address the use of company time and resources for social networking, protect the employer’s confidential information and trademarks, and prohibit discriminatory or harassing conduct based on a protected category. The policy should also ban employees from using company computers or company time for social networking, unless the social networking site involves the company or company business. To address privacy concerns, the policy should also specifically advise employees that any

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material posted, exchanged or discussed on social media sites may be accessed at any
time without advance notice to the employee. In addition, the policy should prohibit
posting material that is obscene, vulgar, discriminatory, personally harassing, or abusive
to another individual. It is important to give specific examples of broadly described
conduct such as “confidential information” so that employees do not understand it to
include things like pay and working conditions.

V. ADA and Pregnancy Developments

The Pregnancy Discrimination Act was passed in 1978, in part, to overturn a 1976
Supreme Court decision, General Electric Co. v. Gilbert,17 which had rejected the
EEOC’s broad reading of Title VII b to cover pregnancy bias as a form of sex
discrimination. The PDA added “pregnancy, child-bearing or related medical conditions”
to Title VII’s definition of sex discrimination,18 and directs that pregnant women “be
treated the same for all employment-related purposes ... as others persons not so
affected but similar in their ability or inability to work.” 19

New EEOC Chair Jenny R. Yang plans to target what she characterizes as “blatant
pregnancy discrimination” still prevalent in the workplace. In July 2014, the Commission
updated its Pregnancy Discrimination Guidelines with the following key points:

• Although pregnancy is not a disability, pregnancy related complications
could be;

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17 429 U.S. 125 (1976).
19 Id.
• Reasonable accommodations available to pregnant workers with impairments that constitute disabilities might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a workstation, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position;

• The PDA prohibits discrimination not only because of current pregnancy but because of future plans to become pregnant, use of fertility treatments, having an abortion, using contraception, and lactation and breastfeeding;

• An employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee’s limitations (e.g., a policy of providing light duty only to workers injured on the job).

The EEOC Guidelines are being put to the test before the U.S. Supreme Court in Young v. United Parcel Service, argued December 3, 2014. In that case, a pregnant part-time delivery driver gave her supervisor a doctor’s note saying she could not lift more than 20 pounds in her first twenty weeks of pregnancy and nothing more than 10 pounds thereafter. Her job description required her to be able to lift up to seventy pounds, although she spent most of her time delivering overnight letters and small packages.

UPS’s light duty policy provided light duty work for four categories of workers: (1) those injured on the job; (2) those with an impairment recognized under the Americans with
Disabilities Act ("ADA"); (3) those who lost their driver’s license because they were
temporarily unqualified to drive; and (4) those with pregnancy-related lifting or other
physical restrictions “in compliance with state or federal law, if applicable.” UPS takes
the position that the pregnancy clause, which is taken from its collective bargaining
agreement with drivers, applies only in states that have passed their own laws requiring
such accommodations, and that federal law requires nothing more than not singling out
pregnancy for disparate treatment.

The United States District Court for the District of Maryland and the Fourth Circuit found
that UPS had crafted a “pregnancy-blind policy” and that Young’s restriction “was
temporary and not a significant restriction on her ability to perform major life activities.”
The Obama Administration urged the Supreme Court to not take up the matter, arguing
that although pregnancy in and of itself does not qualify as a disability, the expanded
definition of “substantially limited in a major life activity” under the amended ADA may
require the accommodation of employees like Young.

The trend certainly seems to be in favor of expanded protection for pregnant workers.
The U.S. government, which previously defended the Postal Service’s light duty policy,
which is virtually identical to the UPS policy at issue, now says that this older view is no
longer the view of the United States and that the Postal Service is “considering its
options” in light of the amended ADA and the new EEOC Guidelines. UPS itself has
announced that, beginning January 1, 2015, it will make temporary light duty work
available to more of its pregnant employees with lifting restrictions. Maryland, where

\[20\] 707 F.3d 437,450 (4th Cir. 2013).
\[21\] Id. at 445.
Young was based when she worked for UPS, passed a law mandating such accommodations in 2013 and is one of at least nine states that have done so.

VI. Minimum Wage Developments

Increasing the minimum wage has long been a goal of the Obama Administration and 2014 saw much activity towards that goal, although a change in the federal minimum wage was not achieved. In February, President Obama signed an Executive Order raising the minimum wage for federal contractors from $7.25 an hour to $10.10 an hour.

In March 2014, Senator Tom Harkin, Democrat of Iowa, introduced S. 460, the Fair Minimum Wage Act, which would amend the Fair Labor Standards Act to raise the federal minimum wage to $8.20 an hour on the first day of the third month after enactment of the bill; to $9.15 after the first year; to $10.10 after two years; and an amount to be determine annually by the Secretary of Labor based on the Consumer Price Index after three years. The minimum wage for tipped employees would increase to $3.00 an hour from $2.15.

The bill has been read twice and is currently languishing in committee. With the Republicans taking control of the Senate in 2015, it seems unlikely the bill will come to a vote.

At the state level, however, there are currently 23 states and the District of Columbia that have a minimum wage higher than the federal level. Increased rates range from $7.75 in Maine to $9.50 in D.C.
Organized labor has also been pushing hard for increases in the minimum wage, particularly in the fast food industry. The Summer 2014 strikes by fast food workers as part of the “Fight for $15” campaign drew much media attention and has spurred increases in the minimum wage in most major cities in California, as well as Seattle and Chicago.

VII. Labor & Employment Cases Pending Before the U.S. Supreme Court

There are several labor and employment cases of interest on the U.S. Supreme Court’s 2014-2015 calendar, including the following:

*Integrity Staffing Solutions v. Busk*, 713 F.3d 525, 20 WH Cases2d 937 (9th Cir. 2013) (71 DLR AA -1, 4/12/13). The issue presented is whether time spent by warehouse workers in security screenings at the end of their work shifts is compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act. The matter was argued on October 8, 2014. On December 9, 2014, the Court held that such time was not compensable.

*M&G Polymers USA, LLC v. Tackett*, 733 F.3d 589, 56 EBC 1829 (6th Cir. 2013) (155 DLR A-1, 8/12/13). The issue presented is whether, when construing collective bargaining agreements in Labor-Management Relations Act cases, courts should follow the Sixth Circuit and presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue
indefinitely). One alternative view from the Third Circuit is that a CBA should require a clear statement that health-care benefits are intended to survive the termination of the CBA. A second view espoused by the Second and Seventh Circuits is that a CBA should require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely. The matter was argued on November 10, 2014.

*Dep't of Homeland Sec. v. MacLean*, 714 F.3d 1301, 35 IER Cases 821 (Fed. Cir. 2013) (83 DLR A-5, 4/30/13). The issue presented is whether certain statutory protections codified at 5 U.S.C. 2302(b)(8)(A), which are inapplicable when a federal employee makes a disclosure “specifically prohibited by law,” can bar an agency from taking an enforcement action against an employee who intentionally discloses sensitive security information. The matter was argued on November 4, 2014.

*Perez v. Mortg. Bankers Ass’n; Nickols v. Mortg. Bankers Ass’n.*, 720 F.3d 966, 20 WH Cases2d 1527 (D.C. Cir. 2013) (127 DLR AA-1, 7/2/13). The issue presented is whether a federal agency must engage in notice-and-comment rulemaking under the Administrative Procedure Act before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation. The matter was argued on December 1, 2014.

*Mach Mining, LLC v. EEOC*, 738 F.3d 171, 121 FEP Cases 327 (7th Cir. 2013) (247 DLR AA-1, 12/23/13). The issue presented is whether and to what extent a court may enforce the Equal Employment Opportunity Commission’s duty to conciliate discrimination charges before filing suit.
Young v. United Parcel Serv., Inc., 707 F.3d 737, 116 FEP Cases 1569 (4th Cir. 2013) (08 DLR A-2, 1/11/13). The issue presented is whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are "similar in their ability or inability to work," as provided by the Pregnancy Discrimination Act, which amended Title VII of the 1964 Civil Rights Act. The matter was argued on December 3, 2014.

EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 120 FEP Cases 212 (10th Cir. 2013) (192 DLR AA-1, 10/2/13). The issue presented is whether an employer can be liable under Title VII of the 1964 Civil Rights Act for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only where employer has actual knowledge that a religious accommodation was required based on direct, explicit notice from the applicant or employee.

Tibble v. Edison Int'l, 729 F.3d 1110, 56 EBC 1245 (9th Cir. 2013) (57 DLR A-5, 3/25/13); amended opinion (149 DLR A-9, 8/2/13). The issue presented is whether notwithstanding the ongoing nature of the Employee Retirement Income Security Act's fiduciary duties, does the statute of limitations under 29 U.S.C. §1113(1) immunize 401(k) plan fiduciaries for retaining imprudent investments that continue to cause the plan losses if the funds were first included in the plan more than six years ago.