# LEGAL UPDATE

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# AGENDA

- EEOC FY 2014 Charge Filing Statistics
- Discrimination Law Update
- Wage & Hour
- Evolving Law of Workplace Pregnancy
- Joint Employment & NLRB's *Browning Ferris* Decision
- Q&A

# EEOC CHARGE DATA

# EEOC FY CHARGE FILING STATISTICS

**Discrimination: Total charges declined from 93,727 last year to 88,778 this year, down over 10% from 2012.**

- 2,879 total charges filed in Alabama
- When analyzing charge data on state level, Alabama has twice the number of charges compared to the average per capita
- 50% of charges filed in Alabama involved race discrimination compared to 35% national average

**Sex Discrimination – 28.3% of all charges filed last year**

**Retaliation - 42.8% of all charges filed last year**

- 13th consecutive year of increase in total retaliation charges (record high number)

**ADA: Disability charges increased for 7th consecutive year to 28.6%, up from 20.4% in 2008, the year before the ADA Amendments Act.**

# EEOC FY CHARGE FILING STATISTICS

## Cause vs No Cause

- 66% of all charges resulted in a No Cause finding
- Just 3.1% of all charges resulted in a Cause finding
- 27.2% of all charges resulted in a resolution through mediation, settlement, and conciliation, with an average settlement of $10,238 for each, a total of $296.1 million in monetary settlements.
- EEOC filed suit in just 133 cases last year, so about 1.5 times for every 1,000 charges filed
- EEOC collected $22.5 million in judgments in the cases litigated

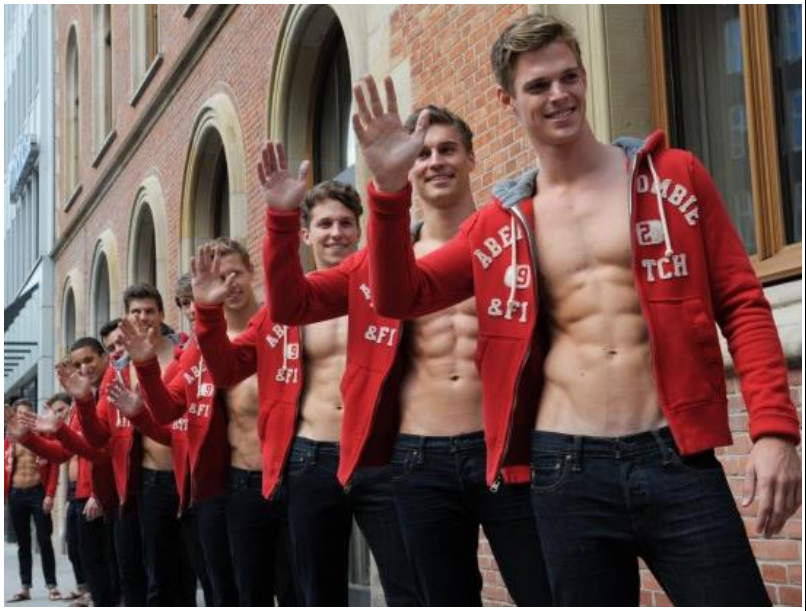
# DISCRIMINATION UPDATE

# DISCRIMINATION UPDATE

## EEOC V. ABERCROMBIE & FITCH STORES

**135 S.Ct. 1338 (2015)**

- A young Muslim woman interviewed for a salesperson job while wearing a hijab that covered only her hair
- The interview included a discussion of appropriate attire when working, but neither applicant nor manager discussed the hijab
- Manager thought she would make a good hire, but also thought she was Muslim and wasn't sure if she could work while wearing a hijab. Manager contacted her district manager to ask about it
- District manager was not told the applicant was Muslim, but simply answered that the store would not deviate from its "Look Policy" which prohibited wearing caps
- Manager never called the applicant back
- EEOC sued on applicant's behalf claiming A&F failed to accommodate her religion



# DISCRIMINATION UPDATE

## EEOC V. ABERCROMBIE & FITCH STORES

- District court allowed the case to go to trial and the jury awarded the plaintiff $20,000
- A&F appealed to the Tenth Circuit, which found that in order to make a case, plaintiff would have to show she informed the employer that she engaged in a religious practice that was "inflexible," conflicted with work, and that she needed an accommodation
- On appeal to the Supreme Court, it disagreed, stating that Title VII does not impose a knowledge requirement; rather, the plaintiff must show that her religion was a "motivating factor" in the employer's decision

# DISCRIMINATION UPDATE

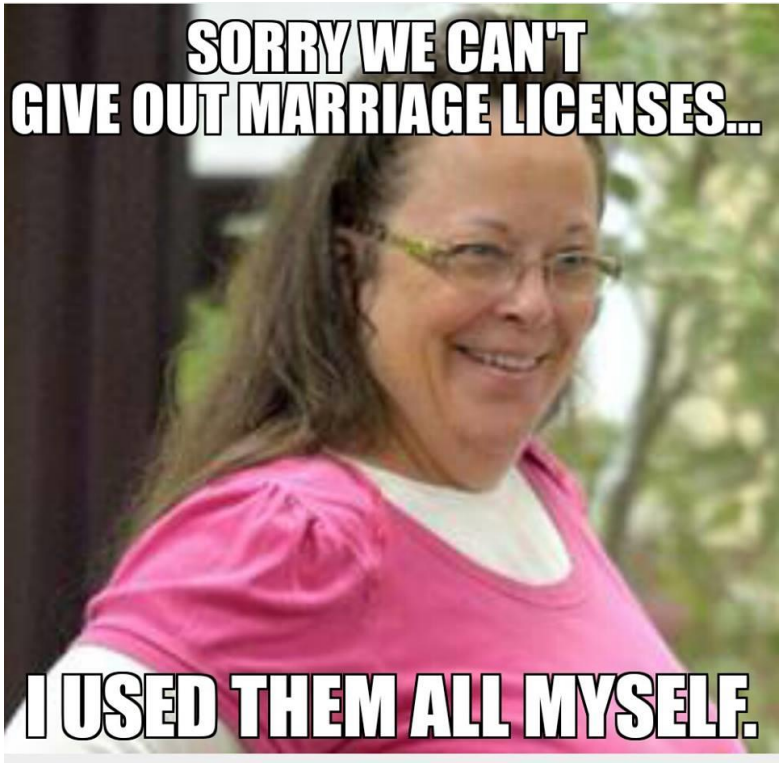
## *ABERCROMBIE* TAKEAWAYS

- Employers do not need to educate hiring managers on every possible religious belief they might encounter, but they do need to make hiring managers aware of the obligation to accommodate religious beliefs/practices
- Consider reasonable accommodations without disputing the religious conviction
- Develop a workplace culture that is consistent with accommodation

# DISCRIMINATION UPDATE

## OBERGEFELL V. HODGES

**135 S.Ct. 2071 (2015)**




- **5-4 decision holding that same-sex marriage is a right guaranteed by the 14th Amendment**
- **Two holdings:**
  - States must license a marriage between two people of the same sex
  - States must recognize a lawful same-sex marriage performed out-of-State
- **The Court emphasized the "benefits" society, government bestow upon married couples in finding protected fundamental rights for same-sex married couples**
- **Strong dissents written by all four dissenting justices**

# DISCRIMINATION UPDATE

## *OBERGEFELL* TAKEAWAYS

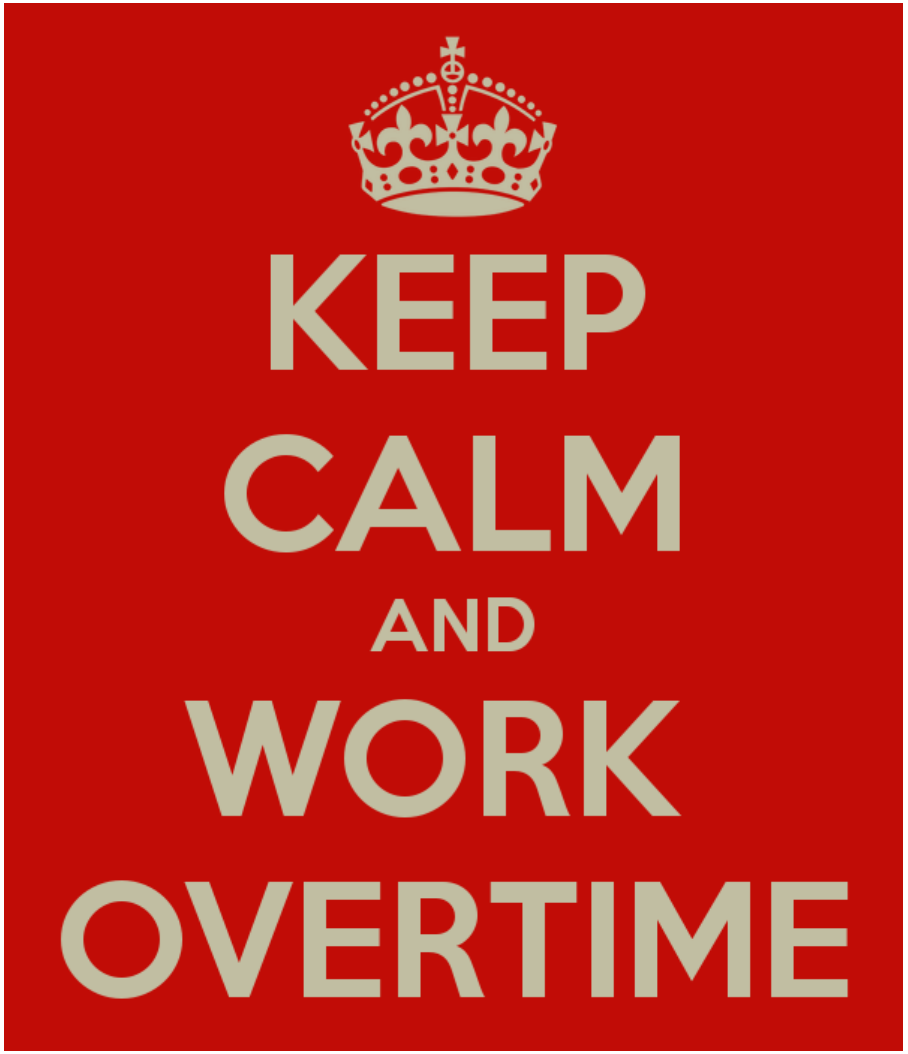
- **Constitutional protections only apply between governments and citizens—such rights are not guaranteed from private employers**
- **Public Employers**
  - Likely required to treat same-sex married couples equally for purposes of benefits eligibility
- **Private Employers**
  - Does not change ERISA requirements for private employers
  - At this time, employer's health and welfare benefit plans are still not required to cover same-sex spouses under ERISA.
    *See Roe v. Empire Blue Cross Blue Shield*, No. 14-1759-CV (2d Cir. 2014)

# DISCRIMINATION UPDATE

## *OBERGEFELL* TAKEAWAYS

- **ERISA Preemption of State Law**
  - ERISA preempts state law with regard to self-funded plans.
  - Because ERISA allows employers to define spousal eligibility ("spouse" is not defined in ERISA for purposes of health and welfare benefits), ERISA preemption generally precludes state law from requiring same-sex spousal coverage
  - Indirect Regulation - state laws applicable to insurance carriers may indirectly require same-sex spousal coverage for fully-insured plans
- **Health Plans:**
  - If same-sex spouses covered under a health plan, which is not required, treat as spouses for purposes of COBRA, HIPAA and other federal laws that apply to the benefits
- **Pre-Tax Premiums**
  - If employer chooses to allow coverage of same-sex spouse under health plan, then required to allow same-sex spouse premiums to be paid pre-tax under any cafeteria plan offered by employer

# WAGE & HOUR



# WAGE & HOUR

## DOL PROPOSED FLSA REGULATIONS FOR MINIMUM WAGE & OVERTIME

- **Would more than double the minimum salary to qualify for an executive, administrative, professional, or computer employee exemption from the current $455 per week ($23,660 per year) to *approximately* $970 per week ($50,440 per year)**
  - Adjusted for inflation
  - Based on arguments that (1) economic recovery has been without wage growth and (2) current minimum salary is the equivalent of the federal poverty level for a family of 4
  - DOL projects a $2 billion cost to employers in Year 1, and substantial wage growth
- **No proposal to change the duties tests applicable to the FLSA exemptions**
- **No proposal to increase minimum wage (for now)**

# WAGE & HOUR

## PRACTICAL CONSIDERATIONS FOR PROPOSED FLSA REGULATIONS

- **Not likely to increase wages**
- **Most likely to affect front line managers**
- **First, what happens to employee who is no longer exempt:**
  - Can't just convert salary to hourly
  - Collect data to know how much overtime an employee might work
  - Break full-time position into 2 part time positions?
- **Second, if you do make a formerly exempt employee non-exempt, how will you account for his/her time:**
  - Responding to after hours demands, calls, e-mails
  - Other away from the office work
  - Creating time cards and having them approved
- **Evaluate the effect on staffing, policy, compensation, benefits, culture, morale, production, supervision, customer contracts, and budgets**

# WAGE & HOUR

## ACT NOW TO PREPARE FOR PROPOSED FLSA REGULATIONS

- Who in your organization is classified exempt and on what basis?
- If classified executive, administrative, professional, or computer employee exempt AND employee earns less than $60,000 per year, track these employees on a spreadsheet
- Roll out a time-keeping procedure no later than January 1, 2016. Have them turn in hours spent working (you may need to define what they should record) in a manner that hours can be tracked on a weekly basis
- Do not use the data to pay anyone differently—at least not yet
- Evaluate the data to determine what an effective hourly rate might need to be in order to account for the employee's probability of working overtime
- Experiment in 2016 with methods to control overtime
- Use your data to establish potential models for how your organization might respond if DOL's rule becomes final in 2017

# WAGE & HOUR

## DOL'S PROPOSED FLSA REGULATIONS: WHERE DO WE GO FROM HERE?

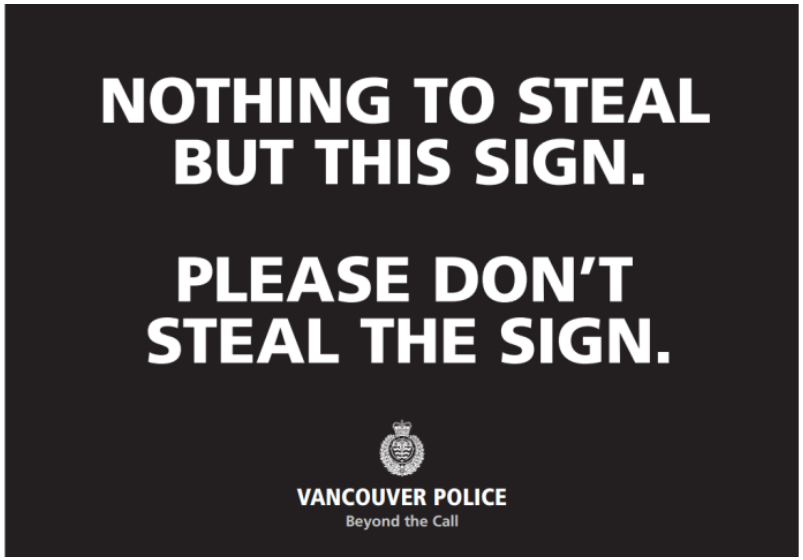
- Comment Period closed on September 4, 2015.

- Crystal Ball Gazing:
  - The Administration wants a final rule before it leaves office.
  - Historically employers are given at least 6 months' advance notice whenever wages/salaries are implicated by a change to federal regulations.
  - We do not expect the final rule to take effect any sooner than January 1, 2017.

# WAGE & HOUR

## E.O. 13665 – PAY TRANSPARENCY & NON-RETALIATION

- Signed by President in April 2014
- Proposed Rule issued by OFCCP in Sept. 2014 and Final Rule issued Sept. 10, 2015
- *Final Rule effective January 11, 2016 and covers all federal contractors
- Prohibits retaliation/discrimination for inquiring about, discussing, or disclosing compensation information
- Requires amendment to your E.O. 11246 EEO clause to include non-retaliation, including in employee handbooks
- New "Equal Employment Opportunity is the Law" poster

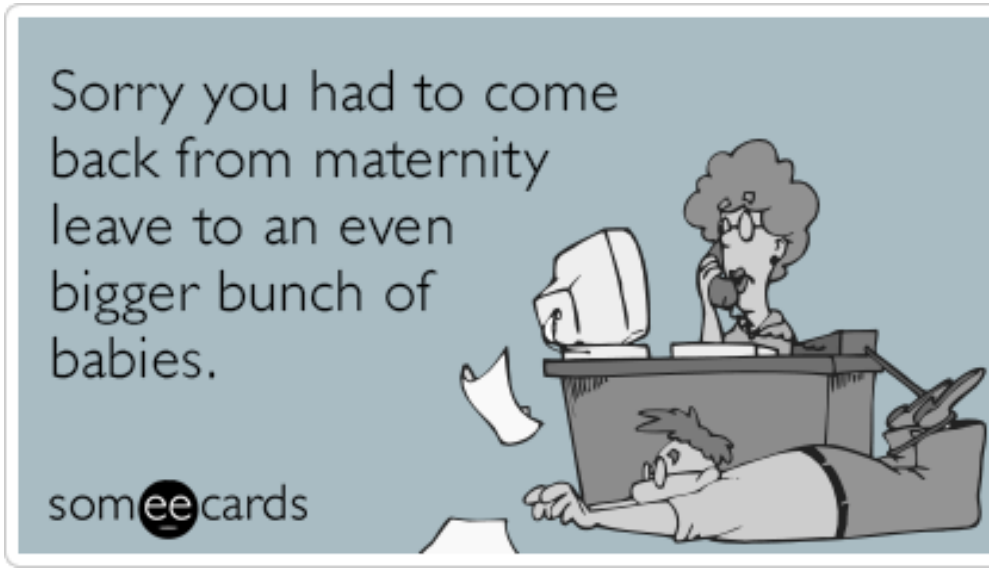


# WAGE & HOUR

## E.O. 13702 – PAID SICK LEAVE

- **Signed by President September 7, 2015**
- **Applicable to all federal contractors**
- **Goal - 7 days or more of paid sick leave annually**
  - All employees shall earn not less than 1 hour paid sick leave per 30 hours worked
  - Limit on total accrual of paid sick leave per year must not be less than 56 hours
  - Accrued paid sick leave must carry over
  - Accrued paid sick leave must be reinstated for employees rehired within 12 months of a job separation
  - Limit on when certification may be required for use of paid sick leave – absences of 3 or more consecutive work days
- **Regulations expected by September 2016 with final effective date by January 1, 2017**

# PREGNANCY AND THE WORKPLACE

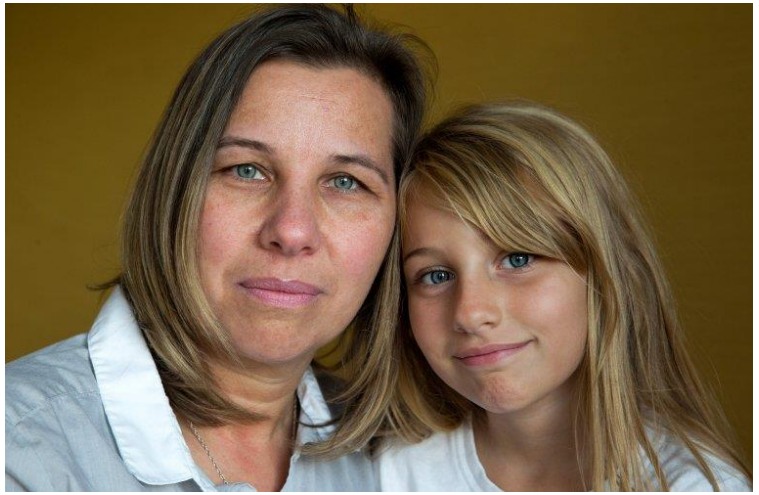


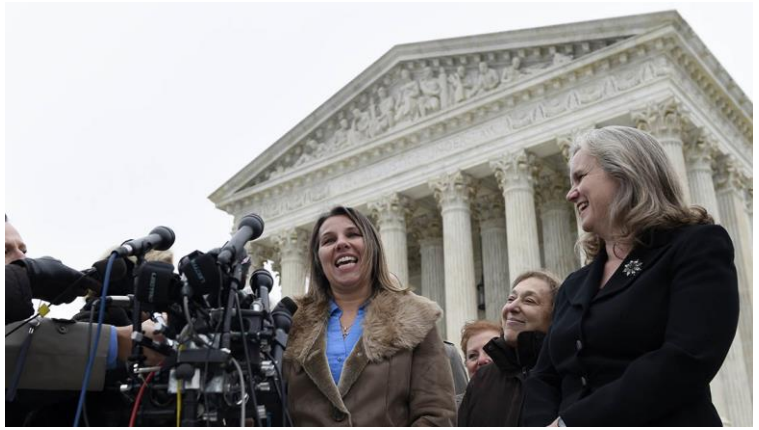
# DISCRIMINATION UPDATE

## YOUNG V. UNITED PARCEL SERV., INC.

135 S.Ct. 1338 (2015)

- Peggy Young was a part time delivery driver
- All drivers are required to lift up to 70 lbs, although Young's duties usually required delivering letters and small packages
- After becoming pregnant, she took unpaid leave and then presented a doctor's note with a 20 lb max lifting restriction
- She asked for an accommodation of light duty
- UPS refused the light duty and instructed her to remain on leave, because lifting over 20 lbs was an essential function of the job
- UPS maintained a light duty work program for employees who experienced on-the-job injuries. It also provided accommodations and light duty to persons with ADA disabilities
- Young sued for discrimination under PDA





# DISCRIMINATION UPDATE

## YOUNG V. UNITED PARCEL SERV., INC.

- The MD District Court granted summary judgment for UPS, finding Young had failed to establish a prima facie case
- The 4th Circuit agreed, finding that UPS had no duty to offer Young light duty so long as it offers similar accommodations to pregnant employees as non-pregnant employees. The court argued that a broad reading of PDA would be tantamount to granting a "most favored nations" status to pregnant workers to the disadvantage of all other employees who would receive no accommodation for injuries sustained off-the-job
- Young appealed and argued the PDA requires employers to provide light duty to a pregnant employee if it provides light duty to other employees in other circumstances

# DISCRIMINATION UPDATE

## YOUNG V. UNITED PARCEL SERV., INC.

- The Court rejected EEOC's July 2014 guidance, questioning the timing of its release after the Court had already granted cert
- Rejected UPS's argument that a facially neutral policy that treats medical issues originating on-the-job different from those off-the-job is permissible since it treats pregnant employees the same
- The Court agreed with the 4th Circuit that PDA did not intend to confer "most favored nations" status to pregnant workers

# DISCRIMINATION UPDATE

## YOUNG V. UNITED PARCEL SERV., INC.

- The PDA's comparison of "other persons" does not mean pregnant employees are entitled to the same accommodation as any single other person who is similar in ability or inability to work
- Rather, a pregnant employee can establish a prima facie case by showing (1) the employer denied a request for a pregnancy accommodation; and (2) the employer accommodated other employees similar in their ability or inability to work. If the employee satisfies this burden, the employer must provide a legitimate, non-discriminatory reason (LNR) for denying the accommodation
- The legitimate reason may not be based on the expense or inconvenience of accommodating pregnant employees on similar terms as non-pregnant employees
- If the employer provides LNR, the plaintiff must show pretext

# DISCRIMINATION UPDATE

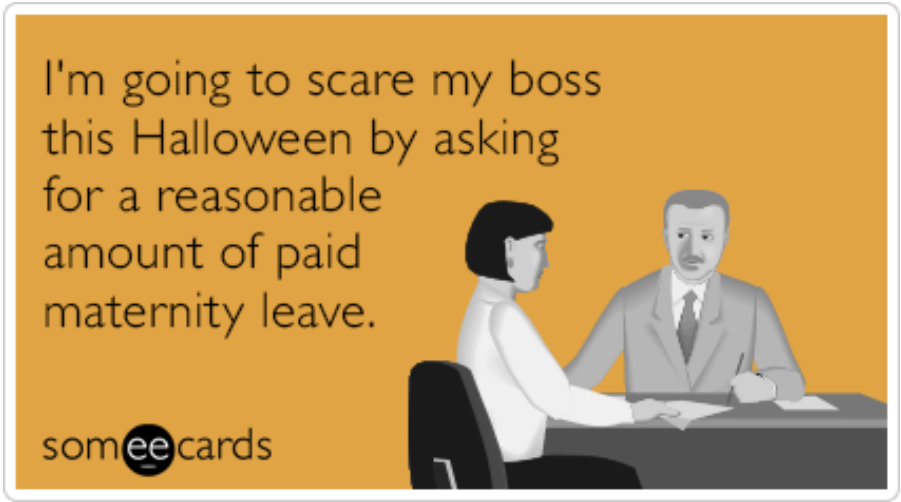
## YOUNG V. UNITED PARCEL SERV., INC.

- A plaintiff could establish pretext by (1) significant evidence that facially neutral policies impose a "significant burden" on pregnant employees, and (2) the employer's legitimate, nondiscriminatory reasons are not "sufficiently strong" to justify the burden
- The Court gave an example where a plaintiff could show that an employer accommodated a large percentage of non-pregnant employees without accommodating a large percentage of pregnant employees
- Remanded to the 4th Circuit with the instruction that Young had proved a prima facie case because UPS had three categories of leave that accommodated a large percentage of non-pregnant employees, creating disputed fact whether it treated non-pregnant employees more favorably

# DISCRIMINATION UPDATE

## EEOC'S 2015 REVISED PDA GUIDANCE

- On June 25, 2015, EEOC revised its PDA guidance in the wake of the Supreme Court's *Young v. UPS* decision:
  - We meant what we said in 2014
  - Except that we embrace the rules of *Young*
  - We no longer understand the difference between disparate treatment and disparate impact under the PDA and we will enforce the law accordingly

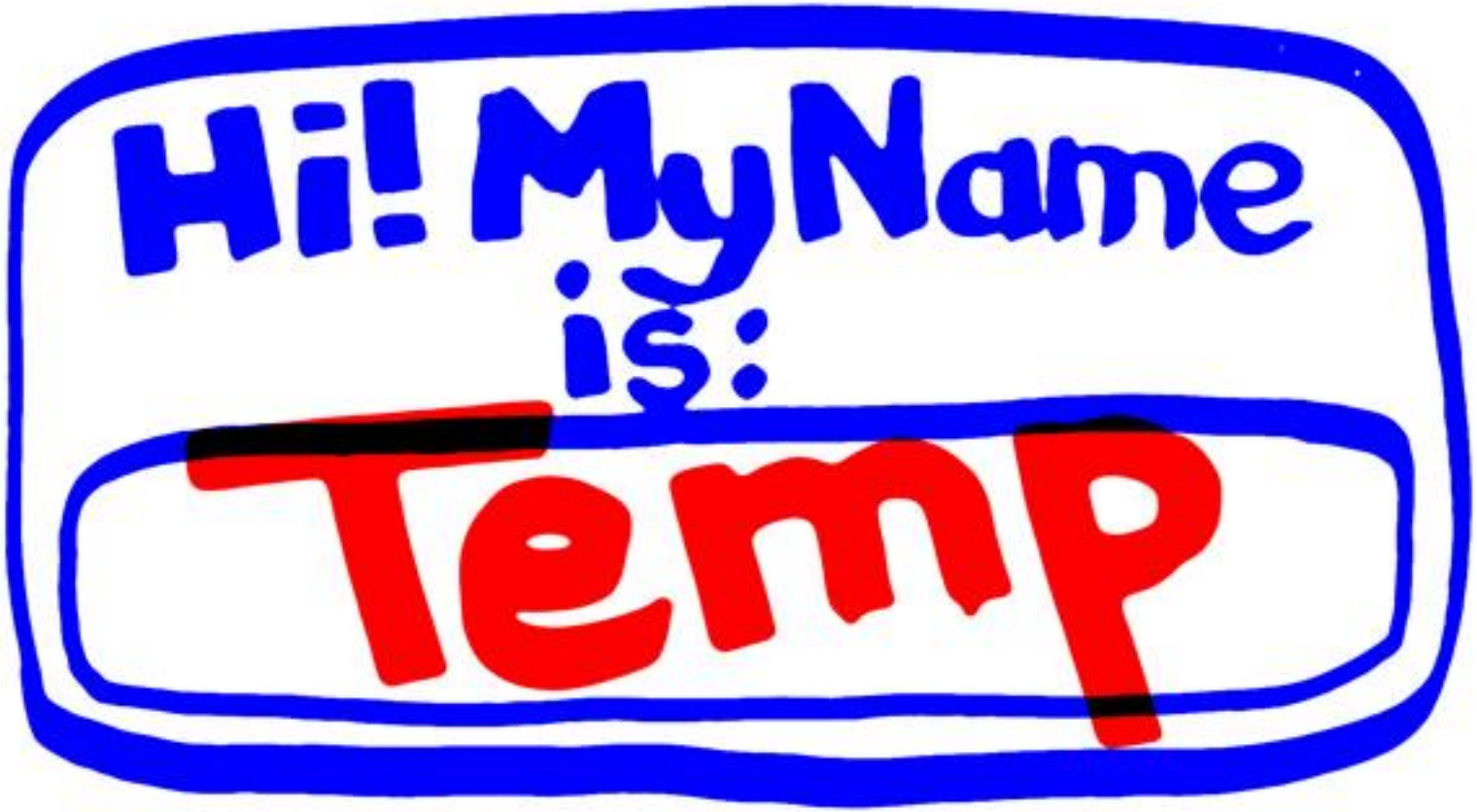


# DISCRIMINATION UPDATE

## *YOUNG* TAKEAWAYS

- Although *Young* stopped short of finding all employer light duty policies must be open to pregnant employees, it left unresolved just how an employer could deny light duty to pregnant employees without it being pretext
- Most employers need to revisit their leave policies and how they apply them
- Although pregnancy is not an ADA disability (yet), even though pregnancy complications are covered as temporary impairments, would it not be more prudent to treat it like one?

# JOINT EMPLOYMENT AFTER *BROWNING FERRIS*



# JOINT EMPLOYMENT

## *BROWNING FERRIS*

**32-RC-109684 (NLRB August 27, 2015)**

- National Labor Relations Board decided whether Browning Ferris Industries ("BFI") was a joint employer with its temp service, Leadpoint, in a union petition pending against Leadpoint

- NLRB (3-2 decision) found BFI to be a joint employer using a new two-part test:
  - Does a common law employment relationship exist?
  - Do two or more employers share or codetermine the essential terms and conditions of employment?

- In temp relationship, does the site employer have the ability to affect the means of temp employee work, terms of employment either directly or indirectly?

# JOINT EMPLOYMENT

## *BROWNING FERRIS* TAKEAWAYS

- Employers who use temp staffing firms should reevaluate the relationship in light of likely joint employment
  - Did the initial relationship contemplate the possibility of joint employment?
- Consider what rights the site employer has reserved in the contract
  - Is there even a contract?
  - What does it say about who controls the work?
- If temp agency is exposed to a union petition, the same may be true for site employer
- But other theories of joint liability may apply now, too
- Introduces potentially conflicting business interests in defense of claims, union bargaining

# Q&A

## 2015 HRM Legal Update

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