Top Ten Employment Law Risks in the Hospitality Industry for 2014[1]

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I. Exempt Status and The FLSA White Collar Exemptions

The Fair Labor Standards Act (FLSA) "white collar" exemptions exempt executive, administrative, or professional employees from the FLSA's overtime and minimum wage requirements.[2] A common misunderstanding of employers is that designating an employee as "salaried" makes them exempt. In fact, exempt employees must meet both a salary and a duties test. The FLSA salary test requires payment of at least $23,660 a year in salary. In addition, the duties test of one of the three exemptions must be met.

A. The Executive Exemption

Exempt executives are those whose primary duty is management of the business or of a department or subdivision of the business. In addition, they must regularly manage at least two employees, must be able to hire or fire or make recommendations as to hiring, firing, and other status changes. Those recommendations must be given particular weight, as opposed to just being made and never acted upon.

In addition, the employee's primary duty must be the performance of exempt work. Many employers have subjected themselves to class action liability by failing to properly apply the primary duty test. Under FLSA regulations, "primary duty" is the principal, main, major or most important duty that the employee performs, "with the major emphasis on the character of the employee's job as a whole."

A multi-factor test applies, including the relative importance of the exempt duties, other types of duties, the amount of time spent performing exempt work, the employee's relative freedom from direct supervision, and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed. Employees can still be exempt if they spend less than fifty percent of their time on exempt duties, but an analysis of the actual tasks performed should be conducted before reaching any classification decision. Employee surveys, time and motion studies, consultant review, and job descriptions can all be helpful when deciding whether an employee meets the primary duty test.

A significant amount of class action litigation has resulted from employers classifying lower-level managers as exempt under the executive exemption. Employers should proceed with caution when dealing with lower-level managers, making sure that they are actually managing two more employees as their primary duty and carrying out the other functions required under the duties test. Often, a low-level managerial employee is only spending 10% of their workday performing bona fide managerial tasks.

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[1] The information in this memorandum is not to be relied upon as legal advice. Consult legal counsel for advice in any particular situation.

[2] Additional exemptions exist. This memorandum addresses the three white collar exemptions only.

B. The Administrative Exemption

The administrative exemption has created substantial confusion for employers, and is often used as a fallback position when the employee fails to meet the duties test of the executive exemption. Many employers have been faced with class action lawsuits for failing to thoroughly analyze the administrative exemption and the detailed regulations interpreting it set forth in the Code of Federal Regulations.

To qualify for the exemption, the employee's primary duty must be performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. In addition, the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. Work "directly related to the management or general business operations" includes work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, Internet and database administration, legal and regulatory compliance, and similar activities.

In determining whether an employee "exercises discretion and independent judgment with respect to matters of significance," relevant factors include:

- whether the employee carries out major assignments in conducting the operations of the business;
- performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- has authority to formulate, affect, interpret or implement management policies or operating practices;
- can waive or deviate from established policies and procedures without prior approval;
- can commit the employer in matters that have significant financial impact;
- provides consultation or expert advice to management; is involved in planning long-or short-term business objectives;
- investigates and resolves matters of significance on behalf of management; and
- represents the company in handling complaints, arbitrating disputes or resolving grievances.

When employees do not fit neatly into the categories approved of by the regulations, it is critical that a thorough review of the employee's duties be conducted prior to classifying them as exempt. Often a few minor adjustments to an employee's scope of responsibility is enough to nudge the employee into having primarily exempt duties.

C. Professional Employees

Professional employees exempt from FLSA overtime pay requirements are those whose primary duty is performance of work requiring either knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Historically, these exemptions have not created significant class action liability for employers, as they largely involve traditional professions such as medicine, accounting, law, architecture, and similar professions.

Nevertheless, employers have run into problems in this area when they seek to classify certain positions as exempt, such as bookkeepers and other positions that share some of the duties of exempt professionals. A full analysis of any such decisions should be conducted to make sure that the positions qualify under the FLSA.

II. Hours Worked

A. "Off The Clock" Work

The FLSA broadly defines hours worked to include all hours employees work, including work not requested but "suffered or permitted" by an employer.

In cases where the employer has time records that are generally compliant, the fallback position for plaintiffs in both class action and single plaintiff cases has been to allege that the employees at issue have worked "off the clock." These cases have often faced an uphill battle at the class action certification stage. But employers must be aware of their duty to compensate nonexempt employees for "off the clock" work (before punching in or after punching out on a time clock) if the employer knows or should have known that the employee was working.

Therefore, employers need to make clear in their employee handbooks, and during the orientation process, that off the clock work is strictly prohibited. They also need to provide a mechanism by which employees can report any alleged off the clock work required by a supervisor. And they should take swift disciplinary action against any supervisor found guilty of requiring employees to work off the clock.

Taking these steps allows the employer to assert certain defenses under the FLSA. For example, the courts have generally recognized that where an employer has established a reasonable process for employees to report uncompensated work time, the employer is not liable under the FLSA for nonpayment if the employee fails to follow that established procedure.

B. Break Time

Under the FLSA, for break time to not be considered hours worked, breaks need to be at least thirty minutes in length; twenty minute meal breaks are allowed only under special conditions. Meal periods are not worktime under federal law if the employee is not on duty. Many employers have been sued on a class action basis for automatic deductions of meal breaks. Any automatic deduction policy should provide ample mechanisms by which employees are allowed to report any inaccurate deductions. Managers also need to be thoroughly trained on such a policy.

C. On Call Time

Additional liability is often created by the problem of "on call" time. On call time may be compensable if it is spent primarily for the benefit of the employer. The predominant considerations are the agreement of the parties and the degree to which the employee is free to engage in personal activities. Relevant factors include:

- whether there was an on-premises living requirement;
- whether there were excessive geographical restrictions on the employee's movements;
- whether the frequency of calls was unduly restrictive;

- whether a fixed time limit for response was unduly restrictive;
- whether the on-call employee could easily trade on-call responsibilities;
- whether use of a pager could ease the restrictions on the employee; and
- whether the employee actually engaged in personal activities during call-in time.

In addition, substantial litigation has occurred over time spent by an employee getting ready for work before clocking in – "preparatory activities." Such activities, if they are an integral part of the employee's principal activity, are time worked. However, time spent in changing clothes or washing at the beginning or end of each workday is not considered compensable time.

Under the Portal-to-Portal Act, travel time between home and work is generally not compensable. Time spent attending lectures, training programs or meetings is not compensable if (i) attendance is outside regular working hours, (ii) attendance is voluntary, (iii) the session covers material not directly related to the employee's job, and (iv) the employee does not perform any productive work during the session.

III. Tipped Employees

A wave of class actions lawsuits has rippled through the hospitality industry over tip-related issues. Employers may not use tips for any reason other than as a credit against minimum wage or as part of a tip pool. Under the FLSA, an employer may take a tip credit toward minimum wage equal to the difference between the required cash wage (which must be at least $2.13) and the federal minimum wage, meaning the maximum tip credit is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13). A tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit.[3]

The employer must provide the following information to a tipped employee before the employer may use the tip credit:

- the amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;
- the additional amount claimed by the employer as a tip credit, which cannot exceed $5.12 (the difference between the minimum required cash wage of $2.13 and the current minimum wage of $7.25);
- that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

[3] A recent federal case has affected the state of the DOL's regulations in this area. In *Oregon Restaurant and Lodging Ass'n et al. v. Solis*, -- F. Supp. 2d --, 2013 WL 2468298 (D. Or. 2013), the U.S. District Court for the District of Oregon declared the DOL's 2011 regulations that limit an employer's use of its employees' tips when the employer has not taken a tip credit against its minimum wage obligations to be invalid. Pending resolution of that case, the Department has decided that it will not enforce its tip retention requirements against any employer that has not taken a tip credit in jurisdictions within the Ninth Circuit while the federal government considers its options for appeal of the decision. The Ninth Circuit has appellate jurisdiction over the states of California, Nevada, Washington, Oregon, Alaska, Idaho, Montana, Hawaii, and Arizona; Guam; and the Northern Mariana Islands.

- that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
- that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

An employer who fails to provide the required information cannot use the tip credit provisions and must pay the tipped employee at least $7.25 per hour in wages and allow the tipped employee to keep all tips received. Tipped employees must receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If they do not, the employer must make up the difference. In addition, employers have subjected themselves to liability by paying tipped employees overtime at their tip credit rate, as opposed to their minimum wage rate.

The FLSA prohibits any arrangement between the employer and the tipped employee under which any part of the tip becomes the property of the employer. Thus, even if a tipped employee receives at least $7.25 per hour in wages from the employer, the employee may not be required to turn over tips to the employer.

However, a valid tip pooling arrangement among employees who customarily and regularly receive tips is permitted. The FLSA does not impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each tipped employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

The Department of Labor (DOL) has recognized that employees who customarily and regularly receive tips include waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders. The DOL has taken the position that a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors.

Employees in both a tipped and a non-tipped occupation, such as maintenance persons and waitpersons, can take the tip credit only for hours spent in the tipped occupation. An employer can take the tip credit for some time that the tipped employee spends in duties related to the tipped occupation, even though those duties are not by themselves directed toward producing tips. For example, a waitperson who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation, even though these duties are not tip producing. However, where a tipped employee spends a substantial amount of time (in excess of twenty percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties.

A compulsory charge for service, for example, fifteen percent of the bill, is not a tip. Amounts distributed to employees from service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a percentage on each sale, the employer may pay the employee the tip, less that percentage. For example, where a credit card company charges an employer three percent on all sales charged to its

credit service, the employer may pay the tipped employee ninety-seven percent of the tips. However, this charge on the tip may not reduce the employee's wage below the required minimum wage. The amount due to the employee must be paid no later than the regular pay day and may not be held while the employer is awaiting reimbursement from the credit card company.

IV. Independent Contractors

Recent studies show that businesses misclassify anywhere from 10% to 60% of workers as contractors. The IRS, working with the Department of Labor, has set a goal of investigating 6,000 employers for misclassification issues. According to the Department of Labor, since September 2011, the federal government has collected more than $9.5 million in back wages for more than 11,400 workers misclassified as contractors. In evaluating contractor status, the DOL uses the "Economic Realities Test."

As the U.S. Supreme Court has explained, the goal of the analysis is to determine the underlying economic reality of the situation, and whether the individual is economically dependent on the supposed employer. An employee is one who "follows the usual path of an employee" and is dependent on the business the employee serves. The factors that the Supreme Court has considered significant, although no single one is regarded as controlling, are:

> (1) the extent to which the worker's services are an integral part of the employer's business. Examples: Does the worker play an integral role in the business by performing the primary type of work that the employer performs for his customers or clients? Does the worker perform a discrete job that is one part of the business' overall process of production? Does the worker supervise any of the company's employees?;
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> (2) the permanency of the relationship. Example: How long has the worker worked for the same company?;
>
> (3) the amount of the worker's investment in facilities and equipment. Examples: Is the worker reimbursed for any purchases or materials, supplies, etc.? Does the worker use his or her own tools or equipment?;
>
> (4) the nature and degree of control by the principal. Examples: Who decides on what hours to be worked? Who is responsible for quality control? Does the worker work for any other company(s)? Who sets the pay rate?;
>
> (5) the worker's opportunities for profit and loss. Examples: Did the worker make any investments such as insurance or bonding? Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?; and
>
> (6) the level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise. Examples: Does the worker perform routine tasks requiring little training? Does the worker advertise independently via yellow pages, business cards, etc.? Does the worker have a separate business site?.

The most important factor is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has that right of control, an employer-employee relationship exists, even if the right is not exercised.

Doing the same work for the general public as for a specific business suggests contractor status. Contractors are more likely to hire or fire their own employees without the employer's consent. Contractors might also have a separately incorporated business and business cards, or advertise to the public. If an employer has employees who typically do the same type of work as contractors, this suggests employee status. If the worker previously performed work as an employee, but is now called a contractor, that also suggests contractor status. The wage hour laws seek to protect unskilled or semi-skilled workers. The less skill involved, the more likely the worker will be deemed an employee. In addition, contractors typically make business decisions that affect their ability to make a profit or suffer a loss.

Contractors typically provide their own tools, equipment and supplies. The more the worker personally invests in these items, the more this points to contractor status. Contractors also typically decide when and where work is performed.

If the work is an isolated event, it is more likely to be performed by a contractor; ongoing work is more likely to be performed by employees. If the employer can fire the worker or they can quit at any time, they are more likely to be an employee. Contractors cannot walk away until a job is complete. Moreover, contractors agree to do a job and are paid upon completion of the project. Paying employees on regular basis, such as salary or hourly, suggests employment status.

Work that is part of the employer's regular business is typically done by employees. For example, a sales clerk selling shoes in a shoe store, compared to a plumber hired to fix the store's pipes. A written agreement indicating that the parties believe the relationship is that of contractor can be helpful when other factors are less clear. Contractors are free to do jobs in their own way, using specific methods they choose. They are engaged for the end result. Employees are typically trained and given specific instructions how to perform, their performance is evaluated, and they are subject to discipline if they fail to meet a certain standard. If the work is being done as part of a business enterprise, it is more likely performed by an employee, as opposed to work for the benefit of an individual.

Other relevant factors include whether the worker completes tax forms and is on payroll with deductions, whether the employer keeps books and records for the worker, and whether the worker must work only for the company.

Employers should note, however, that these factors are neither determinative nor complete. They are merely relevant to the right to control analysis, and can be overridden by other, more compelling evidence that establishes the right of control. In addition, no one factor controls; all must be considered together.

In September 2011, the IRS and the DOL entered into a Memorandum of Understanding, which states as its purpose, "[t]he sharing of information and collaboration between the parties will help reduce the incidence of misclassification of employees as independent contractors, help reduce the tax gap, and improve compliance with federal labor laws." Thus, an audit by one of these agencies that uncovers contractor issues will likely result in an audit by the other agency.

Penalties for failure to properly classify can be severe, and can include federal and state income tax withholding, unemployment insurance contributions, workers' compensation penalties, liability for minimum wages and overtime, and more. By preparing in advance, however, employers can reduce the risk associated with a classification status audit or lawsuit.

V. EEOC Background Check Guidance

On April 25, 2012, the U.S. Equal Employment Opportunity Commission issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. The EEOC expressed concerns about employers using arrest and conviction records to unlawfully discriminate against job applicants based on their race or national origin and about reintegrating criminal offenders into the work force.

The EEOC's general position is that blanket use of criminal conviction records causes an unlawful disparate impact on African-Americans and Hispanics. It bases this conclusion on statistics showing that such minority groups are convicted at a rate disproportionately greater than their representation in the population." According to the EEOC, any use of such information must be justified by business necessity. The guidance also makes clear that background checks can violate the disparate treatment standard when used to treat applicants or employees differently based on a protected category.

To show business necessity under the guidance, an employer making an employment decision based on a criminal conviction must consider the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job.

Employers in the hospitality industry routinely use background checks due to the sensitive nature of many of the positions at issue. Employees with regular access to guest rooms, spa employees, and employees serving alcoholic beverages, to name just a few, all present risks. Indeed, hospitality industry employers have faced negligent hiring lawsuits alleging failure to uncover facts that a basic background check could have revealed.

To balance these risks, employers should review the factors set forth under the EEOC's three-factor test when making employment decisions. They should also consider the guidance's recommended best practices, which include:

- eliminating policies or practices that exclude people from employment based on any criminal record;

- training managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination;

- developing a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct (the guidance provides detailed recommendations);

- when asking questions about criminal records, limiting inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity; and

- keeping information about applicants' and employees' criminal records confidential.

VI. Social Media

A. NLRB Enforcement

Over the past two years, the National Labor Relations Board (NLRB) has issued decisions and guidelines regarding the nature of protected employee speech under the National Labor Relations Act (NLRA). Under this line of authority, employees may lawfully discuss "concerted activity" through personal social media accounts. The NLRB has found unlawful overly-broad policies that can reasonably be interpreted as a restriction on the exercise of collective bargaining rights.

The NLRA protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter. In response to requests from employers for guidance in this developing area, the NLRB released three memos in 2011 and 2012 detailing the results of investigations in dozens of social media cases.

The first report, issued on August 18, 2011, described 14 cases. In four, the NLRB found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five others, the activity was found to be unprotected. In five cases, some provisions of the policies were found to be overly-broad.

The second report, issued on January 25, 2012, also looked at 14 cases. If found five employer policies to be unlawfully broad, and two lawful. The NLRB also found several discharges unlawful because they flowed from unlawful policies. The report stressed that (1) employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees and (2) an employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

In the third report, issued on May 30, 2012, the Board examined seven employer policies. In all seven, it found some or all provisions of the policies to be unlawful because they interfered with the rights of employees to discuss wages and working conditions.

On September 28, 2012, the Board found that the firing of a BMW salesman for photos and comments posted to his Facebook page did not violate the NLRA, because the salesman was fired exclusively for posting photos of an embarrassing accident at an adjacent Land Rover dealership that did not involve fellow employees, not for posting mocking comments and photos with co-workers about serving hot dogs at a luxury BMW car event. The incident was not concerted activity and thus was not protected.

On December 14, 2012, the Board found that it was unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a coworker who intended to complain to management about their work performance. It found that the Facebook conversation was concerted activity.

B. Best Practices

Employers have discovered that social media can have many benefits, including increasing website visitors, enhancing brand awareness, and building client relationships. However, social media has also subjected employers to increased liability exposure. For example, employers can be held liable for employee actions done within the course and scope of employment. So, if an employee uses Facebook to post false statements or rumors about a competitor or co-worker, that employee might expose his employer to potential defamation claims. In addition, misstatements or misrepresentations about a competitor could lead to trade libel claims. Online dissemination of employees' disparaging or inappropriate comments are another concern. Thus, employers need a clear policy setting forth in advance the parameters of proper social media use.

Employees do not have free reign to denigrate their employers. For example, "Cisco Fatty," a young University of California student, made headlines after getting fired over a tweet about her internship, which read, "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work." Cisco rescinded her offer. The employee did not challenge Cisco's decision, but it appears unlikely that this type of speech — having no connection to any complaint about actual or potentially unlawful working conditions — would be legally protected conduct.

In addition to the NLRB, state legislatures have been active regarding social media policies. Maryland, Illinois, California, Michigan, Utah, New Mexico, Arkansas, Colorado, Washington, Oregon, and Nevada have all passed bills that, in some form, prohibit an employer from requesting or requiring that an employee or applicant disclose any username, password, or other means for accessing a personal account or service through specified electronic communications devices. Many of these states also prohibit an employer from forcing employees or applicants to log in to their accounts in the presence of the employer. And retaliation against an employee or applicant for refusing to provide access to a social media account is unlawful in most of these states. Some states such as California have carved out exceptions for legitimate needs, such as workplace investigations. Furthermore, public employers must consider an entirely separate body of law that protects certain speech by public employees. Employers must be aware of the evolving body of federal and state law on social media when crafting a policy.

In addition, employers must ensure that social media activity does not violate policies against harassment. In addition, employers should suggest that employees use caution when posting on social media websites. Although certain online conversations about co-workers are technically protected, as a best practice, employers should discourage employees from discussing co-workers online, particularly given that employers can be held liable under federal and various state laws, in certain circumstances, for harassment committed by supervisors.

Moreover, confidential and proprietary information can be easily disclosed through social media, even when employees are not seeking to harm the company, but rather are excited about a new product, marketing strategy, or merger. Employees who carelessly post confidential information might also breach a fiduciary duty, as well as copyright and trademark laws.

For example, a mobile phone website sued a former employee alleging that the 17,000 Twitter followers he gained while working there were exactly the same as the website's customer list, and thus did not belong to him In another case, the founder of a company was fired but kept her company

LinkedIn account. The new owners claimed that she was misappropriating her identity to obtain trade secrets. Although the court ultimately held that the contents and connections of the LinkedIn account did not constitute "trade secrets" because they were generally known to the wider business community via the LinkedIn website, it is a good example of the need for an explicit and clear social media policy. Employers should prohibit posting confidential or proprietary information on social media accounts and should require employees to identify and credit all copyrighted or borrowed material.

Employers should also explain the consequences for violating the social media policy. Some actions may be more serious than others, resulting in termination, rather than just a warning. Employers should require all employees to sign an acknowledgement form, stating that they have agreed to the policy. Furthermore, because the social media world evolves constantly, policies need to be reviewed and updated regularly.

Employers should take the following steps when creating a social media policy:

- Do Not Prohibit Protected NLRA Activity: indicate that protected speech cannot be censored by an employer;

- No Unlawful or Abusive Remarks: offensive, demeaning, defamatory, abusive, or inappropriate remarks must be prohibited;

- Be Specific: an overly broad policy could violate the NLRA;

- Requiring Disclaimers as Necessary: examples include, such as, "The postings on this site are my own and do not represent the employer's positions, strategies, or opinions," if the postings directly or indirectly relate to the employer;

- Prevent Bullying, Discrimination, and Harassment: be clear that this kind of behavior will not be tolerated;

- Comply With State and Federal Laws: remind employees not to post any information or engage in any activity that violates applicable local, state or federal laws;

- Posts About the Company: remind employees that posts can be reviewed, copied, and disseminated by others, including competitors;

- Ownership of Material: describe what belongs to the company. Blog posts created during non-working hours on topics unrelated to the business will likely belong to the employee.

- Protect Trade Secrets: protect confidential, proprietary information prohibiting unauthorized dissemination.

- Educate and Enforce: educate the workforce and make the policy readily available; then monitor and enforce the policy, and update it regularly.

VII. Retaliation

Title VII of the 1964 Civil Rights Act prohibits actions taken in retaliation for activity protected under the statute. Retaliation claims may be brought to trial even where the employee's primary claims are dismissed. To establish a prima facie case, a plaintiff must show that:

- the plaintiff engaged in a protected activity;
- the employer subjected the plaintiff to an adverse employment action; and
- a causal link exists between the protected activity and the employer's action.

Moreover, Title VII protects employees who:

- make a charge, testify, assist or participate in any manner in proceedings or hearings under the statutes ("the participation clause"); or
- oppose acts made unlawful by the statutes ("the opposition clause").

The employee, however, need not actually prove that an unlawful act occurred. The employee is protected if the employee had a reasonable and good faith belief that the employer's practice was unlawful.

The employee must show that the adverse action happened after or simultaneously with the protected activity. Moreover, the employer's retaliatory actions must have been "materially adverse" to the employee, which, according to the courts, means that they were harmful to the point that they could dissuade a reasonable employee from engaging in protected activity, such as complaining to the EEOC or the employer.

A key aspect of retaliation cases is timing. To prevail, the employee must demonstrate a causal link between the protected activity and the adverse action. The causal link can be established by circumstantial evidence, such as the employer's knowledge that the employee engaged in protected activities, the proximity in time between the protected action and the allegedly retaliatory adverse action, or a pattern of conduct consistent with a retaliatory intent, such as hostile treatment or exclusion from meetings.

The courts are divided on the importance of timing, and how closely the adverse action must follow the alleged protected activity. For example, some courts hold that timing alone is sufficient to allow a lawsuit to move forward, while others hold that timing alone is insufficient. In addition, some courts find that the temporal proximity must be very close – e.g., one month – while others take a more lenient view.

The key takeaway for employers is that the underlying discrimination and harassment is only part of their risk analysis when preparing to take an adverse action. Whether the employee engaged in good faith protected activity is a key part of the analysis. And, the closer in time that protected activity to the contemplated adverse action, the greater the risk. Juries have repeatedly made it clear that they are willing to punish retaliatory behavior with high punitive damages awards.

In addition, employers should be cognizant that employees often will engage in alleged "good faith" protected activity just before an adverse action is about to occur. Employees tend to develop a sixth sense about an impending termination, demotion, etc., and often report some alleged violation by the employer, such as a safety violation, or seek to exercise a right, such as FMLA leave, before the employer can take action. Thus, employers should not excessively delay or agonize over adverse action decisions. The longer the employer waits, the more likely it is that the employee will beat the employer to the punch and create additional risk by engaging in protected activity.