BELL NUNNALLY
ATTORNEYS & COUNSELORS

LABOR AND EMPLOYMENT LAW

WHAT YOU NEED TO KNOW IN 2015

2015 holds several significant human resource and labor relations changes. This Alert highlights the major developments impacting employers.

THIS ALERT COVERS

- **Supreme Court Ruling Says Employers May Need to Accommodate Pregnant Workers**
- **Recent NLRB Ruling Allows Employees to Use their Employer's Email for Union-Related Communications**
- **Does Saks Have the Legal Right to Fire a Transgender Employee?**
- **Employer Credit Checks Create Growing Litigation Risk**
- **Recent NLRB Decisions Reinforce the Board's Vigilance Over Terminations Involving Social Media Postings**
- **Paid Sick Leave – Are you Ready?**

I. Supreme Court Ruling Says Employers May Need to Accommodate Pregnant Workers.

On March 25, 2015, the United States Supreme Court ruled in *Young v. United Parcel Service* that under certain circumstances employers are obligated to provide light duty to pregnant employees.

Historically, Title VII, the federal law that protects pregnant employees, and the Americans with Disabilities Act ("ADA") have not required employers to accommodate workers experiencing physical limitations associated with an ordinary pregnancy. *Young v. UPS* explored the extent to which those workers might be entitled to light duty or some other accommodations.

The ADA only requires accommodation for pregnancy related complications that results in a condition constituting a "disability." But what about the limitations of ordinary pregnancy – fatigue, inability to stand for extended periods, back pain, lifting restrictions? In this case, Young was a part time driver for UPS who required a 20 pound lifting restriction after she became pregnant. UPS responded that they had no light duty jobs to fit that limitation. Young sued for discrimination, arguing that UPS' pregnant workers were being discriminated against because UPS provided light duty for other workers with physical limitations, such as those on workers compensation. UPS, Young argued, cannot pick and choose which categories of workers to whom it offers light duty. Because UPS did not persuasively argue why pregnant workers were not entitled to the same benefits afforded other workers with limitations, the Supreme Court sided with Young and sent the case back to the 4th Circuit Court of Appeals.

Guidance for Employers: This decision does not mean that all pregnant workers are entitled to relief from regular work requirements in every instance. Instead, the Supreme Court found that if employers provide work relief to other workers it must provide pregnant workers the same relief, absent compelling facts differentiating between the two classes of workers in a way that justifies denial of that relief to the pregnant workers.

II. Recent NLRB Ruling Allows Employees to Use their Employer's E-Mail for Union-Related Communications.

The NLRB has taken an aggressive stance in recent years to promote union activity to try to reverse the trend of a declining unionized worker population in the United States. A recent NLRB decision illustrates this. On December 11, 2014, the National Labor of Relations Board ruled in the *Purple Communications* case that employers cannot prohibit employees during non-working time from using their employer's e-mail system to communicate about terms and conditions of employment, including union organization.

The *Purple Communications* ruling gives employees, for the first time, the right to use their employer's e-mail for union organizing. The decision by the Board overturned the 2007 decision in *Register Guard* which said that employees have no right to use employer e-

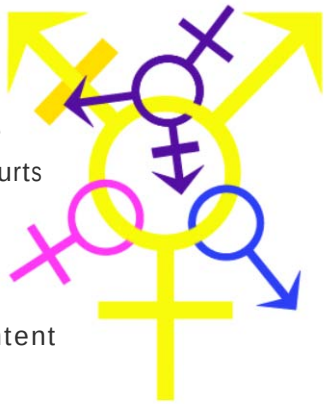
mail systems other than as permitted by the employer. The *Purple Communications* decision found that employees are entitled to use the employer's e-mail systems during non-working time for protected communications. This allows the employees to not only converse about pay, benefits, hours, and other policies and procedures of the employer, but to also outright discuss the possibility of union organization.

In its decision, the NLRB provided few limitations on employee use of employer e-mail, such as whether employees are restricted from using the company's e-mail system in a manner that impacts work productivity or workplace discipline. The only restriction provided by the Board was that the e-mail activity not take place during working hours. Presumably, this means employees can use the e-mail system before and after work, as well as during lunchtime.

Guidance for Employers: Employers can still monitor their employees' use of email and the computer system as long as that practice is motivated by a legitimate business purpose. As before, to restrict the expectation of privacy, employers need to notify employees that their e-mail communications may be monitored. The Board cautioned in *Purple Communications* that increased e-mail monitoring during possible union organizing activity or selective monitoring of e-mail communications by union supporters will attract Board scrutiny. This includes employers selectively monitoring those workers with whom it has concerns about union organizing activity.

III. Does Saks Have the Legal Right to Fire a Transgender Employee?

In Texas a former employee of Saks Fifth Avenue has sued the retail store claiming that she was discriminated against for being transgender. The employee, Leyth Jamal, contends she was belittled by co-workers, forced to use the men's restroom, and repeatedly referred to by male pronouns "he" and "him" before ultimately being fired.



Saks has filed a motion to dismiss the case on the basis that Title VII does not currently cover transgender employees. Although the EEOC has taken the position that transgender employees are protected under Title VII, federal courts have not yet weighed in on this issue. Saks argues that it is "well settled" that transgender people are not protected under Title VII. In its defense, Saks quotes a Seventh Circuit ruling that says sex discrimination is not synonymous with "discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."

The EEOC issued guidance stating Title VII does protect transgender workers. In 2012, the EEOC made a landmark decision in a case called *Macy v. Holder*. In that lawsuit, a transgender man applied for a job with a federal agency while presenting as a man. Shortly after the interview process concluded, the applicant informed the agency that she would be transitioning from male to female, and a few days later she was told that the job was no longer available. That case lead the EEOC to expressly argue that discrimination based on gender identity is a form of "sex discrimination" under Title VII.

Guidance for Employers: While 18 states have non-discrimination laws that cover sexual orientation and gender identity, Texas is not one of them. In addition, Congress has not amended Title VII to include protection for these categories of workers. As with many of these laws, it is important for employers to know the law on sexual orientation in the cities and municipalities in which they conduct business and monitor them as they continue to change.

IV. Employer Credit Checks Create Growing Litigation Risk.

The Fair Credit Reporting Act was passed in 1970 to help consumers ensure that information about their credit stays private and accurate. The FCRA requires employers to take several steps if they want to obtain a consumer report that contains information about a job applicant's credit.

- They must provide a clear and conspicuous written disclosure that they intend to obtain the report, and have the applicant to sign off on it.
- If the report results in the employer deciding not to hire the employee, it must provide the employee a notice before the action is taken, including a copy of the report to the applicant while also giving the applicant a reasonable period of time to address the report.
- This disclosure allows the applicant the ability to explain the negative report and perhaps point out any errors or inaccuracies.

In recent years, some courts have expanded the FCRA's requirements to include ordinary background checks on applicants. Class action plaintiffs have focused on employers who fail to follow the FCRA's requirements. The most common situation in which the background check is scrutinized occurs in the application process. Employers will receive a negative background check on an employee, such as a criminal background check, suggesting that the employee is not qualified for employment and then decides not to hire that worker without giving him or her an explanation of the report's existence or why the report resulted in the inability to hire the applicant. The current docket of class action claims focus on the employer's failure to provide adequate notice to the employee (or any notice at all) concerning the existence of a negative background check or consumer credit report.

In order to avoid the possibility of becoming a defendant in such a case, an audit of your background check policies and procedures may be warranted.

V. Recent NLRB Decisions Reinforce the Board's Vigilance Over Terminations Involving Social Media Postings.

The NLRB continues to find that employees have the right to post on social media negative comments about co-workers, management, or the company. While this right is not unlimited, it is important to note that the Board believes that employees have the protected right to make such comments if there is any connection whatsoever to protected activity under the National Labor Relations Act: wages, benefits, or terms and conditions of employment (including supervisors and other managers). For example, open criticism of management on social media is not only allowed, but encouraged by the Board.

This is not an unrestricted right. Employees are not allowed to defame co-workers or the company. Also, ordinary gripes, crude comments, and poor attempts at humor do not pass the Board's scrutiny because they are not connected with the employer's terms and conditions of employment (i.e., protected activity).

VI. Paid Sick Leave – Are you Ready?

In the 2015 State of the Union address, President Obama brought the topic of paid sick leave to the forefront saying that the U.S. was one of the few advanced countries that does not guarantee paid sick leave to workers: "Forty-three million workers have no paid sick leave," he said. "That forces too many parents to make the gut-wrenching choice between a paycheck and a sick kid at home." While Republicans are unlikely to pass such a bill into law, President Obama has warned, "I'll be taking new action to help states adopt paid leave laws of their own."

Sixteen cities, including San Francisco and New York City and Washington D.C., have implemented their own sick leave laws, which provide paid leave to employees so they are not limited to the unpaid leave provided by the Family Medical Leave Act. Connecticut was the first state to offer paid sick leave while other states, Maryland, Oregon, Washington and New Jersey have introduced sick leave bills in their legislatures.

In-house counsel should be aware of overlapping laws – city and state – regarding paid sick leave that can apply to a worker seeking leave. These overlapping laws will become more complicated if President Obama passes an executive order requiring paid sick leave under Federal law. Employers should continue to monitor this law's application where they operate and be mindful of the city and state laws that exist in each of the locations where they have stores.

Please contact one of our attorneys listed below with questions regarding this topic, or to arrange for a more detailed presentation.

CONTACT INFORMATION

Jay M. Wallace
Attorney at Law | Board Certified Labor & Employment Law
3232 McKinney Avenue, Suite 1400
Dallas, Texas 75204
Direct #: 214-740-1407
Fax #: 214-740-5707
Email: jwallace@bellnunnally.com

Alana K. Ackels
Attorney at Law
3232 McKinney Avenue, Suite 1400
Dallas, Texas 75204
Direct #: 214-740-1412
Fax #: 214-740-5712
Email: aackels@bellnunnally.com

Lindsey L. Goldstein
Attorney at Law
3232 McKinney Avenue, Suite 1400
Dallas, Texas 75204
Direct #: 214-740-1436
Fax #: 214-740-5736
Email: lgoldstein@bellnunnally.com