

Nonprofit Organizations Committee Legal Quick Hit:

Employment Law Litigation Trends: How Your Nonprofit Can Avoid Common Family-Oriented Lawsuits

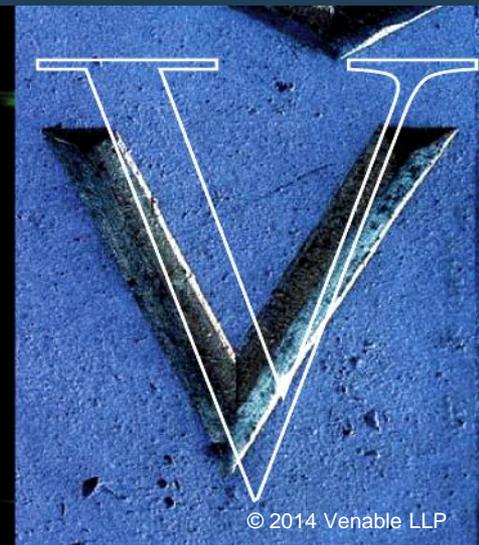
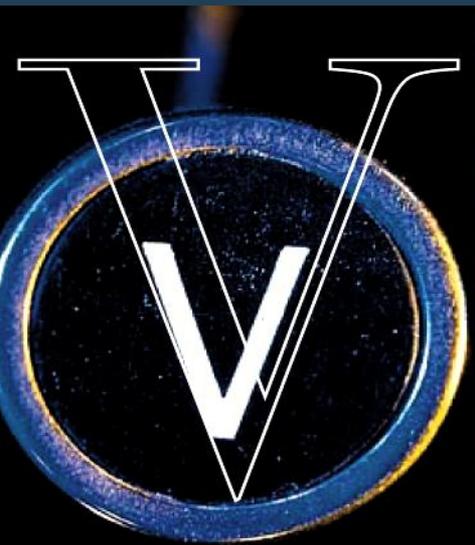
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TUESDAY, JANUARY 14, 2014

3:00 p.m. ET



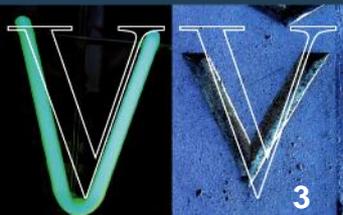
Program Overview

- Litigation Trends Under Family-Oriented Employment Laws
 - Pregnancy Discrimination and Disability Claims
 - Claims for Interference with Family and Medical Leave Act (“FMLA”) rights
 - Disability Association Discrimination Claims
- Tips for Minimizing the Risk of Litigation
- Questions



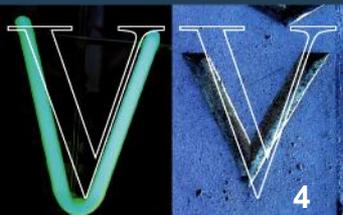
EEOC Steps Up Enforcement

- EEOC's Strategic Enforcement Plan
 - Six National Priorities Identified
 - “Addressing Emerging and Developing Issues”
 - Accommodating pregnancy-related limitations under the ADAAA and PDA
 - Coverage, reasonable accommodation of disabilities, qualification standards, and undue hardship
- EEOC's Performance and Accountability Report
 - 38% of “merits” filings included ADA claims in 2013
 - \$14MM collected in connection with 59 ADA lawsuits the EEOC resolved in 2013



Pregnancy: Disability Issues

- The Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”)
 - Expanded coverage to include many pregnancy-related impairments as disabilities
 - New definition of “substantially limit” & “major life activity”
 - Common examples that an employer must typically accommodate:
 - Morning sickness
 - Pre-natal visits
 - Physical limitations, e.g., inability to remain standing for periods of time



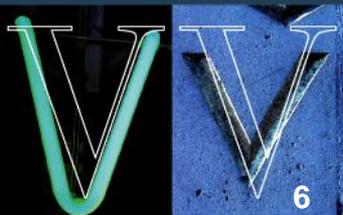
Pregnancy: Discrimination Issues

- The Pregnancy Discrimination Act (“PDA”)
 - Amended Title VII of the Civil Rights Act of 1964
 - Gender discrimination includes discrimination arising from “pregnancy, childbirth, or related medical conditions”
 - Pregnant applicant or employee must be treated the same as other non-pregnant applicants or employees based upon her ability or inability to work
 - Common trouble areas include hiring decisions, promotions, and disability leave requests
 - Pending certiorari petition in *Young v. UPS* (4th Cir. 2013)



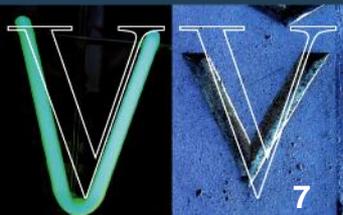
FMLA Claims: Interference & Retaliation

- Interference With Exercise of Rights & Retaliation for Exercising Rights
 - Discouraging employees from taking leave (through words, actions, negative employment conditions)
 - Limiting or refusing to recognize FMLA rights and grant benefits (denying leave, denying benefits maintenance, denying job protection/restoration)
 - Refusing to grant leave extensions
 - Terminating an employee on leave
 - Manipulating employees to avoid responsibilities under the Act



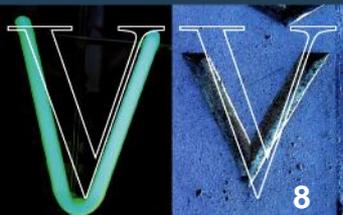
FMLA Claims Continued: Case Law Examples

- Valid interference claim where employer transferred employee to a different position upon reinstatement, then later terminated employment
- No interference claim where employer asked employee to go part-time, rather than take leave, where question was valid to determine what type of leave would be most appropriate
- In many cases, courts have found that negative or derogatory comments about or near the time of leave constitute direct evidence of discriminatory intent
- NOTE: Employees are entitled to protections, as if they did not take leave. They are not entitled to *greater* protections. In other words, if they would have been terminated anyways (violation of work rules, downsizing), FMLA does not afford a greater protection than that afforded to others.



Disability Association Discrimination

- ADA prohibits discrimination against disabled employees *and* employees with a relationship with a disabled person
- Expected uptick in claims because of expanded family leave laws
- No accommodation required
- Four elements:
 - Qualified for position
 - Subject to adverse employment action
 - Known to have “a relative” with a disability
 - Inference that relative’s disability was factor



Disability Association Discrimination (cont'd.)

- Three recognized theories of liability:
 1. Expense: Increased health benefit plan costs
 2. Disability by association: Risk of becoming disabled, either by contraction through relative or genetic predisposition
 3. Distraction: Employee will be inattentive at work because of relative's disability
- Disclosures during interviews
- Employer's length of awareness of association is usually critical: *Stansberry v. Air Wisconsin Airlines Corp.* (6th Cir. 2011)



Tips for Minimizing the Risk of Litigation

- Check federal, state, and local laws
- Develop and disseminate a strong EEO/Nondiscrimination policy
- Review employment policies/handbooks in light of changing laws, such as FMLA updates and expanded definition of disabled under ADAAA
- Train decision-makers regarding interview questions, application decisions, and leave requests
- Have a leave policy with some flexibility in light of the specific facts and the law at play (e.g., ADA)
- Establish step-by-step protocols for when employee's complain internally or request leave
- Establish consistent policies and practices, as well as a mechanism for ensuring that you are treating employees equally
- Ensure that all employment decisions are well-documented and transparent



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