JACKSON WALKER L.L.P.

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THE INTERACTIVE "HOW-TO" SYMPOSIUM FOR MAKING NECESSARY CHANGES IN YOUR COMPANY

THURSDAY, MARCH 3, 2005
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LABOR AND EMPLOYMENT

LABOR AND EMPLOYMENT

Jackson Walker has extensive experience representing management in a comprehensive range of employment and labor law issues. These include, among others, counseling with management, defending employee claims, workers' compensation issues, and traditional labor relations.

COUNSELING WITH MANAGEMENT

Members of the section routinely provide counsel and assistance to their clients on numerous employment related issues including the following listed below.

- Employment issues relating to employee training, workforce reductions, corporate acquisitions, reorganizations, and relocations
- Appropriate discipline of employees
- Drafting and enforcement of employment contracts, including non-competition agreements
- Preparing and auditing employee handbooks and personnel policies
- Unemployment compensation claims
- Wage-hour obligations
- Workers' compensation claims
- Occupational safety and health issues
- Immigration control procedures
- Affirmative action plans and OFCCP compliance issues

DEFENDING EMPLOYEE CLAIMS

The section members also offer to our clients expertise in mediating, arbitrating, and litigating the defense of individual and class action employee charges and suits involving a wide range of matters and issues.

LABOR AND EMPLOYMENT

- Race and sex discrimination claims
- Sexual harassment claims
- Age discrimination claims
- Disability discrimination claims
- Family and medical leave claims
- Defamation claims
- Wrongful discharge claims
- Workers' compensation retaliation
- Claims asserting violations of various other federal and state employment related and civil rights statutes

WORKERS' COMPENSATION ISSUES

Section members, in conjunction with the firm's employee benefits attorneys, also assist employer subscribers and non-subscribers under the Texas Workers' Compensation Act.

- Review and analysis of employers' existing workers' compensation insurance arrangements
- Evaluation of legal risks associated with becoming a non-subscribing employer
- Rejection of the Texas Workers' Compensation Act
- Evaluation and implementation of employee benefit programs in lieu of workers' compensation, including design and drafting of employee benefit plans; analysis of insurance policies, safety consultants, and medical providers; and coordination with insurance advisors
- Establishment of litigation minimization procedures, such as hiring policies, safety procedures, and claims processing
- Representation of employers in claims disputes

LABOR AND EMPLOYMENT

TRADITIONAL LABOR RELATIONS

Jackson Walker's labor and employment law attorneys also provide substantial experience and expertise in management's dealings with labor unions. Their expertise encompasses such areas as those listed below.

- Union avoidance campaigns
- Union election contests
- Negotiation of collective bargaining agreements
- Arbitration of disputes arising under collective bargaining agreements
- Responding to unfair labor practice charges under the National Labor Relations Act, the Railway Labor Act, and related statutes

EMPLOYEE BENEFITS / EXECUTIVE COMPENSATION

Section members also assist clients in a variety of matters related to ERISA, Employee Benefits and Executive Compensation, including the following:

- counseling regarding plan governance procedures and best practices designed to minimize fiduciary liability risk; and
- assistance in dealing with compliance and administrative considerations related to plans, including matters pertaining to participants and governmental agencies.

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W. GARY FOWLER

General Employment Law Update

W. GARY FOWLER

W. Gary Fowler is a partner in the Labor and Employment section of Jackson Walker and is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. Mr. Fowler's practice includes both counseling and defending clients in employment related matters. In counseling clients, he applies his broad depth of knowledge of labor and employment law to avoid unnecessary risks and the significant expense of avoidable lawsuits. He advises clients in specific difficult workplace situations, provides preventative services in employee handbooks, documentation, and in-house seminars, and prepares and analyzes employment contracts and related documents, from the simple to the complex, to protect employer interests.

Mr. Fowler tries cases and defends employers in federal and state courts and before all labor administrative tribunals. He has won summary judgments in both federal and state courts (including state courts in Texas which are not known for granting summary judgments in employment suits) in at least fifteen cases, saving his clients the significant expense and diversion of trial. He has argued appeals in the Supreme Court of Texas, the United States Court of Appeals for the Fifth Circuit, and several state Courts of Appeals. He was counsel for the employer in *Federal Express Corp. v. Dutschmann*, a leading Texas Supreme Court case which established that employers are not liable for statements in employee handbooks. Mr. Fowler also argued, and won, for the employer in *LTV Corp. v. Thomas*, an important Fifth Circuit case in the area of the National Labor Relations and Taft-Hartley Acts. His recent trial court victories have included a discrimination suit for a major telecommunications company, a covenant not to compete case concerning brokers for a financial company, a workers' compensation retaliation case for a major car manufacturer, and a disability discrimination suit for a large radio company.

Mr. Fowler's clients include high-tech companies, large restaurant chains, insurance companies, and businesses ranging from medium to large corporations. He is recognized for his experience in the Americans with Disabilities Act and is an

Gary Fowler practices Labor and Employment law in the Dallas office.

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W. GARY FOWLER

Adjunct Professor in disability discrimination law at SMU Law School in Dallas. He is also known for his knowledge of covenants not to compete, which are particularly complex under Texas law.

He is admitted to practice by the State Bar of Texas, the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit, and the United States District Courts for the Northern, Western, Eastern, and Southern Districts of Texas.

MEMBERSHIPS

In addition to being board certified, Mr. Fowler is an active member of the Labor and Employment Sections of the Dallas Bar Association, the State Bar of Texas, and the American Bar Association.

AWARDS

Mr. Fowler was named a "Texas Super Lawyer" in the November 2003 and October 2004 issues of *Texas Monthly* magazine.

EDUCATION

Mr. Fowler received his B.A., *summa cum laude*, from Texas Christian University and his J. D. from Yale Law School. He served as briefing attorney to Hon. Sam D. Johnson, Judge, United States Court of Appeals for the Fifth Circuit. He is a member of Phi Beta Kappa and is the 1979 Harry S. Truman Scholar for the State of Texas.

GENERAL EMPLOYMENT LAW UPDATE

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DEVELOPMENTS IN TEXAS STATE LAW

AGE

Texas Parks & Wildlife Dep't v. Dearing, No. 03-03-00131-CV (Tex. App.—Austin 2004). This case involved an interlocutory appeal from a class certification asserting disparate-impact liability for age discrimination under the Texas Commission on Human Rights Act. The Department challenged the class certification on the basis that disparate impact claims were not viable under the Texas Commission on Human Rights Act for claims of age discrimination. Joining the Fifth Circuit, the Austin Court of Appeals agreed that disparate impact was not a basis for employer liability for age discrimination. Unlike other forms of discrimination, the Texas Commission on Human Rights Act mandates that in determining the availability of and burden of proof applicable to a disparate impact case involving age discrimination, courts are to apply the judicial interpretation of the Age Discrimination in Employment Act of 1967 and its subsequent amendments. Thus, because disparate impact claims are not viable claims under the Age Discrimination in Employment Act in the Fifth Circuit, such claims are equally unavailable under the Texas Commission on Human Rights Act. The court of appeals vacated the class certification and remanded the case to the trial court.

ARBITRATION

J.M. Davidson v. Webster, 128 S.W.3d 223 (Tex. 2003). In this case, the Texas Supreme Court considered whether an employer's promise to arbitrate was illusory, and thus, insufficient as consideration to support an arbitration agreement when the employer reserved the right to unilaterally modify or terminate the arbitration policy without notice. This case was heard by the Court after it rendered an important decision in *In re Halliburton Co. v. Brown & Root Energy Services*, 80 S.W.3d 566 (Tex. 2002). The plaintiff in *Halliburton* was an "at-will" employee at Brown & Root Energy Services when Root's parent company, Halliburton, sent notice to all employees that it was adopting an Alternative Dispute Resolution Program, which would require binding arbitration for resolution of all disputes between the company and its employees. The notice expressly provided that any employee continuing to work after January 1, 1998 would be deemed to have accepted the new program. The terms included the employer's right to modify or discontinue the program, but also required the employer to give employees notice of any such changes and provided that any amendments would apply only prospectively. In 1998, Halliburton demoted the plaintiff from his position as general manager based on his "lack of interpersonal skills." Because the plaintiff believed that the real reason for this adverse employment action was age and racial discrimination, he filed suit in state district court alleging wrongful demotion pursuant to the Texas Commission on Human Rights Act. In response, Halliburton moved to compel arbitration pursuant to its Alternative Dispute Resolution Program. The trial court denied Halliburton's motion, and the court of appeals denied Halliburton's petition for writ of mandamus. On appeal, the Texas Supreme Court granted Halliburton's application for writ of mandamus and enforced the parties' arbitration agreement. The Court held that the agreement was supported by sufficient consideration because both parties were bound by their promises to waive the right to litigation and submit all employment disputes to arbitration. Specifically, the Court reasoned that Halliburton's right to modify or discontinue the program did not allow the employer to avoid its promise to arbitrate altogether because it was

limited by express contract provisions. Distinguishably, in *J.M. Davidson*, the clause in dispute provided, "The Company reserves the right to unilaterally abolish or modify any personnel policy without prior notice." Because the Court could not determine from the clause in dispute whether the employer's unilateral right to terminate "personnel policies" applied to the parties' agreement to arbitrate, it concluded that the arbitration agreement was ambiguous and remanded the case for further proceedings on that issue. However, without unequivocally stating so, the Court did intimate that if an employer retained the unilateral, unrestricted right to modify or terminate its arbitration program without notice, an agreement to arbitrate under such terms would be considered illusory.

Granite Const. Co. v. Beaty, 130 S.W.3d 362 (Tex. App.—Beaumont 2004). In this mandamus proceeding, an employer challenged the trial court's denial of its motion to compel arbitration of a wrongful discharge claim pursued by a former employee. The court recognized that evidence demonstrating that the employer mailed its arbitration policy to an employee's address was sufficient to establish proof of an employee's notice of the policy. The court of appeals held that a valid arbitration agreement existed between the parties and the employer had not waived its right to arbitrate by failing to move for arbitration at the outset of the litigation. In this case, there was no showing that the employer "substantially invoked the judicial process to its opponent's detriment" or that the employee suffered any prejudice or increased cost based on the employer's delay in invoking arbitration. The court also found that the policy which specifically applied to "wrongful discharge" and "all disputes . . . except workers compensation claims" applied to claims of workers' compensation retaliation. Accordingly, the employer's petition for writ of mandamus was conditionally granted.

COVENANTS NOT TO COMPETE

Alex Sheshunoff Management Services, L.P. v. Johnson, 124 S.W.3d 678 (Tex. App.—Austin 2003). In this summary judgment case, the issue was whether a covenant not to compete agreement entered into a few months after an employee was promoted to a new position was enforceable as a matter of law. After reviewing the record, the Austin Court of Appeals held that under the circumstances the covenant not to compete was unenforceable because it was not ancillary to or part of an otherwise enforceable agreement since it lacked sufficient consideration on the employer's part. Specifically, although the employer had promised to provide the employee with confidential information and training to assist in the performance of his duties, the employee already had access to special training and confidential information by virtue of his promotion. In addition, the employer could escape its obligation to perform by firing the employee immediately after he entered into the agreement; thus, the promise was deemed illusory. The employer's only non-illusory promise, independent of continued employment, was to give the employee notice of termination. But, this promise was also insufficient to support the covenant not to compete because it did not give rise to the employer's interest in restraining the employee from competing. The Texas Supreme Court has granted the employer's petition for review in this case.

DAMAGES

Shear Cuts, Inc. v. Littlejohn, 141 S.W.3d 264 (Tex. App.—Fort Worth 2004). In the fall of 2001, the plaintiff, a licensed cosmetologist, applied for a position with Shear Cuts. The plaintiff interviewed with the area supervisor for the store manager position at Shear Cuts' Arlington salon. According to the plaintiff, during the course of that interview, she was offered the position and assured that she would make at least $30,000 her first year. However, the area supervisor stated that she did not offer the plaintiff the position and instead told the plaintiff that she would call her. The following afternoon, the plaintiff went to the salon and began setting up her workstation. The plaintiff testified that she was immediately confronted by a salon employee, who eventually called the area supervisor. She then testified that the area supervisor called her and fired her, reasoning that the salon employees were concerned that they would lose their white clientele because blacks would be coming to the salon. In contrast, the area supervisor testified that the plaintiff unexpectedly appeared at the salon, and because she was never hired, she was asked to gather her belongings and to leave the premises. The plaintiff filed suit alleging that Shear Cuts discriminated against her on the basis of her race in violation of the Texas Commission on Human Rights Act. The trial court, sitting without a jury, found in favor of the plaintiff and awarded her $107,123.50 in damages, apportioned as follows: $40,911 for lost wages, $50,000 for punitive damages, $8,712.50 in attorney's fees, and $7,500 for appellate costs. The trial court specifically found that clear and convincing evidence existed that Shear Cuts acted with malice or reckless indifference to the plaintiff when it engaged in the discriminatory employment practice. Shear Cuts appealed the trial court's judgment. After reviewing the evidence in light of the five factors established by the United States Supreme Court to determine the reprehensibility of conduct in support of punitive damages, the Fort Worth Court of Appeals held that the evidence was legally insufficient to support the trial court's award of punitive damages. Facts weighing against the imposition of punitive damages included the following: (1) despite her claims of emotional distress, the plaintiff's damages were primarily economic and she did not require medical treatment; (2) Shear Cuts' misconduct did not constitute reckless disregard for the health and safety of others; (3) due to the plaintiff's short term of employment, she was no more financially vulnerable than if Shear Cuts had never hired her and no evidence existed that she had refused other employment in reliance of her expected employment; (4) Shear Cuts' prior conduct with respect to African Americans indicated that this was an isolated event; and (5) Shear Cuts' misconduct did not show malice or reckless indifference to the plaintiff's rights.

Hoffman La-Rouche Inc. v. Zeltwanger, 144 S.W.3d 438 (Tex. 2004). The plaintiff sued her former employer for sexual harassment and retaliation under the Texas Labor Code in addition to alleging a common law claim for intentional infliction of emotional distress. The jury returned a verdict for the plaintiff and awarded her nearly $20 million in damages, including punitive and mental anguish damages. Because the damages against the defendants were statutorily capped under the Texas Commission on Human Rights Act, the plaintiff moved to limit her recovery under the Act to front and back pay and attorney's fees and to recover the remaining punitive and mental anguish damages under her intentional infliction of emotional distress claim. Hoffman-La Rouche appealed the intentional infliction of emotional distress award to the Texas Supreme Court. The Texas Supreme Court held that where the gravamen of a plaintiff's complaint is for sexual harassment, the plaintiff must proceed solely under the statutory claim, unless there are additional facts, unrelated to sexual harassment, that support an independent tort claim for

intentional infliction of emotional distress. The Court reasoned that the tort of intentional infliction of emotional distress was a "gap-filler" tort created by the courts to allow recovery in rare instances where a defendant inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress. In fact, according to the Court, anytime the gravamen of a plaintiff's complaint is the type of wrong that a statutory remedy was intended to cover, a plaintiff cannot maintain an actionable intentional infliction of emotional distress claim, regardless of whether he or she succeeds on, or even makes, a statutory claim.

Southwestern Bell Telephone Co. v. Garza, No. 01-1142 (Tex. December 31, 2004). In this action for a violation of the Anti-Retaliation Law, the jury found that SBC acted with actual malice in harming the plaintiff, and awarded punitive damages. On appeal, the Texas Supreme Court stated that an elevated standard of proof at trial, i.e, clear and convincing evidence, requires a correspondingly elevated standard of review on appeal. Accordingly, in a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard all evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. Applying this standard of review, the Court held that a reasonable trier of fact could not have formed a firm belief or conviction that SBC acted toward the plaintiff with ill will, spite, evil motive, or purposeful injury. According to the Court, while there were some indications that SBC might have acted with malice, there were a number of other indications that the organization did not. Because the evidence was insufficient to produce a reasonable conviction that SBC intended to punish the plaintiff without cause, the Texas Supreme Court reversed the punitive damage award.

DEFAMATION

Cram Roofing Co. v. Parker, 131 S.W.3d 84 (Tex. App.—San Antonio 2003). In this case, the plaintiff, a former employee, filed suit against Cram Roofing for libel. After the plaintiff left his employment with Cram Roofing, he and another former employee started a competing business. Cram Roofing's attorney sent several letters to suppliers and roofing companies which provided that the plaintiff had voluntarily terminated his employment with Cram Roofing. The letters also asserted that the plaintiff had engaged in "illegal activities" based on his breach of a non-compete agreement. Cram Roofing maintained that these statements were not defamatory and were substantially true. At trial, the jury found that Cram Roofing had libeled the plaintiff, and the trial court rendered judgment in the plaintiff's favor. On appeal, the San Antonio Court found that the statement that the plaintiff voluntarily terminated his employment was not

defamatory. However, based on the statement regarding "illegal activities," the court held that the jury could have properly found that the gist of the statement was not substantially true. and that Cram Roofing libeled the plaintiff. The court reasoned that a reasonable person could have believed that such an allegation of "illegal activities" implied criminal conduct and/or activities. The court affirmed the trial court's judgment.

DISABILITY

Little v. Texas Dep't of Criminal Justice, 148 S.W.3d 374 (Tex. 2004). The plaintiff filed suit against the Texas Department of Criminal Justice alleging disability discrimination under the Texas Commission on Human Rights Act. The plaintiff, whose leg was amputated at the knee, wore a prosthetic leg and walked with visible limp. The trial court granted summary judgment in favor of TDCJ, and the court of appeals affirmed the judgment, holding that plaintiff failed to present sufficient summary judgment demonstrating that she was disabled because there was no evidence showing that she was substantially limited with respect to any major life activity or that TDCJ regarded her as having an impairment. After reviewing the record, the Texas Supreme Court found probative summary judgment evidence suggesting that at the time of the adverse employment actions, the plaintiff was significantly restricted as to the manner in which she could walk compared to the manner in which the average person in the general population could walk. As a result, the Court concluded that the plaintiff raised a genuine issue of fact regarding whether she suffered from a physical impairment that substantially limited at least one major life activity at the time of the adverse employment action, and reversed and remanded the case for further proceedings.

Haggar Apparel Co. v. Leal, No. 02-1182 (Tex. December 21, 2004). The plaintiff was employed as a seamstress for Haggar Apparel Co. During her employment, she began suffering from carpal tunnel syndrome and lower back problems. The plaintiff was later terminated for returning from vacation two days late. At the time, she was on probation for excessive unexcused absences. The plaintiff filed suit against Haggar Apparel Co. alleging age and disability discrimination, workers' compensation retaliation, and intentional infliction of emotional distress. The jury found in favor of the plaintiff with respect to her disability claim only, and the court of appeals affirmed the trial court's judgment. The Texas Supreme Court reversed the decision of the court of appeals and rendered judgment in favor of Haggar Apparel Co. The Court held that there was no evidence to support the plaintiff's claim that her impairments (carpal tunnel syndrome and lower back problems) substantially limited a major life activity, namely her ability to work.

NEGLIGENT DRUG TESTING

Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003). The plaintiff was employed as a truck driver for Mission Petroleum Carriers. Pursuant to the Department of Transportation's regulations, Mission required all of its employees to submit to random drug testing. The plaintiff, an at-will employee, was terminated after he tested positive for marijuana use. The plaintiff then filed suit against Mission alleging that it breached a common-law duty by not exercising ordinary care in the manner it collected his urine specimen for testing. At trial, the jury found in favor of the plaintiff and awarded him approximately $900,000 in damages.

The case was ultimately appealed to the Texas Supreme Court. The Texas Supreme Court reversed the decision and rendered a take nothing judgment in favor of Mission. In light of the Department of Transportation's extensive regulations governing drug testing, the Court declined to impose a common law duty on employers to exercise ordinary care in the manner it collects urine for drug tests. The Court also noted that imposing such a duty on employers would undermine the at-will employment doctrine because an employer's basis for termination would necessarily have to be justified by a reasonable investigation.

PROOF OF DISCRIMINATION

Wal-Mart Stores v. Canchola, 121 S.W.3d 735 (Tex. 2003). Canchola was employed as the deli manager in a Wal-Mart store in Mission, Texas. During his employment, Canchola was permitted to take several leaves of absence and to work a reduced schedule due to a medical condition. After two employees complained that Canchola had engaged in inappropriate behavior towards them, he was suspended pending an investigation of the complaints and eventually terminated for violating Wal-Mart's sexual harassment policy. Thereafter, Canchola filed suit alleging that Wal-Mart had unlawfully discriminated against him based on his age and his disability in violation of the Texas Commission on Human Rights Act. After a trial on the merits, a jury rendered a verdict for Canchola on his disability discrimination claim. Wal-Mart appealed arguing that there was insufficient evidence that its stated reason for the termination was a pretext for intentional discrimination or that Canchola's disability was a motivating factor in his termination. In response, Canchola maintained that Wal-Mart's investigation into the charges against him was inadequate and one-sided; thus, constituting some evidence that Wal-Mart was motivated by his disability. In reversing the jury's verdict, the Texas Supreme Court stated that the evidence offered by Canchola which assailed the quality of Wal-Mart's investigation was insufficient to prove that Canchola's medical condition was a motivating factor in his termination. Because Canchola failed to offer evidence that Wal-Mart's stated reason for terminating him was false and that Wal-Mart's decision to discharge him was based on his disability, the Court held that the evidence was legally insufficient to support the jury's finding of disability discrimination.

Winters v. Chubb & Son, Inc., 132 S.W.3d 568 (Tex. App.—Houston [14th Dist.] 2004). The plaintiff was employed as an underwriter in Chubb & Son's Department of Financial Institutions section. During this time, his supervisor, Deanne Gordon, observed various performance issues and met with the plaintiff several times to discuss these issues. Eventually, the plaintiff's continuing performance issues culminated in a written warning advising the plaintiff that termination could result if his performance did not improve. Shortly thereafter, the plaintiff resigned and filed suit against Chubb & Son and Gordon alleging racial discrimination under the Texas Commission on Human Rights Act. Chubb moved for summary judgment, maintaining that the plaintiff failed to offer sufficient evidence of disparate treatment based on race. The trial court granted summary judgment in Chubb's favor, and the plaintiff appealed. In affirming the trial court's judgment, the court of appeals adopted the Fifth Circuit's rule that an employer's deferential treatment of employees is insufficient to prove disparate treatment unless this treatment occurred under nearly identical circumstances. Consequently, because the plaintiff in this case did not offer any evidence of preferential treatment of other employees under nearly

identical circumstances, he did not present sufficient evidence to demonstrate that he was treated differently based on his race.

Kokes v. Angelina College, 148 S.W.3d 384 (Tex. App.—Beaumont 2004). In this case, Angelina College rejected the plaintiff's (a sixty-five-year-old white male) application for the position of psychology instructor and hired a younger African American female for the position instead. The plaintiff filed suit alleging that Angelina had discriminated against him on the basis of age, race, and gender. Angelina filed a motion for summary judgment on the basis that the plaintiff had failed to prove that its stated non-discriminatory reasons for rejecting the plaintiff were merely a pretext for discrimination, and the trial court granted the motion. In reviewing the trial court's decision, the appellate court focused on statements made by an official involved in the selection process which suggested that discrimination was a motivating factor in the plaintiff's rejection. Although Angelina argued that these statements were only stray remarks, the court held that the statements constituted direct evidence raising a genuine issue of material fact as to whether Angelina made its decision based on age, race, or gender, despite its proffered explanations for its decision. Consequently, the Beaumont Court of Appeals reversed the trial court's judgment and remanded the case to the trial court for further proceedings.

PROOF OF RETALIATION

Pineda v. United Parcel Service, Inc., 360 F.3d 483 (5th Cir. 2004). The plaintiff filed suit against United Parcel Services for retaliation pursuant to the Texas Commission on Human Rights Act after he was discharged by the company. During his employment with UPS, but while on medical leave for diabetes, the plaintiff filed a charge of discrimination against UPS for allegedly delaying his return to work. Additionally, upon his return to UPS, the plaintiff provided deposition testimony against UPS in a discrimination suit brought by another employee. The plaintiff was eventually terminated by UPS after three coworkers alleged that he made violent threats against them. The plaintiff maintained that he was discharged in retaliation for engaging in the protected activities of filing a discrimination charge and testifying in a discrimination case. At trial, the jury found in favor of the plaintiff and awarded him damages, including $400,000 in compensatory damages. UPS moved for judgment as a matter of law and sought remittitur of the compensatory damage award. The trial court refused to disturb the jury verdict, but remitted the compensatory damage award to $202,500. UPS appealed both rulings. On appeal to the Fifth Circuit, the plaintiff argued that in retaliation cases brought under the Texas Commission on Human Rights Act, the less stringent "motivating factor" test applied, as opposed to the "but for" standard. However, the Fifth Circuit rejected this argument, holding that in retaliation cases under the Texas Commission on Human Rights Act, the plaintiff had the burden to prove that "but for" the discriminatory purpose he would not have been terminated. Applying the "but for" causation standard, the court found that the evidence was insufficient to support the jury's finding that UPS retaliated against the plaintiff because he engaged in protected activity. Although the plaintiff presented evidence suggesting that he did not commit the acts alleged by his coworkers and that UPS selectively investigated and terminated him, he presented no evidence that independently suggested that UPS falsely and selectively fired him because he engaged in protected activity, or that had he not engaged in that activity he would not have been terminated. Accordingly, the Fifth Circuit reversed the trial court's ruling denying

UPS's motion for judgment as a matter of law and remanded the case to the trial court for entry of judgment in favor of UPS.

SABINE PILOT LITIGATION

Morales v. Simuflite Training Int'l, Inc., 132 S.W.3d 603 (Tex. App.—Fort Worth 2003). Simuflite is an aviation training company headquartered at the Dallas-Fort Worth International Airport. Simuflite's classroom and hands-on training activities are highly regulated by the Federal Aviation Administration. As a result, the training centers, as well as the instructors and evaluators that provide this training, are required to acquire and to maintain a FAA training certificate. The plaintiff was a part-time instructor for Simuflite. In 1999, the plaintiff's certification expired and he did not obtain the necessary flight time to renew his certification. Although Simuflite was aware that the plaintiff was no longer certified to train its pilots, after a scheduling mistake, his supervisor instructed him to go ahead and train the pilots, but not to sign off on the training that he had performed. The following week, without the plaintiff's knowledge, the supervisor signed off on the pilots' training record using his own identification number. Shortly thereafter, the FAA began investigating Simuflite regarding simulator training provided by the plaintiff. At this time, Simuflite became aware of the possible training violation and asked the plaintiff to sign a blank flight report. Because the plaintiff was concerned that Simuflite might falsify the blank flight report to cure the training violation that was being investigated, he refused to sign the form. The plaintiff was then given the opportunity to resign in lieu of being discharged, and he chose to resign. The plaintiff filed suit against Simuflite alleging that he had been terminated solely for refusing to sign the form, which he believed could have possibly subjected him to criminal sanctions. The basis for his claim was the Texas Supreme Court's decision in *Sabine Pilot Serv., Inc. v. Hauck*, wherein the court provided that an at-will employee could maintain a common law claim for wrongful termination if the sole reason for the employee's termination was his refusal to perform an illegal act. 687 S.W.2d 733 (Tex. 1987). The trial court granted summary judgment in favor of Simuflite. The Fort Worth Court of Appeals reversed this decision, finding that the evidence raised a genuine issue of fact as to whether the plaintiff was asked to perform an illegal act and whether his refusal to perform the illegal act was the sole basis for his termination. The court recognized that under the circumstances, the plaintiff could have been charged with aiding and abetting the falsification of a federal document.

WORKERS' COMPENSATION

Lone Star Steel v. Hatten, 104 S.W.3d 323 (Tex. App.—Texarkana 2003). In this case, the plaintiff sustained an on-the-job injury to her right hand while employed by Lone Star Steel. Although the plaintiff was originally allowed to return to her normal position, her condition began to deteriorate, ultimately resulting in her placement in an alternative work program. Lone Star's alternative work program was only available to employees who had been injured on the job and had filed a workers' compensation claim. After an eligible employee had been in the program for thirty days, his or her condition was re-evaluated and if the employee's condition had not improved, Lone Star placed them on restricted medical leave without pay until the employee was cleared to return to work. When the plaintiff was re-evaluated, she was diagnosed

with carpal tunnel syndrome and she showed no signs of improvement. In addition, Lone Star was notified by its workers' compensation insurance carrier that the plaintiff's injury might not have been caused by work. Consequently, the plaintiff was taken out of the work program and placed on restrictive leave without pay until she was medically released to return to work. Pursuant to company policy, the plaintiff was required to notify Lone Star of her medical status when medically cleared. The Texas Workers' Compensation Commission later determined that the plaintiff had a compensable injury. Approximately one year later, the plaintiff was notified that she had reached maximum medical improvement and her benefits ceased. The plaintiff then filed suit against Lone Star alleging workers' compensation retaliation. Upon learning, through the lawsuit, that the plaintiff was cleared to return to work, Lone Star promptly notified the plaintiff that she was welcome to return to work. The plaintiff did return to Lone Star, but the lawsuit remained pending. The plaintiff's main contention was that being placed on leave without pay was a violation of §451 of the Texas Labor Code. After a trial on the merits, a jury awarded the plaintiff $50,000 in compensatory damages and $2,000 in lost wages. The Texarkana Court of Appeals reversed the trial court's judgment and rendered a take-nothing judgment in favor of Lone Star. The court held that the plaintiff failed to present evidence establishing a causal link between being placed on restrictive leave and the filing of the workers' compensation claim. The court recognized that neither an employer's economic incentive to dispute a workers' compensation claim nor an employee's assignment to work in contradiction with his or her medical condition constituted sufficient evidence of an expression of a negative attitude towards the employee's injury.

Aust v. Conroe I.S.D., No. 09-04-063-CV (Tex. App.—Beaumont December 16, 2004). Aust was employed by the district as an electrician's helper for approximately nineteen years. In December 2000, he injured his knee while getting out of a maintenance truck. This injury resulted in the filing of a workers' compensation claim. Although Aust underwent knee surgery for his injury, the surgery was only partially successful in repairing his knee. As a result, Aust sought light duty work with the district, but was unsuccessful. The following year, the district eliminated Aust's position, moved him to another department, and decreased his salary. Aust then resigned and filed suit against the district asserting workers' compensation retaliation and constructive discharge. After the trial court granted summary judgment in favor of the district, Aust appealed. The court of appeals reversed and remanded the decision, holding that Aust raised a genuine issue of material fact as to whether the district's stated reason for the adverse actions was a pretext for retaliatory action. Specifically, the summary judgment evidence showed that only two months after Aust's position was allegedly eliminated, the district hired a new employee to fill the position. Likewise, in its motion for summary judgment, the district articulated a different reason for Aust's transfer (i.e., worker safety), which resulted decrease in his salary.

DEVELOPMENTS IN FEDERAL LAW

ANTI-INJUNCTION ACT AND THE ADEA

Vines v. University of Louisiana at Monroe, No. 03-31172, 2005 WL 189713 (5th Cir. Jan. 28, 2005) (designated for publication). Plaintiffs were former administrators and faculty at the University of Louisiana at Monroe. Plaintiffs retired and received benefits, but were periodically

rehired to perform additional work. Subsequently, the University implemented a policy by which it would no longer hire retired former employees. Plaintiffs brought suit under the Age Discrimination in Employment Act ("ADEA") and related Louisiana state law. Plaintiffs were initially engaged in a lawsuit along with the EEOC, but the district court later ruled that it lacked jurisdiction over the individual claims. The EEOC's claim (seeking damages) on behalf of the plaintiffs was allowed to proceed, but the district court eventually found that the University's policy did not violate the ADEA. When the individual plaintiffs sought to recover on their Louisiana causes of action in state court, the Fifth Circuit ordered the district court to issue an injunction pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, which allows a federal court to issue an injunction against state court proceedings in order to protect or effectuate a prior judgment by a federal court. The Fifth Circuit held that since the EEOC had sought damages on behalf of the individual plaintiffs, and because the state law claims were essentially identical to the previous federal case, the individual plaintiffs were precluded from continuing with their lawsuit in state court.

STATUTE OF LIMITATIONS FOR 42 U.S.C. § 1981

Pegram v. Honeywell, Inc., 361 F.3d 272 (5th Cir. 2004). In *Pegram v. Honeywell*, the Fifth Circuit established a two-year statute of limitations for claims under 42 U.S.C. § 1981 that are brought in Texas. Pegram, an African-American sales employee began working for Honeywell in 1991. In 2000, Pegram was promoted to the position of Total Plant Account Manager ("TPAM"). Later that year, Pegram was transferred to a Service Account Manager ("SAM") position. Pegram was dissatisfied with the SAM position, which he considered a demotion. Pegram alleged that while the base pay of the two positions was equal, the opportunities for incentive based compensation were less frequent in the SAM position than in the TPAM position. Pegram attempted to find a TPAM position within the company, but when he could not do so he was terminated. Pegram brought suit, in part, under 42 U.S.C. § 1981, alleging racial discrimination. As part of his claim of discrimination, Pegram alleged that several earlier actions by Honeywell constituted racial discrimination, including a failure to include him in the MBA program, denial of various training opportunities, and denied access with clients. The Fifth Circuit held that these additional claims were time-barred. Because § 1981 had no internal statute of limitations, the Court held that the applicable statute of limitations was that of the most closely analogous state law. The Court held that the two-year statute of limitations found in Tex. Rev. Civ. Stat. art. 5526 was applicable, and ruled that any act which occurred more than two years prior to the filing of the federal complaint was time-barred.

Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004). In *Jones*, the Supreme Court took a different approach to the statute of limitations under 42 U.S.C. § 1981. The three classes of plaintiffs in *Jones* were African-American employees in defendant's Chicago plant. They alleged that they were subject to a racially hostile work environment, given an inferior employee status, and wrongfully terminated or denied a transfer in connection with the closing of the Chicago plant. At issue before the Court was whether plaintiffs' claims under 42 U.S.C. § 1981 were subject to a two or four-year statute of limitations. Under federal law, the applicable statute of limitations for laws enacted prior to December 1, 1990 is the statute of limitations for the most closely analogous state law cause of action in the forum state. In this instance, the applicable Illinois statute of limitations for personal injury claims was for two years. However, for claims

enacted after December 1, 1990, Congress had set a catchall four-year statute of limitations codified in 28 U.S.C. § 1658. The Supreme Court held that since 42 U.S.C. § 1981 was originally enacted in 1866, any cause of action arising under the original language would operate under the two-year state law cause of action. However, § 1981 was substantially amended in 1991 to allow claims for post-contract discrimination. The Court held than any cause of action which arose from the new statutory language found in the 1991 Amendment would operate under the four-year statute of limitations. Please note that in *Honeywell*, the Fifth Circuit did not address whether the cause of action in question operated under the original language or the 1991 amendment, but because of *Jones* it will be required to do so in the future.

RETALIATION UNDER 42 U.S.C. § 1981

Foley v. University of Houston System, 355 F.3d 333 (5th Cir. 2003). Plaintiffs Dr. Roy Foley and Dr. Nora Hutto were tenured members of the School of Education at the University of Houston, Victoria. Plaintiff Foley, who was African American, alleged discrimination under 42 U.S.C. § 1981 in part on the University's failure to promote him from associate professor to full professor. Plaintiff Foley alleged that he was passed over for promotion because of his race, and in retaliation for earlier charges filed with the EEOC. Plaintiff Hutto, who was Caucasian, alleged that she was removed as department chair in retaliation for her support of Plaintiff Foley. At issue in *Foley* was whether a cause of action for retaliation existed under § 1981. The Fifth Circuit held that it did. However, the court also held that the claims brought against individual officers of the university were subject to the qualified immunity defense.

REVERSE DISCRIMINATION

General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004). In *Cline*, the United States Supreme Court held that the Age Discrimination in Employment Act of 1967 ("ADEA") did not prevent an employer from discriminating against younger employees in favor of older employees. *Cline* involved a collective bargaining agreement between General Dynamics and the United Auto Workers. This agreement eliminated the company's obligation to provide health benefits to the subsequently retired employees, except as to then-current workers who were at least 50 years old. Cline, and several other co-workers who were over 40 (and thus within the protection of the ADEA) but under 50 filed a charge with the Equal Employment Opportunity Commission alleging discrimination because of their age in violation of the ADEA. When no informal resolution could be reached, they filed suit in federal court. The District Court for the Northern District of Ohio held that the ADEA did not prohibit discrimination against younger workers in favor of older workers, but the Sixth Circuit disagreed, holding that the plain language of the ADEA prevented discrimination based upon age. The Supreme Court reversed in a 6-3 decision, with Justices Scalia, Thomas, and Kennedy dissenting. The majority held that both the language and the intent of Congress in formulating the ADEA was meant to prohibit discrimination against older employees. The majority also held that there could be legitimate reasons why an employer would discriminate against younger employees. The dissenters argued that the ADEA's prohibition against age-based discrimination was not qualified, and thus should prevent reverse age discrimination as well.

CONSTRUCTIVE DISCHARGE BASED UPON SEXUAL HARASSMENT

Pennsylvania State Police v. Suders, 124 S.Ct. 2342 (U.S. 2004). Plaintiff Nancy Suders was an officer of the Pennsylvania State Police. Plaintiff alleged that three of her supervisors subjected her to sexual harassment of such a severe degree that she was forced to resign, and that her resignation constituted a constructive discharge. In *Suders*, the Supreme Court clarified the burdens of proof that each party must bear when the plaintiff alleges constructive discharge due to sexual harassment in violation of Title VII. The Court that the plaintiff bears the initial burden of establishing a hostile work environment by demonstrating harassing behavior sufficiently severe or pervasive to alter the conditions of their employment. In addition, in order to show constructive discharge, the plaintiff must show that the abusive working environment became so intolerable that her resignation constituted a fitting response. The employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving sexual harassment claims; and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided apparatus. This affirmative defense, however, is not available if the plaintiff quits in response to an employer-sanctioned adverse action officially changing her employment status or situation, such as a humiliating demotion, an extreme cut in pay, or transfer to a position in which the employee would face unbearable working conditions. In these instances, the employer is strictly liable for the harassing actions of its supervisors.

REVOCATION OF NOTICE TO SUE

Martin v. Alamo Community College District, 353 F.3d 409 (5th Cir. 2003). At issue in *Martin* was the meaning of the term "issued" in 29 C.F.R. § 1601.19(b). Under § 1601.19(b), if, after the issuance of a notice of right to sue the EEOC issues a notice of intent to reconsider prior to the time when the employee files suit, the notice serves to revoke the employee's right to sue. In the instant case, plaintiff had filed her first complaint on the same day that the EEOC mailed a notice of intent to reconsider. The district court held that "issued" meant received in the mail by the plaintiff, and held that this was presumed to be three days after the letter was mailed. The Fifth Circuit reversed, holding that "issued" meant placed in the mail by the EEOC. The Fifth Circuit went on to hold that because there was no uniform practice among either courts or post offices regarding time stamping, that it would not consider the time of day either action took place, but held that when a complaint was filed on the same day as the notice of intent to reconsider was issued, both acts would be considered to have taken place simultaneously.

DISPARATE TREATMENT V. DISPARATE IMPACT

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003). In *Raytheon*, the United States Supreme Court clarified the distinction between disparate impact and disparate treatment analyses as applied to the Americans with Disabilities Act ("ADA"). Plaintiff Hernandez was a Raytheon employee who tested positive for cocaine and was consequently forced to resign for violating the company's drug policy. Later, after he had received treatment for cocaine addiction, he re-applied with Raytheon. At the time, Raytheon had a policy in which it refused to rehire employees who had been terminated for violating workplace conduct rules. As Hernandez's employee file indicated that he had been discharged for violating a workplace rule (although it did not state that the violation was for drug use), Raytheon refused to consider his application. Hernandez brought suit alleging disparate treatment in violation of the ADA. In applying the *McDonnell Douglas* framework, the Ninth Circuit ruled that Raytheon's policy did not constitute

a legitimate, non-discriminatory reason for its refusal to hire Hernandez. The Ninth Circuit held that a policy which prevented the reemployment of a successfully rehabilitated drug-addict was an unlawful violation of the ADA and thus could not constitute a nondiscriminatory reason for Raytheon's refusal to hire Hernandez. The U.S. Supreme Court reversed, stating that the Ninth Circuit had inappropriately combined a disparate impact analysis with a disparate treatment analysis. The Court held that Raytheon's policy satisfied its burden to state a non-discriminatory reason for its refusal to hire Hernandez, and thus placed the burden upon Hernandez to prove that this reason was a pretext.

AUTOMATIC TERMINATION OF EMPLOYMENT CONTRACT AND FMLA

Slaughter-Cooper v. Kelsey Seybold Medical Group, P.A., 379 F.3d 285 (5th Cir. 2004). Employment contract provides that it terminates automatically upon disability lasting more than three months. Employee goes on disability and receives benefits under the Family Medical Leave Act ("FMLA"). When disability lasts longer than three months, employer terminates contract. Fifth Circuit holds that under these facts, employee cannot maintain cause of action for retaliatory discharge in violation of FLMA because employee cannot demonstrate causal link between protected activity and discharge.

JURISDICTION

Arbaugh v. Y&H Corp., 380 F.3d 219 (5th Cir. 2004). The Fifth Circuit reaffirmed its decision in *Dumas v. Town of Mt. Vernon-Alaska*, 612 F.2d 974 (5th Cir. 1980) that the issue of whether an employer has 15 or more employees and is thus subject to Title VII is a question of the court's subject matter jurisdiction. Plaintiff Arbaugh obtained a jury verdict against Y&H Corp. for sexual harassment in violation of Title VII. The district court, however, later held that it lacked subject matter jurisdiction because several Y&H employees were actually independent contractors. On appeal, plaintiff argued that the Fifth Circuit should reject the *Dumas* holding, and side with the Second, Seventh and Federal Circuits which hold that the court has subject matter jurisdiction so long as the plaintiff makes a good faith claim that the employer is covered by Title VII. The court, however, stated that it was bound by the *Dumas* decision, and further noted that this position is consistent with the position taken by the Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits.

Clayton v. Rumsfeld, 106 Fed. Appx. 268 (5th Cir. 2004). Civilian employee of the Army and Air Force Exchange Service at Randolph Air Force Base was scrutinized, given a non-promotable performance rating, a letter of warning, and eventually demoted and transferred to another base. Plaintiff alleged various forms of employment discrimination under Title VII. After a hearing with an Administrative Law Judge ("ALJ") and filing a charge with the EEOC, plaintiff filed suit in district court. In her complaint, plaintiff for the first time added a cause of action for constructive discharge. The Fifth Circuit held that because she had not raised this claim during her hearing with the ALJ or her charge with the EEOC, she had not exhausted her administrative remedies on that claim, and affirmed summary judgment in favor of the government on the constructive discharge claim.

TAXES ON CONTINGENCY FEES

Commissioner v. Banks, 125 S.Ct. 826 (U.S. 2005). Respondent Banks settled a federal employment discrimination suit against his employer, a California state agency. On appeal, the Sixth Circuit held that while the settlement amount was to be included as gross income, the portion paid to Banks' attorney as a contingency fee was not income. In a related case, *Commissioner v. Banaitis* (consolidate with *Banks*), the Ninth circuit held that a similar contingency fee did constitute income. The United States Supreme Court sided with the Ninth Circuit, and held that when a taxpayer recovers settlement amounts which would be classified as income, and a portion of that amount is paid to an attorney as a contingency fee, the amount paid to the attorney must also be characterized as gross income. This decision is ameliorated somewhat by the American Jobs Creation Act of 2004, 26 U.S.C. § 62(a)(19) which establishes that a contingent fee will not constitute income to the plaintiff in a specified list of 18 types of cases involving "unlawful discrimination."

RETALIATION UNDER GERA

Brazoria County, Tex. v. EEOC, 391 F.3d 685 (5th Cir. 2004). Plaintiff Kyle Knight was employed as a clerk by former justice of the peace David Christian. Plaintiff resigned in November of 1996 and filed a charge with the Equal Opportunity Employment Commission ("EEOC") that month alleging that Christian had created a hostile work environment through sexual harassment, and that after she complained about it to a county official, Christian retaliated by (1) failing to promote Knight, (2) placing Knight on probation, and (3) constructively discharging Knight. As plaintiff was a member of the personal staff of an elected official, she was not covered by Title VII. However, the court held that she was covered under the Government Employee Rights Act ("GERA"), 42 U.S.C. § 2000e-16a. At issue was whether GERA provided a cause of action for retaliation. The Fifth Circuit held that while the language of GERA did not specifically forbid retaliation, statutory language stating that all employment decisions were to be made free from any discrimination prohibited retaliation. Consequently, the court held that a cause of action for retaliation did exist under GERA. However, under the particular facts of Brazoria County, the court held that the plaintiff had failed to establish any ultimate employment action sufficient to state a claim for retaliation.

FACT QUESTION AS TO CONSTRUCTIVE DISCHARGE

Hawkins v. Frank Gillman Pontiac, 102 Fed. Appx. 394 (5th Cir. 2004). Plaintiff Hawkins was a sales manager at Frank Gillman Pontiac for 24 years. Subsequently, Hawkins was offered a mandatory transfer to the position of fleet sales manager. Hawkins alleged that his manager informed him that they wanted "new blood," "you know, younger people." Hawkins considered the transfer a demotion because it was purely commission based whereas his sales manager position paid both commission and salary. In addition, the new position provided Hawkins with fewer subordinates. Hawkins declined the transfer and filed suit under the Age Discrimination in Employment Act ("ADEA") alleging constructive discharge. The district court held that plaintiff's claim was time barred, and granted summary judgment in favor of the defendant. The Fifth Circuit reversed on the statute of limitations issue, and then examined the merits of plaintiff's claim to determine if there was any alternative basis to uphold summary judgment. The court found that under the facts as presented, a reasonable jury could conclude that Hawkins had enough knowledge of the two positions to know that the transfer constituted a demotion, and

that Hawkins might feel compelled to resign. The Fifth Circuit accordingly reversed the district court's order granting summary judgment.

NO CONSTRUCTIVE DISCHARGE

Stewart v. Dept. of Health and Hospitals, 117 Fed. App. 918 (5th Cir. 2004). Stewart, a high-ranking employee in the Louisiana civil service, alleged race and sex discrimination, hostile work environment, and constructive discharge under Title VII. Stewart was transferred to a position that she alleged was inferior to her former position. Stewart then requested a six-month leave of absence, but was granted only one month. When she returned, she was given tasks she felt were beneath her level and experience. She then negotiated, with help of counsel, a six month leave of absence in which she would take administrative leave, and then resign. The Fifth Circuit affirmed summary judgment granted against plaintiff's constructive discharge claim, holding that a resignation negotiated with the help of counsel, and which provided for 300 hours of paid administrative leave, did not constitute an involuntary termination resulting from intolerable working conditions.

GENERAL EMPLOYMENT LAW UPDATE

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Supreme Court of the United States

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Supreme Court of the United States

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1B

RAY CLARK

When Johnny Comes Marching Home: Employers' Obligations Under USERRA

RAY CHARLES CLARK

Ray Charles Clark is a partner in the Labor and Employment section of Jackson Walker. Mr. Clark's practice consists of counseling clients and representing employers in a wide variety of labor and employment issues. Mr. Clark has defended clients against several statutory and common law claims, such as claims brought under the Age Discrimination in Employment Act, Americans with Disabilities Act, Fair Labor Standards Act, Family and Medical Leave Act, Texas Commission on Human Rights Act, Texas Payday Act, and Title VII.

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Mr. Clark's most recent speaking engagements include a presentation of his paper, "When Johnny Comes Marching Home: Employers' Obligations Under USERRA," given at Jackson Walker's 2003 Employment Law Symposium; a presentation titled "Employee Wellness Programs: Potential Liability from the Misuse of Genetic Information," given at the North Dallas Chamber of Commerce's 2003 Health Care Conference; and a presentation of a paper he co-authored titled "Internal Affairs: Ethical Issues for In-House Counsel in Workplace Investigations," given during Jackson Walker's 2004 continuing legal education ethics program for its corporate clients.

Mr. Clark is the author of an overtime guidebook for the Texas Association of Broadcasters titled "TAB's Guide to Wage and Hour Rules," which is published on their Web site. He has written articles for Jackson Walker's labor and employment newsletter, *Employer's Update*. These articles include "The Ramifications of Operation Enduring Freedom and the Uniformed Services Employment and Reemployment Rights Act of 1994" and "Architectural Barriers And You: Liability For Failure To Provide Access To Your Facilities." Mr. Clark has also published an article on NAFTA for *International Company and Commercial Law Review*.

RAY CHARLES CLARK

COMMUNITY INVOLVEMENT

Mr. Clark is active in his community and serves as the President for RDC Foundation, which supports the Richardson Development Center, a charitable organization that provides therapy to disabled babies and children in the greater Dallas area.

EDUCATION

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When Johnny Comes Marching Home: Employers' Obligations Under USERRA

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1.0
INTRODUCTION

In the nearly 3 ½ years that have passed since the terrorist attacks of September 11, 2001, the Reserve and National Guard forces of the United States have been repeatedly mobilized and demobilized. According to the Department of Defense, there were 185,432 Reserve and National Guard forces mobilized as of February 16, 2005. This time last year, there were 184,132 such troops mobilized and more than 150,000 in mid-February, 2003. Indeed, more than one Pentagon official has noted that the days of weekend warriors – who could expect to train one weekend per month and two weeks during the summer and rarely, if ever, be mobilized – are over. If the past 3 ½ years are a guide, the United States will continue mobilizing and demobilizing Reserve and National Guard forces into the near future. Employers should therefore become familiar with the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), which governs leaves of absence taken to perform military service and the service-members' right to reemployment following such leaves.

2.0
THE USERRA

Congress passed the USERRA after the first Persian Gulf War to clarify and strengthen the USERRA's predecessor, the Veterans' Reemployment Rights Act. In passing the USERRA, Congress intended to: (1) to encourage "non-career" participation in the armed services by minimizing the harm caused to civilian careers by such service; (2) facilitate prompt reemployment of men and women in uniform after they complete their military service, thereby minimizing the disruption to their lives, their employers, their fellow employees and their communities; and (3) prohibit discrimination against individuals based on their military service. To this end, the USERRA establishes certain rights and benefits for employees who serve, have served, or intend to serve in the uniformed services. These rights and benefits apply primarily in the context of employment, reemployment, and retention in employment.

2.1 THE IMPORTANCE OF UNDERSTANDING USERRA.

Most anti-discrimination statutes forbid disparate treatment, *i.e.*, they require employers to treat protected individuals the same as non-protected individuals. The individualized assessment and accommodation sometimes required by the USERRA upon returning an employee to work is similar to the individualized assessment required by the Americans With Disabilities Act of 1990 ("ADA"). Like the ADA, the USERRA requires employers to individually assess requests for accommodation made by members of the protected class and, where an accommodation does not impose an undue hardship, provide it. The employer's duty to provide individual assessment, treatment and accommodation is illustrated by *Fink v. City of New York*, 129 F. Supp. 2d 511 (E.D. N.Y. 2001).

In *Fink*, a fireman, Fink, could not take a job-related examination which was a prerequisite for promotion because he was ordered to serve in Bosnia. Following the end of Fink's tour in Bosnia, he returned to his job as a fireman and requested that he be permitted to

take a make up examination so that he would be eligible for promotion. The fire department refused the request, and when pressed on the issue, the personnel director stated that she did not want to hear any more of Fink's "veteran's bullshit." She also told Fink that he was being treated like every other person on a leave of absence. When Fink informed the fire department that under federal law he was entitled to receive credit for the time he spent in Bosnia for purposes of calculating his pension, a representative told him, "I don't know nothing about the law. This is the way the fire department does it. . . . Period. That's it. You're not getting it." The Court correctly noted that Fink "was not on an ordinary leave of absence" and affirmed the jury's finding that the fire department violated the USERRA.

The fire department failed to understand its duties under the USERRA, which can trump an employer's obligations under a collective bargaining agreement or state law. Although the fire department followed its own policies, it failed to understand that that the USERRA required it to treat Fink differently, indeed more favorably, than other employees on a leave of absence. The fire department also failed consider how inflammatory its conduct would appear to a jury. Fink was a *highly-decorated* veteran of the wars in Vietnam and Bosnia. He received more than *50* decorations from a variety of sources, including the Army, the Navy, the Marines, NATO and the state of New York. His service in the fire department also was exemplary. Had the fire department inquired into its duties under the USERRA, or paused to consider Fink's natural jury appeal, it would have realized the need to accommodate Fink's relatively simple requests. However, it did not and, consequently, Fink was awarded almost $900,000 by the jury.

2.2 THE MEANING OF "EMPLOYER" AND "EMPLOYEE" UNDER THE USERRA.

2.2.1 "Employer"

"Employer" means "any person, institution, organization, or other entity that pays salary or wages for work performed *or* that has control over employment opportunities, including . . . a person, institution, organization or other entity to whom the employer has delegated the performance of employment-related responsibilities . . ." Thus, unlike many other anti-discrimination statutes, an employer need not have a minimum number of employees to be covered by the USERRA. Also, as explained by the USERRA regulations (hereafter, the "Regulations"), where one entity pays an employee and another controls the employee's "employment opportunities," both entities are "employers" under the USERRA. Similarly, successor entities are included in the definition of "employer," as are foreign employers that have physical locations in the United States and American companies that operate directly or indirectly in foreign countries. Finally, the definition of USERRA appears to include supervisors, managers and other individuals or entities that have "control over employment opportunities."

2.2.2 "Employee"

"Employee" means "any person employed by an employer" and includes an employer's former employees. The term also includes citizens and national or permanent resident aliens of the United States who work in foreign countries for employers that are incorporated or organized in the United States, or that are controlled by an entity organized in the United States. The

USERRA also protects applicants for employment by forbidding employers from refusing to hire an individual based on his or her past service in the armed forces, obligation to perform service in the armed forces, or application to become a member of the armed services. Therefore, with respect to denials of "initial employment" based on a person's military service, the employer need not actually employ the person to be liable to him or her under the Act. The USERRA does not protect individuals who are discharged dishonorably, for bad conduct, or under conditions that are other than honorable.

2.3 EMPLOYER DUTIES UNDER THE USERRA.

2.3.1 The Duty to Not Discriminate .

The USERRA forbids employers from denying to any person "initial employment, reemployment, retention in employment, promotion, or any *benefit of employment*" on the basis of the person's membership or application for membership in the armed services or the person's "performance of service, application for service, or obligation" to serve in the armed services. The USERRA defines *benefit of employment* quite broadly. It includes "any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice . . ." It includes "rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select hours of work or location of employment." The broad definition of *benefit of employment* is illustrated by USERRA cases.

2.3.1.1 *Hill v. Michelin North America, Inc.*

In *Hill v. Michelin North America, Inc.*, 252 F.3d 307, 312-13 (8th Cir. 2001), the court held that a regular work schedule is a *benefit of employment* under the USERRA, at least where the employee was required to work a schedule consisting of both 8 and 12 hour shifts and the schedule to which the employee was arguably entitled consists of only 8 hour shifts.

2.3.1.2 *Harris v. City of Montgomery*

In *Harris v. City of Montgomery*, 322 F.Supp.2d 1319, 1324 (M.D. Ala. 2004), the court held that a poor evaluation of an employee's performance, "if it prevents a raise, denies a benefit of employment." *Harris v. City of Montgomery*, 322 F.Supp.2d 1319, 1324 (M.D. Ala. 2004). In *Harris*, the employee's supervisor wrote a memorandum about the employee, Harris, stating that Harris is:

> knowledgeable of and carries out his duties and assignments. He is punctual for work and notifies me if he may be late. He requests leave in advance and does not abuse sick leave. However, he needs improvement in the area of following the chain of command.

Harris, 322 F.Supp.2d 1319, 1322.

Three days later, the same supervisor had this to say about Harris:

> Coach Harris fails to notify the Director of intent to be off work in a timely manner; fails to submit request for leave/submit military leave orders in a timely manner; leaves work early; fails to notify the Director of his practice schedule; fails to follow protocol & chain of command in resolving problems; displays a lack of respect for the Director/Assistant Director – failure to maintain a professional domineer [sic] when speaking with the Director; questions/challenges authority & decisions made by the Director; jeopardized the safety of athletes; and is not a team player.

Harris, 322 F.Supp.2d 1319, 1322.

After noting that neither party offered an explanation for the dramatic change in the supervisor's opinion, the court noted that when a poor performance evaluation results in the denial of a pay raise, it denies a benefit of employment. *Harris*, 322 F.Supp.2d 1319, 1324.

2.3.1.3 *Yates v. Merit Systems Protection Bd.*

Yates v. Merit Systems Protection Bd., 145 F.3d 1480 (Fed. Cir. 1998) is similar to *Harris*. In *Yates*, a new postal service employee was on a 90-day probationary period and was supposed to receive performance evaluations at 30, 60 and 90 days into her employment. She did not receive the 30-day evaluation because of military service. At the end of her 90-day probation, she was discharged for unsatisfactory performance. In a subsequent lawsuit, Yates claimed that the postal service denied her a "benefit of employment" under the USERRA when it failed to give her the 30-day performance review. According to Yates, had she received the 30-day performance review, she would have withdrawn from her position with the postal service and not quit a full-time job she had elsewhere. The court found that Yates stated a claim under the USERRA because her evaluation "is properly viewed as a 'benefit of employment' because ... [it] was an 'advantage' or 'status' of her probationary employment with the Postal service." *Yates*, 145 F.3d 1480, 1485.

2.3.1.4 *Schmauch v. Honda of America Mfg., Inc.*

The failure to remove an employee from corrective disciplinary action can, in some circumstances, constitute a denial of a *benefit of employment* under the USERRA. In *Schmauch v. Honda of America Mfg., Inc.*, 295 F.Supp.2d 823 (S.D. Ohio 2003), Honda placed an employee with poor attendance on an Attendance Improvement Program ("AIP"). Employees on the AIP were required to improve their attendance and adhere to criteria over a span of time totaling six months. Pursuant to the AIP, "absences taken during the period covered by an AIP for Military Leave, FMLA Leave, Medical Leave, Personal Leave, and Educational Leave prolong the AIP by the number of days spent on such leaves." *Schmauch*, 295 F.Supp.2d 823, 826. This was not true for other types of absences, such as leaves for bereavement, court-appearances and worker's compensation.

While on AIP, Schmauch took military and FMLA leave. Schmauch was not disciplined for taking this leave, but Honda extended the length of the AIP by a number of days equal to the time Schmauch was absent on military and FMLA leave. As a result, Schmauch would have

completed the AIP in June, but it was extended into August. On August 7, Schmauch had an "attendance occurrence" for which he was terminated. In a subsequent suit, Schmauch claimed that Honda violated both the FMLA and the USERRA by extending his AIP. The court held that Schmauch created a genuine issue of material fact as to whether Honda violated the FMLA by extending the AIP of employees on FMLA leave and thus "discouraging" them from taking FMLA leave. *Schmauch*, 295 F.Supp.2d 823, 831-32. With respect to the USERRA claim, the court stated:

> A "benefit of employment" includes an "advantage" or "privilege" accrued by reason of an employment contract. A reasonable jury could find the employment relationship between Schmauch and Honda is an "employment contract," and it is an "advantage" or "privilege" to be able to extinguish one's AIP because, plainly, the quicker an associate does so, the less time he is in peril of losing his job for an unexcused attendance occurrence. Here, if Schmauch's AIP had expired on June 21, 2001, his August 7, 2001 attendance occurrence would not have been cause for his termination. Thus, the "extinguishment of an AIP" may constitute a "benefit of employment," as defined under USERRA.

Schmauch, 295 F.Supp.2d 823, 839.

2.3.2 The Duty to Not Retaliate.

The USERRA also prohibits employers from retaliating against an individual because the individual has:

(1) acted to enforce a protection afforded any person under USERRA;

(2) testified or otherwise made a statement in connection with a proceeding under the USERRA;

(3) assisted or participated in a USERRA investigation; or,

(4) exercised a right provided for by USERRA.

Like "Title VII, many actions may form the basis of protected activities giving rise to a claim of retaliation under the USERRA." *Gagnon v. Sprint Corp.*, 284 F.3d 839, 854 (8th Cir. 2002). An internal complaint regarding an employer's failure to comply with the USERRA constitutes a protected activity under the USERRA and, therefore, any retaliation against an employee for making such an internal complaint constitutes illegal retaliation under the USERRA. *Gagnon*, 284 F.3d 839, 854.

The protections afforded to individuals under the USERRA's anti-retaliation provisions apply whether or not the individual is a member of the armed services if the individual has engaged in conduct protected by the Act. Similarly, the USERRA's anti-retaliation *and* anti-discrimination provisions apply to employees in brief, non-recurrent positions of employment even though these employees have no right to reemployment under the USERRA.

2.3.3 The Duty to Provide Reemployment.

An employer must promptly reemploy an eligible covered employee when he or she returns from a period of service. "Prompt reemployment" means as soon as practicable under the circumstances of the individual case.

An employee who is absent from work for military leave is entitled to reemployment rights and benefits and other employment benefits if:

(1) the absence is for USERRA-protected service, *i.e.*, "service in the uniformed services"; and

(2) the employer is given advance written or verbal notice of the military service (unless the giving of such notice is unreasonable or impossible); and

(3) the cumulative length of military service is does not exceed five years; and

(4) the employee submits an application for reemployment or reports for reemployment; and

(5) the employee is not discharged dishonorably, for bad conduct, or under conditions that are other than honorable.

2.3.3.1 Service in the Uniformed Services

"Service in the Uniformed Services" means the "performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty" under Federal authority, and absences for medical examinations and funeral honors duty. Although the USERRA is "most often understood as applying to National Guard and reserve military personnel . . . [it] also applies to persons serving in the active components of the Armed Forces. However, [the] USERRA's reemployment provisions vary according to the length of service in the uniformed services."

It is important to remember that "service in the uniformed services" also includes service in "the commissioned corps of the Public Health Service . . . and any other category of persons designated by the President in time of war or national emergency." Similarly, pursuant to the Public Health Security and Bioterrorism and Response Act of 2002, service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or as a participant in an authorized training program counts as "service in the uniformed services." Because of the broad definition of "service in the uniformed services," an employer is forbidden from taking adverse action against an employee who continually volunteers for extra military service. See *Leisek v. Brightwood Corp.*, 278 F. 3d 895 (9th Cir. 2002). If an employer has an issue with an employee continually volunteering for extra service, the employee should address the matter with the appropriate military authority as noted by 32 C.F.R. § 104.4.

In determining whether an employee's absence is for "service in the uniformed services," it is important to note that employees are not required to begin military service immediately after

taking off work, nor are they required to report to work immediately after completing their military service. At a minimum, the employees must have enough time after leaving their employment position to travel safely to the site where their military service is to be performed, and arrive fit to perform. Depending on the specific circumstances, an employee may need additional time to rest, or to arrange his or her affairs and report to duty. If, for example, an employee is ordered to perform an extended period of military service, the employee typically will require a reasonable period of time off work to put his or her personal affairs in order before beginning the military service. This time off is protected by the USERRA, as is the time following a period of military leave, which is discussed generally in § 2.3.3.4, *infra*.

2.3.3.2 Advance Notice

"Notice," when an employee is required to give advance notice of service, means any written or verbal notification of the employee's obligation or intention to perform service in the uniformed services provided to the employer by the employee who will perform such service or by the uniformed service in which the service is to be performed. Notice should be provided as far in advance as is reasonable under the circumstances, but no notice is required where giving notice is prevented by military necessity or is otherwise impossible or unreasonable under the circumstances. Only a designated military authority can make a determination of "military necessity," and such determinations are not subject to judicial review.

When notice is being provided to an employer regarding the necessity of an employee to take military leave, the employee may not be required to state whether he or she intends to seek reemployment after completing military service. Moreover, even if an employee expresses an intention to not seek reemployment after completing the military service, the employee does not forfeit right to reemployment under the USERRA.

2.3.3.3 Five-Year Cumulative Limit On Service

The five-year limit does not include all the time off work an employee takes for military service. The five-year limit does not, for example, include the time an employee takes off work before and after a period of military service. See § 2.3.3.1 *supra*. Rather, it includes only the time actually spent by the employee performing military service. Likewise, the five-year limit does not include periods of military service rendered by an employee when the employee worked for a previous employer. Additionally, several categories of "uniformed service" are specifically exempted from, and thus do not count toward, the five-year limitation, including but not limited to:

(1) service performed in excess of five years if through no fault of the service-member an order releasing the service-member from service could not be obtained;

(2) service performed, including but not limited to the following, if the service-member was ordered to or retained on active duty under the following conditions: (i) involuntary active duty by a military retiree, (ii) involuntary active duty in wartime, (iii) retention on active duty while in captive status, (iv) involuntary active duty during a national emergency for up to 24 months, (v) involuntary

active duty for an operational mission for up to 270 days, and (vi) involuntary retention on active duty of a critical person during time of crisis or other specific conditions;

(3) service performed in a uniformed service if the service-member was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by a proper military authority;

(4) service performed if the service-member was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under law, as determined by a proper military authority;

(5) service performed if the service-member was ordered to active duty in support of a critical mission or requirement as determined by a proper military authority;

(6) service performed as a member of the National Guard if the service-member was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States; and

(7) service performed to mitigate economic harm where the service member's employer is in violation of its employment or reemployment obligations to the service member.

The foregoing list of exceptions to the five-year service limit is by no means exhaustive. Rather, it merely represents the types of service which a service-member is likely to be called to perform in order to maintain national security in light of the terrorist attacks of September 11 and the subsequent wars in Afghanistan and Iraq.

2.3.3.4 Application for Reemployment

Set forth below are the time-frames within which an employee must report back to work or seek reemployment following an absence for USERRA-protected service. Importantly, an employee who misses these time-frames does not automatically forfeit right to reemployment under the USERRA. Rather, the employee becomes subject to the employer's conduct rules, established policy, and general practices pertaining to absences.

An employee's application for reemployment need not follow a particular format, nor must it be in writing. However, the application should indicate that the employee is a former employee returning from military service seeking reemployment. The employee may identify a particular position in which he or she is interested, but the employee cannot be required to do so. The application must be submitted to the employer or an agent or representative of the employer who has apparent responsibility for receiving employment applications. Additionally, an employee does not lose eligibility for reemployment by seeking or obtaining employment with a new employer, provided the employee makes a timely reemployment application to the employee's pre-service employer.

If an employee's period of service lasts more than 30 days, the employer may request – and the employee must furnish – documentation to establish that: (1) the employee's reemployment application is timely; (2) the employee has not exceeded the five-year service limit; and (3) the employee's separation or dismissal from service is not disqualifying. An employer may not delay or deny reemployment if documentation establishing the employee's eligibility does not exist or is not readily available, but the employer may terminate an employee upon receiving documentation showing that the employee is not eligible for reemployment.

(i) Military service lasting less than 31 days

For periods of service less than 31 days, or for an absence for an examination to determine an employee's fitness for duty, the employee must report back to the employer "not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of" service, and a period of eight hours following a period of time allowing for the employee's safe transportation from the place of service to his or her residence. If, through no fault of the employee, this is impossible or unreasonable, then the employee must report to the employer as soon as possible after the expiration of the eight hour period.

If, for example, an employee completes a period of service and travels home, arriving at 10:00 p.m., the employee cannot be required to report to work until the beginning of the next full regularly-scheduled work period that begins at least eight hours after the employee safely arrives home, *i.e.*, no earlier than 6:00 a.m. According to the regulations, if the employee in the foregoing example was scheduled to start working at 5:00 a.m., the employer could not require him to report to work at 6:00 a.m., after the shift began. Rather, the employer could only require the employee to report to work the following workday at 5:00 a.m., if that is the next full regularly-scheduled shift.

(ii) Military service lasting more than 30 days but less than 181 days

An employee whose period of military service is more than 30 days but less than 181 days must submit an application for reemployment within 14 days after the completion of the period of service. If, through no fault of the employee, this is impossible or unreasonable, then the employee must submit an application for reemployment on the next full calendar day when submission of such application becomes possible.

(iii) Military service lasting more than 180 days

An employee whose period of military service is more than 180 days must submit an application for reemployment within 90 days after the completion of the period of service.

(iv) Military service extended by hospitalization or convalescence

An employee whose leave for military service is extended by a period of hospitalization or convalescence because of an illness or injury suffered or aggravated by military service shall, at the end of such period of hospitalization or convalescence, report for reemployment or apply for reemployment as set forth in §§ 2.3.3.4(i)-(iii) *supra*. If the period of recovery exceeds two years, the employee shall have such rights as an employee who missed an equivalent period of time for a non-USERRA protected leave of absence would have under the employer's general

policies or practices. However, such "two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the [applicable] period[s] . . . impossible or unreasonable."

2.3.3.5 Discharge From The Uniformed Services

An employee does not lose his or her USERRA rights based on the character of the employee's service unless the employee has been discharged in one of the following four scenarios: (i) dishonorable or bad conduct discharge; (ii) under other than honorable conditions, as characterized by military regulations; (iii) for a commissioned officer, dismissal by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or (iv) for a commissioned officer dropped from the rolls due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

If any of the foregoing types of discharges are later upgraded, the service member's right to reemployment under USERRA will be restored if the service member is otherwise eligible, but the service member will not be entitled to back pay and other benefits for the period of time between the disqualifying discharge and the upgrade.

2.3.4 Employer Defenses To The Duty To Provide Reemployment.

An employer is relieved of its obligations to reemploy a person under the USERRA if it can prove:

(1) the employer's circumstances have so changed as to make reemployment impossible or unreasonable;

(2) the employee became disabled or aggravated a disability and accommodating the employee in his position or training the employee for a new position would pose an "undue hardship" on the employer; or

(3) the original employment was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

2.3.4.1 Changed Circumstances

An example of a change in circumstances under which an employer would not have a duty under the USERRA to reemploy an otherwise eligible employee is a reduction-in-force in which the employee would have been laid off had he or she not been on military leave.

2.3.4.2 Undue Hardship

"Undue Hardship," in the case of actions taken by an employer, means an action requiring significant difficulty or expense, when considered in light of:

(1) the nature and cost of the action needed under the USERRA;

(2) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(3) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

(4) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

2.3.4.3 Employment In "Brief Non-Recurrent" Positions

Positions for brief, nonrecurrent periods should not be confused with temporary, part-time, probationary, or seasonal employment positions, which do give rise to reemployment rights under the USERRA.

2.3.5 Application of the "Escalator Principle" In Reemployment.

As a general rule, the eligible covered employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for his or her absence due to military service. This policy is known as the "escalator principle;" the job position that it identifies is the "escalator position." The escalator principle holds that, if not for the period of military service, the employee could have been promoted (or, alternative, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites that he or she would have attained if not for the period of service. In all cases, the starting point for determining an eligible covered employee's proper reemployment position is the escalator position.

An individual "is entitled to seniority and other rights and benefits determined by seniority" that he had on the date his military service began "plus the additional seniority and rights and benefits" that he would have attained had he remained continuously employed. "Seniority" means "longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment." With respect to rights and benefits not determined by seniority, a person who is absent by reason of military duty is deemed to be on furlough or leave of absence during such service and is "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer . . . to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service." If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the covered employee must be given the most favorable treatment accorded to any comparable form of leave.

In a recent case, the Fifth Circuit Court of Appeals confirmed this interpretation of the escalator principle, with regard to both the rate of pay that an employee would have achieved, as well as seniority rights that would have accrued. *Rogers v. City of San Antonio*, 392 F.3d 758, 769 (5th Cir. 2004).

2.3.5.1 Military Service Lasting Less Than 91 Days

Except as noted in §§ 2.3.5.3 and 2.3.5.4 *infra*, a person returning from a period of military service that was for less than 91 days is entitled to the position of employment he would have held if the employment had not been interrupted by the period of military service, provided the person is qualified to perform the duties of such position. If the employee is not qualified for such position, the employer must make reasonable efforts to qualify the employee for the position. If these efforts fail, the employee may be put in the position of employment he or she held on the date of the commencement of military service.

"Qualified" with respect to an employment position means "having the ability to perform the essential tasks of the position." "Reasonable Efforts" with respect to an employer's USERRA obligations means "actions, including training provided by an employer, that do not place an "undue hardship" on the employer.

2.3.5.2 Military Service Lasting More Than 90 Days

Except as noted in §§ 2.3.5.3 and 2.3.5.4 *infra*, a person returning from a period of military service that was for more than 90 days is entitled to the position of employment he would have held if the employment had not been interrupted by the period of military service or a position of like seniority, status, and pay, provided the person is qualified to perform the duties of such position. If the employer is unable, after reasonable efforts, to qualify the employee for any of these positions, the employee may be returned to the position of employment he or she held on the date of the commencement of military service or a position of like seniority, status and pay, provided the person is qualified to perform the duties of such position.

2.3.5.3 Return Of An Employee Who Has Suffered Or Aggravated A Disability During Military Service

If an employee incurs or aggravates a disability during the military service, and by reason of such disability is not qualified for the position he would have held but for the interruption in his employment, the employer must make reasonable efforts to accommodate the disability. If these efforts fail, the individual is entitled to "any other position which is equivalent in seniority, status, and pay" provided the individual is qualified for the position or would become qualified through reasonable efforts of the employer. If no such position is available, the individual is entitled to a position "which is the nearest approximation to [such] position . . . in terms of seniority, status, and pay . . ."

2.3.5.4 Return Of An Employee Who Is Not Qualified For Reasons Other Than Disability

If, due to a reason other than disability, a person is not qualified for (1) the position he would have held but for the interruption in his employment or (2) the position he held when his

service began, and he cannot become qualified for such positions, and the person cannot become qualified through the reasonable efforts of the employer, the individual is entitled to "the nearest approximation to a position" such as that he would have held but for the interruption in his employment or, alternatively, the nearest approximation to the position he held when his employment was interrupted by his military service.

2.3.6 Vacation During Leave For Military Service.

The USERRA explicitly forbids employers from requiring an employee to use his vacation during a period of military service. This is true even with respect to reservists who attend annual training in the summer. If, however, an employee wants to use his vacation when he is on military leave, the employer must permit him to do so.

2.3.7 Discharge Only "For Cause" Following Military Leaves Of At Least 30 Days

An individual who is reemployed after military service of at least 180 days may be discharged only for cause for a period of one year following his reemployment. If the period of military service was more than 30 days, but less than 181 days, the individual may be discharged only for cause for a period of 180 days following his reemployment. "For cause" discharge may be based either upon the employee's conduct or, in some circumstances, the application of the escalator principle. If the discharge is based upon the employee's conduct, the employer bears the burden of proving that the discharge was reasonable and that the employee had notice that his or her conduct would constitute cause for discharge. If the discharge is based upon the application of the escalator principle, the employer bears the burden of proving that the employee's job would have been eliminated.

3.0
BURDEN OF PROOF.

The burden-shifting framework approved of in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401, 103 S.Ct. 2469, 2474, 76 L.Ed.2d 667 (1983) is used to discern whether an employer has discriminated or retaliated against an employee in violation of the USERRA. This requires three phases of proof:

> First, the . . . [plaintiff] must show by a preponderance of the evidence that . . . [military status] was a motivating factor in the [the adverse employment decision]. Such a showing establishes . . . [a] violation unless the employer can show as an affirmative defense that it would have [made the same decision] for a legitimate reason regardless of the . . . [plaintiff's military status]. The . . . [plaintiff] may then offer evidence that the employer's proffered 'legitimate' explanation is pretextual – that the reason ither did not exist or was not in fact relied upon – and thereby conclusively restore the inference of unlawful motivation.

Harris v. City of Montgomery, 322 F.Supp.2d 1319, 1325 (M.D. Ala. 2004), *quoting*, *NLRB v. McCain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

4.0
CONCLUSION

Given the mobilization and demobilization of Reserve and National Guard members over the past 3 ½ years and the present active-duty status of more than 185,000 reserve forces, employers should be aware of their obligations under the USERRA. Given the complexity of the statute and its implementing regulations, employers should address questions about an employee's military service to an attorney who understands the USERRA and its implementing regulations.

WHEN JOHNNY COMES MARCHING HOME:

EMPLOYERS' OBLIGATIONS UNDER USERRA

Presented by:
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JW | JACKSON WALKER L.L.P.

USERRA

- Uniformed Services Employment and Reemployment Rights Act

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PURPOSES OF USERRA

- Encourage Non-Career Service
- Prohibit Employer Discrimination
- Guarantee Reemployment

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EMPLOYERS COVERED

- Public
- Private
- Churches
- Individuals

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EMPLOYEES COVERED

- Present Employees, including U.S. employees employed in foreign countries by U.S. entities
- Citizenship is not the test; aliens qualified for employment also are protected
- Past Employees
- Applicants, in some instances

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EMPLOYER DUTIES UNDER THE USERRA

- The Duty Not To Discriminate
- The Duty Not To Retaliate
- The Duty To Provide Reemployment

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DUTY NOT TO DISCRIMINATE

- The USERRA forbids employers from denying to any person "initial employment, reemployment, retention in employment, promotion, or any benefit of employment" on the basis of the person's "performance of services, application for service, or obligation" to serve in the armed services.
- Hill v. Michelin North America, Inc.
- Harris v. City of Montgomery
- Yates v. Merit Systems Protection Bd.
- Schmauch v. Hand of America Mfg., Inc.

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DUTY NOT TO RETALIATE

- The USERRA forbids employers from retaliating against as individual because the individual has:
  1. Acted to enforce a protection afforded any person under USERRA;
  2. Testified or otherwise made a statement in connection with a proceeding under the USERRA
  3. Assisted or participated in a USERRA investigation; or,
  4. Exercised a right provided by USERRA.
- Protection Afforded Regardless of Military Services
- Protection Broader than Right of Employment

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DUTY TO PROVIDE REEMPLOYMENT

Requirements For Reinstatement Follow Leave:

- Civilian Job
- Qualified Military Service
- Advance Notice
- 5 Year Maximum Time Period, Usually
- Timely Application For Reinstatement
- Honorable Discharge

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TYPES OF MILITARY SERVICE

- Active duty Army, Navy, Marine Corps, Air Force or Coast Guard
- Army, Navy, Marine Corps, Air Force or Coast Guard Reserves
- Army National Guard or Air National Guard
- Commissioned Corps of the Public Health Service
- Other

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QUALIFIED MILITARY SERVICE

- Duty on a Voluntary or Involuntary Basis, Including
  - Active duty
  - Active duty for training
  - Initial active duty for training
  - Inactive duty training
  - Full-time national guard duty
  - Absence from work for an examination to determine fitness for any of the above

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ADVANCE NOTICE

- By Employee
- Appropriate Military Officer
- Guarantee Reemployment

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MAXIMUM TIME PERIOD

- 5 Year Cumulative Service Limit
- Voluntary & Involuntary
- Exclusions

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TIMELY APPLICATION FOR REINSTATEMENT

Time Following Completion of Qualified Military Service In Which Reinstatement Must Be Requested	Length of Qualified Military Service
1 day and 8 hours (excluding travel time)	Less than 31 days
14 days	More than 30 days but less than 181 days
90 days	More than 180 days

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EMPLOYER'S REINSTATEMENT OBLIGATION

- Escalator Principle
- If Military Service Lasts 91 Days Or Less —
  - Same Position As If Continuously Employed Encourage Non-Career Service
- If Military Service Lasts More Than 90 Days—
  - *Position With Similar Seniority, Status & Pay*

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EXCEPTIONS TO EMPLOYER'S REINSTATEMENT OBLIGATION

- Impossible or Unreasonable
- Undue Hardship on Employer
- Temporary Employment

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POST-DISCHARGE EMPLOYMENT PROTECTION

- "For Cause" Discharge
- Discharge as a Result of Escalator Principle

Protection Period	Period of Military Service
180 days	30 to 181 days
1 year	More than 180 days

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ENFORCEMENT AND PENALTIES

- VETS
  - Investigation
  - Subpoena power
- Litigation
  - Attorney General
  - Private
  - Double damages
  - Attorneys Fees

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LAW ENFORCEMENT

- Burden of Proof follows Burden Shifting Analysis set forth in NLRB v. Transportation Management Corp.
- Mandatory Arbitration Has Been Found Unenforceable

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ESGR

- National Committee for Employer Support of the Guard and Reserve
- www.esgr.org
- 1-800-336-4590

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VETS

- VETERANS EMPLOYMENT AND TRAINING SERVICE
- www.dol.gov/vets

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1C

E. STEVE BOLDEN, II

Nonqualified Deferred Compensation Provisions of The American Jobs Creation Act of 2004

E. STEVE BOLDEN, II

E. Steve Bolden, II is an associate in the Business Transactions section of Jackson Walker, L.L.P., where his practice consists of representing corporate clients in transactions ranging from mergers, acquisitions, and reorganizations to public and private offerings of debt and equity securities.

Mr. Bolden also advises clients in the design, implementation and administration of tax-qualified, non-qualified retirement plans and other group benefit plans.

Steve Bolden practices transactional law.

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MEMBERSHIPS

Mr. Bolden is a member of the State Bar of Texas, the Business Law Section of the State Bar of Texas, Southwest Benefits Association and Dartmouth Lawyers Association. Mr. Bolden serves as the Secretary/Treasurer for the Business Law Section of the State Bar of Texas.

COMMUNITY INVOLVEMENT

Mr. Bolden serves on the Advisory Board of Directors for the National Association of Black Accountants Academic Career Awareness Program.

EDUCATION

Mr. Bolden received his A.B. degree from Dartmouth College and his J.D. degree from Thurgood Marshall School of Law, *magna cum laude*, where he was a member of the Board of Advocates.

NONQUALIFIED DEFERRED COMPENSATION PROVISIONS OF THE AMERICAN JOBS CREATION ACT OF 2004

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STRUCTURE OF NEW SECTION 409A

- Rules to Determine Whether and When Constructive Receipt is Applicable
- Rules with Specific Limitations for Deferred Compensation Plans

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SWEEPING IMPACT

- Every Deferred Compensation Plan in the U.S.
- Formal and Informal
- Elective and Nonelective
- Single Employee and Groups of Employees
- Consultants and Independent Contractors
- Outside Directors

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COVERAGE – ALL PLANS EXCEPT:

- Qualified Retirement Plans
- Vacation Leave
- Sick Leave
- Compensatory Time
- Disability Pay
- Death Benefit

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AFFECTED PLANS

- SERPs
- Elective Deferred Compensation
- Individual Deferred Compensation Arrangements
- Bonus Deferral Plans
- Outside Director Plans
- Severance Agreements

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AFFECTED PLANS

- Discounted Stock Options
- Restricted Stock Units
- Restricted Stock
- 401(k) "Wrap" Plans

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SCOPE OF NEW SECTION 409A

- Elections
- Acceleration
- Distributions
- All Existing Constructive Receipt Rules
  - Assignment of Income
  - Economic Benefit

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ELECTIONS

- Initial
- Changes
  - Time
  - Form

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ELECTIONS – INITIAL

- Election Must Be Made Not Later Than Close of Preceding Tax Year
- 30 Days Following Initial Eligibility
- Performance – Based Compensation

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ELECTIONS – PERFORMANCE BASED COMPENSATION

- 12 Month or More Service Period
- Election Must Be Made 6 Months Before End of Service Period
- 162(m) Rules

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ELECTIONS – PERFORMANCE BASED COMPENSATION

- Period Not Shorter Than 12 Months
- Amount is Variable and Contingent
- Performance Criteria Established in Writing Within 90 Days After the Start of the Performance Period

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DISTRIBUTION RULES

- Separation From Service
- Disability, as defined in the new law
- Death

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DISTRIBUTION RULES

- Specific Time (Date, Not Event) Determined at Deferral Date
- Change In Control (to be defined by IRS)
- Unforeseeable Emergency

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DISTRIBUTION RULES

- Public Company
- Key Employee
  - Compensation Over $130,000
  - 5% Owners
  - 1% Owners with Compensation over $150,000
- 6 Month Extension to Separation From Service Rule

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UNFORESEEABLE EMERGENCY

- Severe Financial Hardship
- Resulting From Injury or Accident
- Loss of Property Due To Casualty

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UNFORESEEABLE EMERGENCY

- Other Extraordinary, Unforeseeable Circumstances Resulting From Events Beyond Participant's Control
- Amount Limited To Satisfy Need and Pay Taxes
- Other Resources

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DISTRIBUTIONS – CHANGES

Time and Form of Distributions

- New Election May Not Be Effective For 12 Months
- 5 Years if Distribution is Due to:
  - Separation From Service
  - Specified Time
  - Change In Control

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DISTRIBUTIONS – CHANGES

Time and Form of Distribution

- If Due To Specified Time, Election Must Be Made at Least 12 Months Before Payment Time

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ACCELERATION OF DISTRIBUTIONS

- No Acceleration of Time or Schedule of Any Payment Except as Allowed by IRS
- No Haircuts

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ACCELERATION, PERMISSIBLE CHOICES – SUBJECT TO REGULATIONS

- Lump Sum and Annuity
- Cash and Taxable Property
- Compliance With Divorce Decrees
- Tax Liens

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ACCELERATION, PERMISSIBLE CHOICES – SUBJECT TO REGULATIONS

- Withholding of Employment Taxes
- Income Tax Distributions Due To Section 457(f) Vesting
- De Minimis Amounts

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FUNDING RULES

- Offshore Rabbi Trusts
- Financial Difficulty Triggers

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PENALTIES

- All Compensation For Current Year and All Prior Years is Included in Current Year Gross Income
- Interest at IRS Underpayment Rate Plus 1%
- 20% Additional Tax
- Participant Level; Not Plan Level

JW | JACKSON WALKER L.L.P.

PROBLEMS

- Below Market Stock Options
- Bonuses Paid After 2 ½ Months Following Tax Year End
- SARs
- Phantom Stock

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REPORTING

- Withholding Is Required For Income Taxes Due To New 409A
- Deferred Compensation Must Be Reported To IRS On W-2 or 1099 For the Year of Deferral

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EFFECTIVE DATES

- Amounts Deferred After 12-31-04
- Earnings On Grandfathered Amounts Are Grandfathered
- Grandfather is Lost if Plan is Materially Modified After 10/3/04

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EFFECTIVE DATES

- Material Modification is any Addition (Not Reduction) of any Benefit, Right or Feature

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IRS GUIDANCE

- 30-60 Days
- Application of Effective Date Rules
- Grace Period For Amendments to Existing Plans
- Rescission Rules For Employees

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STRATEGIES

- Freeze Existing Plans
- Adopt New Plans For Future Deferrals
- Communicate With Affected Employees
- Obtain Consent
- Wait and See

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PLAN AMENDMENTS

- Caution
- IRS Guidance
- 3 to 6 Month Grace Period
- IRS Model Amendment

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NONQUALIFIED DEFERRED COMPENSATION PROVISIONS OF THE AMERICAN JOBS CREATION ACT OF 2004

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2

PANEL ONE:

RAY CLARK
A. DAVID GROSS
GARY L. INGRAM
KENT R. SMITH

RAY CHARLES CLARK

Ray Charles Clark is a partner in the Labor and Employment section of Jackson Walker. Mr. Clark's practice consists of counseling clients and representing employers in a wide variety of labor and employment issues. Mr. Clark has defended clients against several statutory and common law claims, such as claims brought under the Age Discrimination in Employment Act, Americans with Disabilities Act, Fair Labor Standards Act, Family and Medical Leave Act, Texas Commission on Human Rights Act, Texas Payday Act, and Title VII.

Prior to entering the legal profession, Mr. Clark served in the United State Marine Corps Reserves for seven years. He also developed managerial skills through experience in several industries, including retail and aerospace manufacturing.

Ray Clark practices labor and employment law

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PUBLICATIONS / SPEAKING ENGAGEMENTS

Mr. Clark's most recent speaking engagements include a presentation of his paper, "When Johnny Comes Marching Home: Employers' Obligations Under USERRA," given at Jackson Walker's 2003 Employment Law Symposium; a presentation titled "Employee Wellness Programs: Potential Liability from the Misuse of Genetic Information," given at the North Dallas Chamber of Commerce's 2003 Health Care Conference; and a presentation of a paper he co-authored titled "Internal Affairs: Ethical Issues for In-House Counsel in Workplace Investigations," given during Jackson Walker's 2004 continuing legal education ethics program for its corporate clients.

Mr. Clark is the author of an overtime guidebook for the Texas Association of Broadcasters titled "TAB's Guide to Wage and Hour Rules," which is published on their Web site. He has written articles for Jackson Walker's labor and employment newsletter, *Employer's Update*. These articles include "The Ramifications of Operation Enduring Freedom and the Uniformed Services Employment and Reemployment Rights Act of 1994" and "Architectural Barriers And You: Liability For Failure To Provide Access To Your Facilities." Mr. Clark has also published an article on NAFTA for *International Company and Commercial Law Review*.

RAY CHARLES CLARK

COMMUNITY INVOLVEMENT

Mr. Clark is active in his community and serves as the President for RDC Foundation, which supports the Richardson Development Center, a charitable organization that provides therapy to disabled babies and children in the greater Dallas area.

EDUCATION

Mr. Clark received his B.A. degree, *summa cum laude*, from Texas Christian University and his J.D. degree from New York University.

A. DAVID GROSS

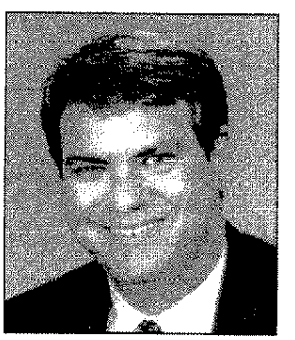
A. David Gross is a partner in the Labor and Employment section of Jackson Walker. Mr. Gross handles a variety of issues for corporate clients including employment contract disputes, Title VII litigation, and appellate law. He also has experience in drafting employee handbooks, contracts, and sexual harassment policies. Additionally, Mr. Gross is frequently called upon to provide advice to his clients on a wide range of general labor and employment issues.

MEMBERSHIPS

Mr. Gross is a member of the Dallas Bar Association and the State Bar of Texas. He is admitted to practice in the United States District Courts for the Northern and Western Districts of Texas.

EDUCATION

Mr. Gross received his B.B.A. degree, *summa cum laude*, from the University of Pittsburgh and his J.D. degree from the University of Texas.



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GARY L. INGRAM

Gary L. Ingram is head of the Labor and Employment section of Jackson Walker. His experience is primarily in labor and employment law matters and civil rights litigation. Mr. Ingram has a litigation-oriented practice for a wide variety of employers including small to mid-size companies, major U.S. corporations, and various governmental entities. He has personally successfully handled every type of case in the field of employment law, from simple arbitration cases to complex class action litigation.

Mr. Ingram is admitted to practice before the United States Supreme Court, Courts of Appeal for the Fifth, Eleventh, and Tenth Circuits, and all Texas courts.

Gary Ingram practices labor and employment law.

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MEMBERSHIPS

He is an active member of the American Bar Association and State Bar of Texas, having served in various leadership roles on the State Bar of Texas Continuing Legal Education Committee, Labor and Employment Section, EEOC Liaison Committee, and OSHA Liaison Committee and on the American Bar Association Workers' Compensation Committee, Labor and Employment Law Section, Committee on Individual Rights and Responsibilities. In addition, he has been a member of the State Bar College and is a Fellow in the Texas Bar Foundation. Mr. Ingram also has held various memberships in the Fifth Circuit Bar Association, the American Arbitration Association's Industrial Relations Research Association, the Southwestern Legal Foundation, and the Tarrant County Civil Trial Lawyers Association.

PUBLICATIONS / SPEAKING ENGAGEMENTS

Mr. Ingram has appeared as an author and lecturer at numerous educational seminars and workshops including programs sponsored by the State Bar of Texas, the Texas Association of Business, the American Arbitration Association, the American Society of Personnel Administrators, College & University Personnel Administrators, and the Fort Worth Human Relations Commission.

GARY L. INGRAM

AWARDS

Mr. Ingram was named a "Texas Super Lawyer" in the November 2003 and October 2004 issues of *Texas Monthly* magazine.

EDUCATION

Mr. Ingram received his B.A. degree from Hendrix College and his J.D. degree from Southern Methodist University.

KENT R. SMITH

Kent R. Smith is a partner in the Labor and Employment section of Jackson Walker. He is board certified in labor and employment law by the Texas Board of Legal Specialization. He has significant experience representing management at both the trial court level and on appeal in matters involving employment litigation and labor law, with specific emphasis in the areas of employment discrimination and wrongful discharge. He is also experienced in issues of non-subscription to the Workers' Compensation Act, wage and hour matters, immigration matters, and drug testing. Mr. Smith is actively involved in advising employers in preventing employee relations problems.

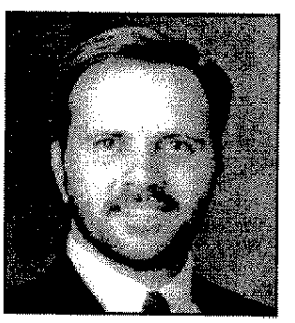
Mr. Smith has also been active in the field of sports law. He is a graduate of the Fifth Annual Sports Law Institute sponsored by SportsSeminars and the University of Wisconsin School of Law. He has also been certified by SportsSeminars and the National Football League Players Association as a registered contract advisor. He was a charter member of the Institute of Sports Attorneys and has been registered as an athlete agent with the Texas Secretary of State.

He completed the 40 hours of alternative dispute resolution training required by the Texas Civil Practice and Remedies Code to qualify for appointment as an impartial third party in pending litigation, and has participated in a number of mediations, both as an advocate and as a mediator.

Mr. Smith is admitted to practice in all Texas State Courts, the United States Supreme Court, the United States District Court for the Northern District of Texas, the United States Court of Appeals for the Fifth Circuit, and the United States Court of Appeals for the Tenth Circuit.

MEMBERSHIPS

Mr. Smith is active in numerous bar activities including regular participation in the activities of the Labor and Employment law section of the Tarrant County Bar Association. He has previously served as Chairman of the Alternative Dispute



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KENT R. SMITH

Resolution Committee of the Fort Worth - Tarrant County Young Lawyers' Association. He is also a member of the Litigation and Labor and Employment Law Sections of both the State Bar of Texas and the American Bar Association.

PUBLICATION / SPEAKING ENGAGEMENTS

Mr. Smith is a frequent speaker on various employment-related topics.

EDUCATION

Mr. Smith received his B.B.A. degree in accounting and information systems, *summa cum laude*, from Abilene Christian University and his J.D. degree, with honors, from the University of Texas School of Law.

PANEL TWO:

SARAH E. DOBSON
SCOTT M. MCELHANEY
W. GARY FOWLER
PHILLIP R. JONES

SARAH E. DOBSON

Sarah E. Dobson is an associate in the Labor and Employment section of Jackson Walker.

COMMUNITY INVOLVEMENT

While attending Baylor University, Ms. Dobson was a volunteer for Habitat for Humanity. Ms. Dobson is currently involved in Big Brothers Big Sisters of North Texas.

EDUCATION

Ms. Dobson received her B.A. degree, *magna cum laude*, from Baylor University. She received her J.D. degree, *summa cum laude*, from Texas Tech University, where she was inducted as a member of the *Order of the Coif*.

Sarah Dobson practices labor and employment law

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SCOTT M. MCELHANEY

Scott M. McElhaney is a partner in the Litigation section of Jackson Walker, where he concentrates on business litigation and employment law.

As litigation counsel for a variety of clients, Mr. McElhaney has handled a range of complex commercial litigation, including contract and business tort suits, trade secret litigation, and non-competition agreement injunction proceedings. He regularly handles a wide variety of employment discrimination, ERISA, FMLA, and FLSA claims, as well as defamation and other intentional tort cases. Mr. McElhaney has represented clients in class action suits in federal and state courts and has successfully prosecuted numerous appellate matters. He has also been appointed by courts to represent indigent clients in federal criminal cases and Section 1983 matters.

Scott McElhaney practices litigation.

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In 2004, Mr. McElhaney was chosen as one of the "Best Lawyers Under 40 in Dallas" by *D Magazine* and was named a "Texas Super Lawyer" by *Texas Monthly* magazine.

Mr. McElhaney is a Lecturer at SMU's Dedman School of Law, where he teaches Employment Law and has taught Legal Research and Writing. Prior to entering private practice, he was a Law Clerk to Judge Barefoot Sanders on the U.S. District Court for the Northern District of Texas and to Judge Irving Goldberg on the U.S. Court of Appeals for the Fifth Circuit.

REPRESENTATIVE CASES

- obtained summary judgment for client against a claim for wrongfully withheld stock options;
- won summary judgment in favor of client on ERISA estoppel, waiver, and breach of fiduciary duty claims for $1 million in plan benefits;
- as appellate counsel, obtained reversal of adverse judgment for client in sex harassment case;
- co-appellate counsel in winning reversal of $11 million jury verdict in case involving claim that plaintiff was discharged for refusing to perform an illegal act;

- co-counsel in obtaining permanent injunction for high tech company against defendant in trade secret misappropriation case;
- co-counsel in securing injunction against former franchisee of client against competing with client in violation of covenant not to compete.

MEMBERSHIPS

Mr. McElhaney is a member of the State Bar of Texas and the American and Dallas Bar Associations. He serves on the Council of the Dallas Bar Association's Business Litigation Section. He is also a fellow in the Texas Bar Foundation, a life fellow in the Dallas Bar Foundation, and a member of the Wm. "Mac" Taylor Inn of Court.

PUBLICATIONS/ SPEAKING ENGAGEMENTS

- "Arbitration: A Better Place to Be? Enforcing and Avoiding Arbitration Clauses" Presented to the Dallas Bar Association Business Litigation Section, March 9, 2004.

- "Avoiding Punitive Damages in Employment Discrimination Cases" Jackson Walker Employer's Update, Spring 2003.

- "From Start to Finish: Procedural Issues and Practical Outcomes in Class Actions" Presented to the Texas State Bar Antitrust and Business Litigation Section Class Action Seminar (April 12, 2002).

- "Reassignment as a Reasonable Accommodation Under the Americans with Disabilities Act" (August 24, 2000).

COMMUNITY INVOLVEMENT

Mr. McElhaney is active in a number of community groups and is a member of the Leadership Dallas Class of 2004.

SCOTT M. MCELHANEY

EDUCATION

Mr. McElhaney received his A.B. degree, *summa cum laude*, in history from Dartmouth College, where he was elected to Phi Beta Kappa. He obtained his J.D. degree, *cum laude*, from Harvard Law School, where he was Managing Editor of the Harvard Civil Rights-Civil Liberties Law Review.

W. GARY FOWLER

W. Gary Fowler is a partner in the Labor and Employment section of Jackson Walker and is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. Mr. Fowler's practice includes both counseling and defending clients in employment related matters. In counseling clients, he applies his broad depth of knowledge of labor and employment law to avoid unnecessary risks and the significant expense of avoidable lawsuits. He advises clients in specific difficult workplace situations, provides preventative services in employee handbooks, documentation, and in-house seminars, and prepares and analyzes employment contracts and related documents, from the simple to the complex, to protect employer interests.

Mr. Fowler tries cases and defends employers in federal and state courts and before all labor administrative tribunals. He has won summary judgments in both federal and state courts (including state courts in Texas which are not known for granting summary judgments in employment suits) in at least fifteen cases, saving his clients the significant expense and diversion of trial. He has argued appeals in the Supreme Court of Texas, the United States Court of Appeals for the Fifth Circuit, and several state Courts of Appeals. He was counsel for the employer in *Federal Express Corp. v. Dutschmann*, a leading Texas Supreme Court case which established that employers are not liable for statements in employee handbooks. Mr. Fowler also argued, and won, for the employer in *LTV Corp. v. Thomas*, an important Fifth Circuit case in the area of the National Labor Relations and Taft-Hartley Acts. His recent trial court victories have included a discrimination suit for a major telecommunications company, a covenant not to compete case concerning brokers for a financial company, a workers' compensation retaliation case for a major car manufacturer, and a disability discrimination suit for a large radio company.

Mr. Fowler's clients include high-tech companies, large restaurant chains, insurance companies, and businesses ranging from medium to large corporations. He is recognized for his experience in the Americans with Disabilities Act and is an

Gary Fowler practices Labor and Employment law in the Dallas office.

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W. GARY FOWLER

Adjunct Professor in disability discrimination law at SMU Law School in Dallas. He is also known for his knowledge of covenants not to compete, which are particularly complex under Texas law.

He is admitted to practice by the State Bar of Texas, the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit, and the United States District Courts for the Northern, Western, Eastern, and Southern Districts of Texas.

MEMBERSHIPS

In addition to being board certified, Mr. Fowler is an active member of the Labor and Employment Sections of the Dallas Bar Association, the State Bar of Texas, and the American Bar Association.

AWARDS

Mr. Fowler was named a "Texas Super Lawyer" in the November 2003 and October 2004 issues of *Texas Monthly* magazine.

EDUCATION

Mr. Fowler received his B.A., *summa cum laude*, from Texas Christian University and his J. D. from Yale Law School. He served as briefing attorney to Hon. Sam D. Johnson, Judge, United States Court of Appeals for the Fifth Circuit. He is a member of Phi Beta Kappa and is the 1979 Harry S. Truman Scholar for the State of Texas.

PHILLIP R. JONES

Phillip R. Jones is a partner in the Labor and Employment section of Jackson Walker. Prior to joining Jackson Walker, he was Senior Corporate Labor Counsel for General Dynamics Corporation in St. Louis, Missouri. His experience includes collective bargaining, grievance arbitrations, unfair labor practice litigation, union avoidance campaigns, wage-hour issues, affirmative action programs, and employment discrimination litigation. Mr. Jones is a frequent speaker on various issues in the employment law area, such as executive employment agreements, reductions in force, employee leasing, and employee discharge and documentation.

MEMBERSHIPS

He is a member of the American Bar Association and its section of Labor and Employment Law as well as the State Bar of Texas and its Labor and Employment Law section.

EDUCATION

Mr. Jones received his B.S. and M.M.S. degrees from Texas Christian University and his J.D. degree from Baylor University.

Phillip Jones practices labor and employment law.

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2A

KENT R. SMITH
MODERATOR

Employee Handbooks

EMPLOYEE HANDBOOKS

- **Exceptions to Texas At Will Doctrine**
  - **Statutory**
  - **Common Law**

- **Exceptions to Texas At Will Doctrine – Statutory**
  - **Texas Labor Code § 21.051 – discharge based on race, color, disability, religion, sex, national origin, or age**
  - **Texas Labor Code § 451.001 – discharge in retaliation for filing a workers' compensation claim**
  - **Texas Agriculture Code § 125.013(b) – discharge for exercising rights under the Agricultural Hazard Communication Act**
  - **Texas Civil Prac. & Remedies Code § 122.001 – discharge for jury service.**
  - **Texas Government Code § 431.005 – discharge for military service**
  - **Texas Election Code § 276.004 – refusing permission to vote and/or retaliating against voter**
  - **Texas Election Code § 161.007 – discharge for attending political convention**
  - **Texas Election Code § 253.102 – coercion of employees for political fundraising**
  - **Texas Civil Statute art. 4512.7 § 3 – discharge for refusing to participate in an abortion**
  - **Texas Family Code § 14.43(m) – prohibiting discharge due to withholding order for child support**
  - **Texas Labor Code § 52.051 – employer subject to fine for coercing employee to buy certain merchandise**
  - **Texas Health & Safety Code § 242.133– Nursing home employee cannot be fired for reporting abuse or neglect of a resident of the institution, and no retaliation for reporting violation of Hazard Communication Act.**

- **Texas Labor Code § 21.055 – No retaliation against an employee for reporting violations of the Texas Commission on Human Rights Act**

- **Exceptions to Texas At Will Doctrine – Common Law**

  - **Narrow exception to employment-at-will doctrine for employee who is discharged for sole reason that the employee refused to perform an illegal act. (Sabine Pilot v. Hauck [1985])**

- **What is a "disclaimer"?**

  - **"This handbook is not a contract, expressed or implied, guaranteeing employment for any specific duration. The policies and other information contained in this handbook are subject to change at any time due to business needs. The guidelines of this handbook do not constitute a contract of employment, nor any other binding agreement**

  - **"The policies stated in this handbook are subject to change at the sole discretion of the Company. From time to time, you may receive updated information concerning changes in policy."**

  - **"The handbook does not create property interests in stated benefits and policies unless some specific agreement, statute, or rule creates such an interest."**

EMPLOYMENT HANDBOOK TOPICS AND REQUIREMENTS

1. **If a covered entity (15 or more employees) the following federal and state requirements must be addressed within the handbook:**

   a. **Anti-discrimination**
   b. **Anti-retaliation**
   c. **Americans with Disabilities Act**
   d. **Sexual harassment**
   e. **FMLA**
   f. **Drug free workplace program - drug abuse policy requirements**
   g. **COBRA conversion rights**
   h. **HOT TOPICS**
      i. **Sarbanes Oxley**

      ii. **Whistleblowers**

      iii. **FLSA**

      iv. **HIPPA**

      v. **Immigration**

      vi. **Electronic Privacy**

      vii. **ADR/ Arbitration**

2. **General topics to be included:**

   a. **Welcome**
   b. **Mission statement**
   c. **At will employment**
   d. **Categories of employment full time/ part time/ contract**
   e. **Anniversary date for probationary period, merit raises, etc.**
   f. **Drug screen testing**
   g. **Motor vehicle and criminal checks**
   h. **Driver's license/driving record**
   i. **Certification or licensing**
   j. **Suggestions**
   k. **Communication**

l. Payroll
    i. Payday
    ii. Paycheck deduction
    iii. Charge backs
    iv. Garnishment/child support
    v. Overtime
    vi. Pay review
    vii. Promotion and transfer
m. Employee benefits
    i. Vacations
    ii. Sick days
    iii. Personal days
    iv. Jury duty
    v. Military leave
    vi. Leave of absence
    vii. Medical insurance
    viii. Dental insurance
    ix. Disability insurance short term or long term
    x. COBRA rights
    xi. Cafeteria plan
    xii. Family and Medical Leave Act
    xiii. Social security
    xiv. Worker's compensation
    xv. Retirement plans
n. Job requirements attendance and punctuality
o. Meals
p. Job training
q. Changes in personal data
r. Standards of conduct
s. Customer and public relations
t. Confidential, proprietary or trade secret information
u. Conflict of interest/Code of Ethics
v. Care of company equipment, vehicles, etc.
w. Personal phone calls
x. Dress policy
y. Reference checks
z. Outside employment
aa. Termination

3. **Safety in the workplace**

4. **Employee responsibility**

5. **Work place searches**

6. **Work place violence**

7. **Smoking**

8. **Concealed weapons**

9. **Substance abuse--policy /treatment/ education/ testing**

10. **Receipt and acknowledgment of handbook signature page**

Regulating The Workplace: The Importance of Employee Manuals

Kent R. Smith

JW | JACKSON WALKER L.L.P.

Policy Manuals

- Important considerations
  - Clear
  - Effectively communicated to all employees
  - Consistently applied

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Benefits

- Minimize lost time spent by addressing employee questions
- Facilitate consistent application of employment practices and procedures
- Build pride in the work force, help create a "team" atmosphere
- Discourage employment related lawsuits
- Reinforce the at-will relationship

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Negative Aspects

- Difficult and time consuming
- Can do more damage than good if they confuse rather than clarify employment policies, or if they unintentionally restrict the at-will employment relationship

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Four Objectives in Mind

- Provide employees with necessary information about the employer, employment benefits, work and attendance rules, disciplinary policies
  - To minimize the risk that the manual can be construed as contract between employer and employee
  - Couched in terms that are non-contractual and which serve to protect management flexibility and prerogative to make employment decisions
  - Do not directly violate employment discrimination laws or disproportionately affect employees or applicants in protected minority groups
  - Be aware that a handbook cannot answer all questions that may arise and residual discretion must be preserved to the employer

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Policies That Should be Included in all Personnel Manuals

- Disclaimer
- Equal Employment Opportunity Statement
- Sexual Harrassment
- Drug and Alcohol Policy
- Paydays
- Affirmative Action (only if required)
- FMLA

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Other Common Policies That Employers Should Consider Having

- Progressive Discipline
- Dispute Resolution
- Performance Evaluations
- Leave Policies
- No Solicitation/No Distribution
- Fair Labor Standards Act
- Privacy-Related Policies

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Inadvisable Policies

- Probationary period
- Permanent status
- Just cause

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2B

GARY L. INGRAM
MODERATOR

Protecting Your Company's Confidential & Proprietary Information

Protecting Your Company's Confidential & Proprietary Information

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What is Confidential & Proprietary Information ("C&P")?

Any formula, pattern, device, or compilation of information that is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it.

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EXAMPLES OF C&P

- Customer lists & pricing information
- Client information & customer preferences
- Buyer contacts
- Market strategies
- Blueprints & drawings

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What is Not C&P?

General knowledge, skills and experience acquired during the course of employment

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How Can I Protect My Company's C&P?

1. Maintain Confidentiality
2. Non-Competition Agreements
3. Non-Disclosure Agreements
4. Where appropriate, secure patents, trademarks, etc.

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Maintaining Confidentiality

1. "Loose lips sink ships" – disclose C&P only to employees with a "need to know"
2. Mark "Confidential" or "Secret"
3. Implement password protection & other security measures
4. Lock those filing cabinets & secret areas!

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Maintaining Confidentiality

Written Confidentiality Policy that:

- Requires employees to protect secrecy
- Certifies that employees read & understand the policy
- Restricts copying of C&P

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Maintaining Confidentiality

1. Periodically circulate "refresher memos" regarding confidentiality
2. Keep list of employees with access to C&P
3. Control documents with C&P

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Maintaining Confidentiality

For departing employees:

- Address C&P in exit interview
- Collect C&P, security passes, keys, etc.
- List items turned in
- Change passwords

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Non-Competition Agreements

1. "At-will" employment contracts usually will not support a non-compete
2. Offer C&P (or *new* C&P for an existing employee) for the employee's promise to not compete
3. Non-compete restrictions must be reasonable

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Non-Disclosure Agreements

"Bare" non-disclosure agreements protect C&P, they do not prohibit competition

Agreement to provide C&P is adequate consideration

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2C

PHILLIP R. JONES
MODERATOR

The Overdue Overtime Overhaul

THE OVERDUE OVERTIME OVERHAUL

Phillip R. Jones

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EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME

- Executives
- Administrators
- Professionals
- Outside Salespeople
- Certain Computer Workers
- Student Learners

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EXECUTIVE EMPLOYEES

New Standard Test

- **$455 per week**
- Primary duty of the management of the enterprise or a recognized department or subdivision.
- Customarily and regularly directs the work of two or more other employees.
- Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).

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EXECUTIVE EMPLOYEES

Examples of Exempt Executives

- Officers and directors
- Regional, branch, and department managers
- Procurement managers
- Some other managers and supervisors (depending on their specific duties and responsibilities)

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ADMINISTRATIVE EMPLOYEES

New Standard Test

- **$455 per week**
- Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.
- Primary duty includes exercise of discretion and independent judgment with respect to matters of significance.

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ADMINISTRATIVE EMPLOYEES

Examples of Exempt Administrative Employees

- Insurance adjusters
- Management consultants
- Assistant retail buyers
- Purchasing agents
- Investment consultants
- Executive and administrative assistants

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LEARNED PROFESSIONAL EMPLOYEES

New Standard Test

- **$455 per week**
- Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolon ged course of specialized intellectual instruction (but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience).

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LEARNED PROFESSIONAL EMPLOYEES

Examples of Exempt Professional Employees

- Doctors and physician assistants
- Other medical professionals such as registered nurses, registered or certified medical technicians, dental hygienists, and pharmacists
- Scientists such as physicists, chemists, and biologists
- Accountants and actuaries
- Engineers and architects
- Lawyers
- Teachers

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CREATIVE PROFESSIONAL EMPLOYEES

New Standard Test

- **$455 per week**
- Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

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NONPROFESSIONAL COMPUTER EMPLOYEES

The computer professional exemption *does not* apply to:

- Employees engaged in the manufacture or repair of computer hardware and related equipment; or
- Employees whose work is highly depen dent on, or facilitated by, the use of computers and computer software programs but who aren't in computer systems analysis and programming or other similarly skilled computer-related occupations.

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COMPUTER EMPLOYEES

New Standard Test

- **$455 per week or $27.63 an hour**
- Primary duty of (A) application of systems analys is techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or

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COMPUTER EMPLOYEES

New Standard Test

- **$455 per week or $27.63 an hour**
- (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, base d on and related to user or system design specifications; or

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COMPUTER EMPLOYEES

New Standard Test

- **$455 per week or $27.63 an hour**
- (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills.

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COMPUTER EMPLOYEES

New Standard Test

- **$455 per week or $27.63 an hour**
- Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

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OUTSIDE SALES EMPLOYEES

New Standard Test

- Primary duty of making sales; or of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.
- Customarily and regularly engaged away from the employer's place or places of business.

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OUTSIDE SALES EMPLOYEES

New Standard Test

- Non-sales work that is incidental to or furthers the employee's sales efforts is also considered exempt work (even if performed at the employer's offices).
- The services sold don't have to be performed by the employee making the sale.
- Promotional work is exempt work only if it is performed incidental to and in conjunction with the employee's own outside sales.
- Drivers who sell and deliver products may be exempt if their primary duty is making sales.

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OTHER ISSUES

- Special Rule for Highly Compensated Employees
  - $100,000
  - Identifiable executive, administrative, or professional position
- Pay – Docking
  - Allows deductions for full-day absences relating to discipline
- Window of Correction & Safe Harbor
  - Must have a policy prohibiting improper deductions
  - Protection lost if policy consistently & willfully violated after receiving employee complaints.
  - Lost protection applies to all employees in the same job classification working for the manager responsible for the error

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WHAT DOES IT ALL MEAN?

Audit Your Workforce

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2D

SCOTT M. MCELHANEY
MODERATOR

Navigating the Workers' Compensation System, The ADA, and The FMLA

Navigating the Workers' Compensation System, the ADA, and the FMLA.

JW | JACKSON WALKER L.L.P.

The Workers' Compensation Act

- Provides medical benefits and income benefits to employees who are unable to work because of a work-related injury or illness.
- The Texas Labor Code make it illegal to discriminate against a person who seeks benefits under the Workers' Compensation system.

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The Americans with Disabilities Act

- The ADA makes it illegal to discriminate against a qualified person with a disability.
- To discriminate under the ADA includes to not make a "reasonable accommodation" a qualified person's disability.
- "Reasonable accommodations" can include job restructuring, a part-time or modified work schedules, and reassignment to vacant positions.

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The Family and Medical Leave Act

- The FMLA requires "covered" employers to give "eligible" employees 12 workweeks of leave during any 12-month period because of a "serious health condition" that makes the employee unable to perform the functions of his or her job.
- The Act generally requires reinstatement of an employee to his or her position, or an equivalent one, and prohibits interfering with the exercise of FMLA rights (i.e., retaliation for taking FMLA leave.

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Employee Rights and Employer Responsibilities

- FMLA certification requirements v. the employee's right to choose a doctor under the workers' compensation system.
- Absenteeism Policies
  - satisfactory v. unsatisfactory attendance ratings
  - uniformly applied consecutive days of absence policies

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Employee Rights and Employer Responsibilities (con't)

- The "almost well" employee problem
- Light duty work and reasonable accommodations

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