BRYCE DOWNEY & LENKOV LLC

Labor & Employment Newsletter
September 2017

ADA & Company PTO/Attendance Policies & Practice

There has been a slew of recent litigation, much of it initiated by the EEOC involving employer leave policies which have an automatic up and out policy after an employee reaches a set period of leave of absence from work. The courts have emphasized that employers cannot have such policies which automatically terminate an employee when they are off work for a designated period of time. Rather, employers are expected to have a more flexible leave policy which examines every individual employee's absence and to engage in an interactive accommodation process.

This issue was once again brought to light by the recent $2 million settlement reached in August by a major international company. Suit was brought in the U.S. District Court, Northern District of Illinois by the EEOC against the company. The company had a leave policy which provided employees would automatically be terminated after 12 months leave without the employer engaging in the interactive process required by the ADA.

Similarly, the EEOC recently filed suit against an Illinois company because it allegedly fired an employee who was on leave with breast cancer and refused to extend her leave for additional few weeks after a period of approved absence.

Practice Tip:

It is critical that each employer closely examine its leave policies to ensure they do not have an automatic up and out provision when an employee reaches a certain set period of absence. Rather, there should be some flexibility built into such leave policies and on a case by case evaluation should be undertaken by the employer associated with any employee with an extended leave of absence. Employers should be aware that a leave of absence can constitute an accommodation under the law.

Employers should train their managers and supervisors to properly apply the law to avoid any liability.

Trump Bans Transgender Citizens from Military Service

Trump recently announced on Twitter that transgender individuals will no longer be allowed to serve in the U.S. military. The announcement came before any official position was made public by the Defense Department. Trump's tweet reasoned that the government should not be burdened by the medical costs associated with transgender service members. The announcement further came the same day that the DOJ proclaimed that sexual orientation is not protected under Title VII.

On August 25th, Trump signed a directive blocking new transgender recruits from joining the military and preventing the Pentagon from paying for medical treatment for transgender individuals currently serving in the military. Following Trump's actions, Defense Secretary James Mattis issued a statement that the

Pentagon will develop an implementation plan for Trump's directive by February 2018. Until the plan is completed, he said, transgender individuals currently serving will not be discharged based on gender identity.

Practice Tip:
The Trump Administration's stance on LGBT rights and protections leaves many uncertainties for the state of the law. Currently, the Seventh Circuit recognizes sexual orientation as a protected class under Title VII. Employers should continue to recognize this protection and update policies accordingly. See our separate article on recent court decisions.

Cook County Minimum Wage Increases

On July 1, 2017, Cook County's minimum wage increased to $10.00 per hour for non-tipped employees and $4.95 for tipped employees. Chicago's new minimum wage increased to $11.00 per hour for non-tipped and $6.10 for tipped employees.

All employers that maintain a business facility within the geographic boundaries of Chicago and/or are subject to one or more of the license requirements in Title 4 of the Municipal Code of Chicago are covered by Chicago's Minimum Wage Ordinance. Starting July 1st, these employers must display applicable posters and include a copy of Chicago's Minimum Wage Poster with the first paycheck issued after July 1st to each employee that is subject to the Ordinance.

Employers who fail to comply with the Ordinance are subject to a fine of $500.00 to $1,000.00 per day for each offense that is not corrected, and may also face potential license suspension or revocations and an order to pay restitution to underpaid employees. Additionally, employees can pursue a private cause of action to recover triple the amount of the underpayment, attorney fees and costs.

Practice Tip:
Employers who fall within the scope of these geographic boundaries should audit their pay practices and ensure that they are in compliance with the new regulations.

Single Racial Slur in the Workplace May be Enough to Sue for Harassment

On July 14, 2017, the U.S. Court of Appeals for the Third Circuit ruled that a single racial slur in the workplace may be enough to establish a lawsuit for harassment.

In its decision in *Castleberry v. STI Group*, No. 16-3131 (3d Cir. July 14, 2017), the Third Circuit reversed a ruling from the U.S. District Court for the Middle District of Pennsylvania, which dismissed the discrimination and retaliation claims of two African-American workers on a pipeline project who were terminated after reporting verbal abuse to supervisors, because the court did not find that they properly pled those claims.

According to the complaint, the plaintiffs reported that they had been told they would be fired if they "n*****-rigged" a fence they had been instructed to remove. This racial slur was enough to plead harassment because "an isolated incident of discrimination (if severe) can suffice to state a claim for harassment." In its opinion, the court clarified that the correct standard in which to plead harassment in the workplace is "severe or pervasive," rather than "severe and pervasive."

Practice Tip:
This case may open the door to similar findings in Illinois if the Seventh Circuit follows the reasoning in this case. Employers should take this opportunity to train their employees on workplace harassment to avoid costly litigation.

DOJ: Sexual Orientation Not Protected Under Title VII

On July 26, 2017, the United States Department of Justice (DOJ) filed an amicus brief in a Second Circuit case taking the position that Title VII does not protect employees against sexual orientation discrimination. The DOJ argued that "*sex"* and "*sexual orientation"* are different under the current statutory language of Title VII. According to the DOJ's brief, "[t]he sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. Any efforts to amend Title VII's scope should be directed to Congress rather than the courts."

The DOJ's position contradicts a recent ruling by the 7th Circuit Court of Appeals which ruled that Title VII prohibits workplace discrimination against LGBT employees. Other Circuits, such as the 11th Circuit, have recently taken conflicting positions.

Practice Tip:
Employers in Illinois and Indiana, which are within the purview of the 7th Circuit, should continue to abide by the ruling which protects employees from discrimination because of their sexual orientation.

Recent Court Decisions Regarding Transgender Individuals

We have seen a few notable legal developments involving transgender individuals in recent months.

First, in *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), a female-to-male transgender high school student sued the school district, claiming that its unwritten bathroom policy violated Title IX of the Education Amendment Act of 1972 and the Equal Protection Clause of the Fourteenth Amendment. The student was told that he could not use the boys' restroom and was disciplined for using it. The School District advised the student that pursuant to its policy, the student would only be permitted to use the boys' restroom if he changed his school records to change his sex to male, but failed to provide him with clear instructions regarding this process.

A Wisconsin district court granted the student a preliminary injunction to use the bathroom that corresponds with his gender identity, rather than his biological sex. The Seventh Circuit affirmed and noted that the school district failed to establish the existence of the policy on which it relied to prohibit the student from using the boys' restroom. Furthermore, in response to the School District's privacy concerns, the Seventh Circuit noted that the student used the boys' restroom for six months and never received any complaints from other students.

While this decision specifically relates to educational institutions, it provides us with some guidance for the employment context. Although the Seventh Circuit held in *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1086–87 (7th Cir. 1984), that Title VII does not prohibit discrimination against transsexuals, that decision is currently under severe scrutiny and also does not specifically address the bathroom usage question. In light of *Whitaker* and recent court rulings in other districts, the safest practice for Illinois and Indiana employers to avoid or minimize transgender discrimination claims is to allow transgender employees to use the restroom corresponding with their gender identity.

Second, in *Blatt v. Cabela's Retail, Inc.,* No. 5:14-CV-04822, 2017 WL 2178123, at *1 (E.D. Pa. 2017), a transgender employee sued her former employer under the Americans with Disabilities Act (ADA) and Title VII, alleging discrimination and failure to accommodate due to her transgender status. Notably, this is the first case addressing whether gender identity disorder is a disability under the ADA.

Blatt alleged that she complained to management that her coworkers made discriminatory comments because she was

transgender. She also alleged that Cabela's denied her requested accommodations, including being permitted to wear a female work uniform and use of the women's restroom. Finally, she alleged that Cabela's terminated her employment in retaliation for her complaints and accommodation requests.

Cabela's motioned to dismiss Blatt's ADA claims, arguing that her gender identity disorder was not covered by the ADA. The ADA provides that the term "disability" does not include "gender identity disorders not resulting from physical impairment." Blatt argued that if the ADA excluded her condition, that the ADA violated her rights under the Equal Protection Clause of the Fourteenth Amendment.

In its long-awaited decision, the Pennsylvania district court denied Cabela's motion, holding that the ADA's exclusion of gender identity disorders could be read narrowly to exclude only the condition of identifying with a different gender, but not excluding "disabling condition that persons who identify with a different gender may have." The court concluded that Blatt's gender dysphoria, which she alleged substantially limits her major life activities, could be an ADA covered disability. It remains to be seen whether Cabela's will appeal the ruling to the Third Circuit.

Practice Tip:

While this case is not binding on employers in Illinois or Indiana, employers would be well-advised to consider transgender employees and job applicants as potentially protected under the ADA, which requires employers to engage in the interactive process to reasonably accommodate requested accommodations. Employers should also treat transgender employee/applicant complaints of discrimination as they would any other complaint of discrimination, by investigating and disciplining the offending employees/parties. See our companion article on POTUS' position on transgender individuals in the military.

7th Circuit Reinstates Sexual Harassment Claim Based on Constructive Knowledge

On August 2, 2017, the 7th Circuit reversed, in part, a ruling by the Northern District of Illinois finding that a former car inspector can pursue a sexual harassment claim against her former employer even though the harassment took place at its client's jobsite and the harasser was not its employee.

In *Nischan v. Stratosphere Quality, LLC*, et al., No. 16-3464 (7th Cir. 2017), the underlying plaintiff was hired as a car inspector by a company which provides third-party inspection and quality control services to car manufacturers. She claimed that she was sexually harassed by one of her employer's clients, who routinely rubbed himself against her and made offensive comments, among other actions.

It was alleged that one such incident took place in front of a supervisor and a colleague in a trailer at the jobsite.

The plaintiff was thereafter removed from the job at the behest of her harasser. She did not complain formally about the harassment until after she was removed.

The District Court granted the defendant's summary judgment dismissing the case, but the 7th Circuit reinstated her harassment charge finding that her employer could be held liable for sexual harassment "if it knew or should have known of the harassing conduct yet failed to act." The court found that the employer is charged with having constructive notice of the harassment because both witnesses to the incident in the trailer observed the harassment and did nothing, and had a duty under the employee handbook to report any such sexual harassment.

Practice Tip:

Employers should be on notice that customers and clients that come into contact with your managers may now enjoy the same protections as your employees when it comes to sexual harassment. Now is a good time to train your managers about sexual harassment.

Employer Granted Summary Judgment on FMLA Retaliation Claim Despite Suspicious Timing

In *Tibbs v. Admin. Office of the Illinois Courts*, 860 F.3d 502 (7th Cir. 2017), Plaintiff, an administrative assistant to a judge, alleged that her former employer terminated her employment in retaliation for taking leave under the Family and Medical Leave Act (FMLA).

The day that she returned from FMLA leave in August 2012, Tibbs was given a letter placing her on paid administrative leave, pending a disciplinary meeting. The letter described several instances of misconduct. First, in March 2011, Tibbs had made changes to the court reporters schedules without authority resulting in controversy among the courthouse staff. Second, in about August 2011, Tibbs had disregarded a request to attend a meeting. Finally, immediately before Tibbs took FMLA leave in 2012, Tibbs failed to notify anyone that a box containing court transcripts was missing from the vault and took another court reporter into the vault without authorization, despite being warned that she did not have authority to handle vault requests. The letter also stated that Tibbs had repeatedly attempted to undermine her supervisor's authority by making disparaging comments to co-workers.

Tibbs skipped the disciplinary meeting and her employment was terminated. She then sued her former employer for FMLA retaliation.

The district court granted Defendant's Motion for Summary Judgment, dismissing the case. The Seventh Circuit affirmed, noting that Plaintiff failed to offer evidence sufficient to support an inference that the reasons her former employer gave for terminating her employment were false and thus, pretext for retaliating against her.

The Seventh Circuit stated: "That timing is suspicious, of course. The problem is that suspicious timing alone is rarely enough by itself. A plaintiff must ordinarily present other evidence that the employer's explanation for the adverse action was pretext for retaliation." 860 F.3d at 505. The court also noted that "Merely disagreeing with an employer's reasons does not meet this standard. A Plaintiff must point to 'evidence tending to prove that the employer's proffered reason are factually baseless, were note the actual motivation for the discharge in question, or were insufficient to motivate' the termination." *Id.* at 506.

Practice Tip:
Timing is often a critical factor in employment litigation. While the employer in *Tibbs* was able to prevail despite poor timing, the case serves as an important reminder that in cases where an employer wishes to terminate an employee following a leave of absence or some type of protected activity, employers should meticulously document the reason(s) for the termination and be prepared to articulate those reasons in litigation.

Indiana Employers May Ask Applicants About Their Criminal History

On July 1, 2017, Indiana enacted Senate Enrolled Act 312, which prohibits the state and municipalities from enacting laws or ordinances that restrict employers from asking job applicants about their criminal histories.

Indiana is the first state in the nation to pass such a law. In fact, for the past decade, in many states and municipalities across the nation, "Ban the Box" laws prohibiting employers from asking job applicants regarding their criminal histories on job applications have become increasingly prevalent in an effort to help ex-offenders re-enter society and stay out of the criminal justice system. This new law will effectively extinguish Indianapolis' 2014 "Ban the Box" ordinance.

Despite Indiana Governor, Eric Holcomb, signing this new law into effect on July 1st, just one day before, on June 30, 2017, he issued an executive order prohibiting state employers from asking about criminal history applications in

order to give rehabilitated criminals a chance to apply for state jobs without disclosing prior illegal acts.

Practice Tip:
Private Indiana employers may ask job applicants about their criminal histories but should carefully consider potential implications before doing so. First, employers who operate in Indiana and states or municipalities that have "Ban the Box" laws that wish to ask Indiana job applicants regarding their criminal histories should use different job applications in states and localities that have "Ban the Box" laws. Second, in deciding whether to ask job applicants about their criminal histories, Indiana employers should evaluate any disparate impact this may have as various studies have shown that this may result in racial discrimination, particularly against African Americans, which can present exposure for race discrimination claims.

Diminishing Defenses in Religious Accommodation Cases

We have previously written an article on religious accommodations *("Religious Accommodations in the Workplace: Practical Lessons,"* DRI's In-House Defense Quarterly Magazine, Summer 2016) and continue to keep a close eye on how the courts are addressing religious protections within the context of the employment setting.

On June 12, 2017, in *EEOC v. Consol Energy*, the Fourth Circuit affirmed the lower court's holding that requiring an employee to use a biometric hand scanner violated Title VII. 860 F.3d 131 (4th Cir. 2017). The Fourth Circuit also affirmed the lower court's award of $150,000.00 in compensatory damages, and $436,860.74 in lost wages and benefits. The employee in *Consol*, Beverly R. Butcher, Jr., was a devout Christian who felt that using the employer's new biometric hand scanner would bestow upon him the "mark of the beast." The employer refused to accommodate the employee and indicated that the employee would be required to use the scanner. The employee resigned after finding that his employer would not accommodate him.

Under Title VII, employers must "make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008). To show a violation, an employee must prove that: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

In arguing that the employee failed to satisfy the first prong above, the employer provided significant evidence to show that the employee's religion would only prevent him from using his right hand in the scanner, not his left hand. The Fourth Circuit held that "it is not Consol's place as an employer, nor ours as a court, to question the correctness or even the plausibility of Butcher's religious understandings. . . . So long as there is sufficient evidence that Butcher's beliefs are sincerely held . . ." *Consol*, 860 F.3d at 142-43. The Fourth Circuit found that the employee had a sincere belief, regardless of whether the employee's belief was inconsistent with his religion's scripture. The Court also noted that the employer was able to accommodate the employee's belief and that it was accommodating at least two other employees, for non-religious reasons, at no additional cost.

Regarding the third prong, the district court held that an employee is constructively discharged when "an employer deliberately makes the working conditions of the employee intolerable." The employer in *Consol* argued that it did not act deliberately because they did not deny an accommodation to provoke the employee's retirement and that the employee could have asserted a grievance under the collective bargaining agreement. The Fourth Circuit noted that in *Green v. Brennan*, the Supreme Court expressly rejected the "deliberateness" or intent requirement and instead only required objective "intolerability" and held that a potentially successful grievance is not enough to alleviate the immediate intolerability of an employee's circumstances.

Another case of religious accommodation was tried before a jury in the U.S. District Court for the Central District of Illinois in *E.E.O.C. v. Star Transport, Inc*., No. 13-cv-124. There, the EEOC brought suit on behalf of two Muslim truck drivers against their former employer, Star Transport, alleging Title VII violations. As Muslims, the employees' religious beliefs prohibited them from transporting alcohol. Both employees advised their dispatchers that their religious beliefs prohibited them from transporting alcohol when they were assigned a load containing beer. They were terminated for refusing to transport their assigned loads. The EEOC alleged that the employer could have, but failed, to accommodate the employees. The judge found in favor of the EEOC after Star admitted liability. The case proceeded to trial to determine damages. The jury awarded $240,000.

In 2016, Mission Hospital, Inc., a North Carolina corporation, was sued by the EEOC for failing to accommodate the religious beliefs of employees who declined to undergo annual flu vaccinations and three such employees were fired as result. *EEOC v. Mission Hospital, Inc.*, 1:16-cv-00118 (Western District of North Carolina, Asheville Division). The plaintiffs argued that they were fired because of their religious held beliefs. The employer argued that they discharged the employees for failing to follow the hospital's accommodation procedure for the vaccine.

The discharged employees' religious beliefs on not getting vaccinated ranged from the position that injecting a flu vaccine was morally or spiritually wrong to healing only occurs with plants, fruits and grains. Each of them submitted requests for religious accommodations but were denied for untimely filing same. The plaintiffs denied receiving any such submission deadlines.

In denying the hospital's motion for summary judgment thereby requiring this case proceed to trial, the court held that a jury could find that the hospital treated individuals with religiously held beliefs differently and did not accommodate those beliefs.

If the hospital had been more flexible with its vaccination schedule and allowed these plaintiffs to skip the vaccines, consistent with their religious beliefs, this case would not exist.

Recently, the EEOC has sued a franchise operator of a large restaurant chain for refusing to allow an employee to wear a skirt instead of pants because of her religious beliefs in violation of federal law. The employee was fired even after she presented management with a letter from her pastor explaining why she could not wear pants. The EEOC filed a lawsuit alleging such conduct violates Title VII, which requires employers to provide reasonable accommodations to employees with sincerely held religious beliefs. In addition to seeking monetary damages, the lawsuit requests injunctive relief to prohibit the franchise from discriminating against other employees who need religious accommodations.

Practice Tip:

Given the Federal Circuit courts' reluctance to question the validity of an employee's sincerely held religious belief, employers faced with a request for a religious accommodation should focus on engaging in an interactive process to determine if they can reasonably accommodate the employee's religious practice without undue hardship. Moreover, cases like *Consol* and *Star Transport* depict not only the broad scope of religious practices leading to accommodation requests, but also the extent of exposure in such cases. With such high potential exposure, employers should regularly train managers on how to handle accommodation requests. While managers may not be equipped to engage fully in the accommodation process, managers should, at the very least, be able to spot potential religious accommodation issues and be able to convey them quickly to HR personnel. Having a robust HR team is great, but it is equally important that managers are adequately trained to work properly with HR.

NRLB Appointments

This summer, President Trump nominated his picks for the two open seats on the National Labor Relations Board (NLRB): William Emanuel, a long time management-side labor and employment lawyer from Littler Mendelson, and Marvin Kaplan, a former Occupational Safety and Health Review Commission lawyer (OSHA).

In early August, the Senate confirmed Kaplan, moving the agency a step closer to a Republican majority. Kaplan was confirmed on a 50-48 vote. The Senate has yet to schedule a vote for Emanuel.

If approved by the Senate, it would result in a Republican led board, which over time, is likely to reverse a number of controversial pro-labor positions taken by the NLRB under the Obama administration. For example, under the Obama administration, the NLRB ruled in favor of employees in many cases involving Section 7 rights–that is, employees' rights to engage in protected, concerted activity—significantly expanding what constitutes protected activity and limiting employers' right to control employee speech and activity. We would expect that we will begin to see a shift in these types of decisions over time. We will continue to monitor the status of the NLRB and keep you posted.

New Form I-9 Released

On July 17, 2017, the United States Citizen and Immigration Services (USCIS) announced the release of a new version of the Form I-9. While the new form does not substantially change the prior version, employers must issue the new form by September 18, 2017. Thereafter, no other form will be acceptable for newly completed Form I-9's. Importantly, employers need not redo all previously completed Form I-9's for their employees. A copy of the new Form I-9 can be found on the USCIS website at https://www.uscis.gov/i-9, or made available by us upon request.

The Future of Overtime Eligibility

The Fair Labor Standards Act establishes a threshold amount wherein salaried employees making less than the prescribed amount are entitled to overtime. In 2016, President Obama raised the maximum salary threshold from $23,660.00 to $47,476.00. This decision marked the first increase in over 10 years and allowed additional increases every three years going forward. The 2016 increase was not set to go into effect until 12/1/16, but nonetheless had immediate effects on employers across the nation. Some employers braced for significant increases in overhead, some elected to increase pay of selected employees to minimize losses, and some were forced to minimize their workforce.

The rule was put on hold when U.S. District Judge Mazzant of the Eastern District of Texas entered an injunction and questioned whether the Obama Administration had the right to double the maximum threshold. *Nevada vs. U.S. Dept. of Labor*, 218 F.Supp.3d 520 (E.D. Tex. 2016). The Justice Department recently appealed the injunction in the 5th Circuit.

The Trump Administration and Department of Labor recently filed a brief in the Federal Court of Appeals, questioning the statutory authority to increase the maximum salary level at all. The brief asks the court to examine only the administration's statutory authority, without regard for the specific salary amounts involved.

The court's decision will have a significant effect on employers everywhere, regardless of how it is decided. Furthermore, while the current question is whether an Administration can increase the maximum threshold, numerous other questions will certainly follow. If the court finds that a given U.S. President's administration can increase the threshold, employers and employment attorneys will need to grapple with issues such as what limitations determine how high it may be set; how often it may be increased; and whether a U.S. President's administration may subsequently reduce the threshold.

Practice Tip:
The Trump Administration has suggested that depending on how the court rules, it intends on increasing the $23,660.00 threshold, but has been quiet on the amount or its exact intentions. Employers should remain vigilant on the case's progression and outcome because no matter how the court rules, change is coming.

DOL Reinstates Wage and Hour Division Opinion Letters

On June 27, 2017, the United States Department of Labor (DOL) announced that it is reinstating the DOL's Wage and Hour Division opinion letter process. The letters were a division practice for more than 70 years until being stopped and replaced by general guidance in 2010.

Employers and employees may submit questions to the division regarding compliance with the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA), amongst other less common federal wage and hour laws. The DOL then exercises it discretion to respond publicly with appropriate guidance. Opinion letters issued by the DOL may be relied upon as a good-faith defense to wage claims arising under the FLSA.

To request an opinion letter from the DOL, visit https://www.dol.gov/whd/opinion/.

Proposed Federal Paid Family Leave

On May 23, 2017, President Trump announced as part of his proposed budget that he would support the creation of a program in which states - meaning, employers within the states - would be required to provide six weeks of paid family leave to new mothers and fathers, including adoptive parents. No such programs exist at this time, and it is unclear whether Congress will support the paid leave initiative.

Although there is no current obligation under federal law to provide paid family leave, there is a growing trend amongst U.S. companies to provide such leave to their employees. The Family Medical Leave Act currently allows up to 12 weeks of leave after the birth of a child and other serious health conditions under certain circumstances, but that leave is unpaid. Many employees, however, do not take advantage of the full leave allowance because they cannot afford to do so. As a result, more and more corporations are offering paid family leave as an incentive to retain working parents.

Practice Tip:
Importantly, if this paid leave initiative is passed, employers' unemployment insurance taxes are likely to increase to fund the leave. We will continue to monitor the status of the proposed paid family leave program under the Trump Administration.

Recent Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics in various practice areas. If you would like a recording of any of our prior webinars, please email Marketing Director, Stuart Fisher at sfisher@bdlfirm.com.

Recent Seminars

- On **9/6/17**, Rich Lenkov with an all-star panel presented *"Stranger Things: The Oddest, Weirdest, Most Bizarre Claims I Have Ever Had"* at the CWC & Risk Conference in Dana Point, CA.

- On **8/16/17**, Jeff Kehl presented, "Discretionary Immunity Under Indiana Tort Claims Act and Illinois Tort Immunity Act" to PMA Insurance Group

- On **7/10/17**, Storrs Downey and Jeff Kehl presented "Illinois Workers' Compensation Liens & Third Party Liability" to PMA Insurance Group.

Upcoming Seminars

- On **9/28/17**, Storrs Downey will present "Labor and Employment: Sex, Drugs, Religion and the Impact of POTUS" at the 2017 Employers' Fall Summit hosted by Encore Unlimited at Pinstripes in Oak Brook, IL. Register here.

- On **10/25/17**, Justin Nestor and Kirsten Kaiser Kus will present "Top Employer Mistakes in Indiana" from 10:00am-11:00am CDT as part of Bryce Downey & Lenkov's monthly webinar series. Register here.

- On **11/2/17**, Justin Nestor, Tricia Bellich and Kirsten Kaiser Kus will be presenting a medical-legal seminar in Indianapolis, Indiana at Lucas Oil Stadium. We will host a highly interactive seminar with an orthopedic specialist discussing IMEs, various members from the Indiana Workers' Compensation Board to discuss compliance, a panel with a mediator, defense counsel and plaintiff's counsel to discuss various issues in claims and mediation. **CEU credits applied for and application is pending approval.** This seminar will be followed by a tour of Lucas Oil Stadium and a Happy Hour.

Recent Accomplishments

We are excited to announce that several of our attorneys have been recognized as industry leaders.

- **Geoff Bryce**, **Storrs Downey**, **Rich Lenkov**, **Jeanne Hoffmann**, **Werner Sabo**, **Terrence Kiwala, James Zahn** and **Brian Rosenblatt** were selected to the Leading Lawyers list. Leading Lawyers recognizes 5% of all lawyers licensed to practice law in Illinois

- **Michael Milstein** was selected to the Emerging Lawyers list. Emerging Lawyers recognizes the top 2% of lawyers of exceptional character and experience under the age of 40 in Illinois

- **Rich Lenkov and Brian Rosenblatt** was selected to the Super Lawyers List. The

Super Lawyers designation is given to no more than 5% of lawyers in Illinois

- **Michael Milstein** and **Kirsten Kaiser Kus** were selected to Rising Stars. Rising Stars is an exclusive list, recognizing no more than 2.5% of lawyers in Illinois

Jeff Kehl Obtains Favorable Verdict for Client in Dental Malpractice Case

Jeff Kehl recently defended a dental malpractice case to verdict on **1/31/17** in LaPorte County Indiana Circuit Court.

The plaintiff claimed that the fitting of his dentures was negligent and that he was not fully informed of the risk. The defense argued that the plaintiff was fully informed and went ahead with dentures rather than implants anyway.

The plaintiff's pre-trial settlement demand was $125,000.00. The settlement offer before and during trial was $10,000.00. The trial court barred certain plaintiff's expert testimony. The jury rendered a verdict for the plaintiff in the amount of $2,500.00.

Storrs Downey Obtains Favorable Decision In Seventh Circuit Court

Storrs Downey successfully convinced the Seventh Circuit Court of Appeals to affirm summary judgment in favor of BDL's client in a suit brought by a former employee who claimed he was retaliated against under the ADA and for filing an OSHA violation complaint.

BDL Is Growing!

BDL welcomes Jessica Jackler. Jessica handles employment & labor claims and earned her JD from Suffolk University Law School.

BDL welcomes Julia Alcaraz. Julia handles workers' compensation and earned her JD from The John Marshall Law School.

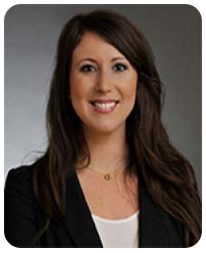
BDL welcomes Chase Gruszka. Chase handles workers' compensation and earned his JD from The John Marshall Law School.

BDL welcomes Emily Schlecte. Emily handles workers' compensation and general liability and earned her JD from The John Marshall Law School.

BDL welcomes Renee Day. Renee handles workers' compensation and general liability claims out of the firm's Indiana office. Renee earned her JD from the Thomas M. Cooley Law School.

Contributors to the September 2017 Labor & Employment Newsletter

The Bryce Downey & Lenkov attorneys who contributed to this newsletter were **Storrs Downey**, **Jessica Jackler** and **Tim Furman**.



Giving Back

Race Judicata 2017

BDL was proud to sponsor this year's wine tent at Race Judicata on **9/14/17**! Each year, Bryce Downey & Lenkov sponsors Chicago Volunteer Legal Services' Race Judicata 5K Race. CVLS is the first and pre-eminent pro bono civil legal aid provider in Chicago.

2017 BDL Participates in Baskets for Breast Cancer

Bryce Downey & Lenkov is proud to participate in USLI's 3rd annual Baskets for Breast Cancer auction from October 11-18, 2017.

The online silent auction of over 70 baskets includes an array of items generously donated from companies. This year, Bryce Downey & Lenkov donated a **"Windy City Family Vacation"** Enjoy everything Chicago has to offer with this one-of-a-kind package!

100% of sales benefit breastcancer.org.

Cutting Edge Legal Education

If You Would Like Us To Come In For A Free Seminar, Click Here Or Email Storrs Downey At sdowney@bdlfirm.com

Our attorneys regularly provide free seminars on a wide range of labor and employment law topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Among the national conference at which we've presented:

- 12th Annual Employment Practices Liability Insurance ExecuSummit
- National Association of Security Companies (NASCO)
- American Conference Institute (ACI)
- Claims and Litigation Management Alliance Annual Conference

- CLM Retail, Restaurant & Hospitality Committee Mini-conference
- National Workers' Compensation and Disability Conference® & Expo
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- RIMS Annual Conference

Some of our previous seminars include:

- Religious & Disability Discrimination & Accomodations.
- Recent DOL & NLRB Developments.
- Approaching LGBT Issues In Today's Workplace.
- Hiring Do's And Don'ts (With Video Examples).
- Is your Independent Contractor Actually An Employee?
- 10 Tricky Employment Termination Questions Answered.
- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace.
- Employment Law Issues Every Workers' Compensation Professional Needs To Know About.

Other Newsletters

Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Director Stuart Fisher at sfisher@bdlfirm.com.

General Liability

- Indiana Court Of Appeals Holds Children's Claims Are Not Time Barred As Derivative Claims In A Medical Malpractice Action
- Illinois Supreme Court Holds Six Person Jury Limitation Unconstitutional

Corporate & Construction

- Will Interest Rates Rise? Economic Slow Down? Time To Talk To Your Banker
- Parties May Be Entitled To A Lien Even If The Project Never Proceeds

Workers' Compensation

- Wage Differential May Not Necessarily Require Wage Loss
- Accident Date Trumps Hearing Date In Wage-Diff Award
- Collateral Source Rule Does Not Apply To Workers' Compensation Cases

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