



TENNESSEE WORKERS' COMPENSATION REFORM



Fredrick R. Baker



Michael W. Jones



Kelly A. Campbell



Andrew J. Hebar

In 2013, the Tennessee General Assembly enacted major workers' compensation changes initiated by Governor Bill Haslam and supported by the Tennessee Chamber of Commerce and Industry. The Act, which is titled the Tennessee Workers' Compensation Reform Act of 2013, was signed with the goal of making Tennessee more employer-friendly and more attractive for new business. In order to achieve these goals, the Act aims to bring about shorter periods to resolve conflicts, quicker return-to-work for injured workers, more assistance for injured workers, more consistency in results, and fewer obstacles to medical care. The law will apply for injuries on or after July 1, 2014.

With the Tennessee Workers' Compensation Reform Act of 2013, the General Assembly intends to benefit Tennessee by changing the business landscape, making existing workers' compensation law more employer-friendly. It will require a fair and impartial statutory construction which will no longer lean automatically in the injured worker's favor. Moreover, the administration of workers' compensation claims will be handled by an entirely separate division within the Tennessee Department of Labor and Workforce Development, calling for the appointment of an Administrator to cultivate the State's business environment and to create new rules in order to efficiently and justly administer workers' compensation claims. This revamped administrative structure will include the creation of a Medical Advisory Committee, Ombudsman program, as well as adjust the requirements for physician panels. With additional benefit calculation changes, such as the new impairment ratings being measured solely on the body as a whole and without reference to pain, the new law promises to significantly alter the way workers' compensation benefits are determined.

For more information on Tennessee Workers' Compensation, Fred Baker will present *Summary of Tennessee Workers' Compensation Reform* on Thursday, November 14th in the Main Ballroom from 10:25 am to 10:45 am. Fred, Kelly Campbell, Michael Jones, and Andrew Hebar will participate in presenting a breakout session entitled *Tennessee Workers' Compensation Reform in Depth and Case Law Update* on Thursday, November 14th from 11:00 am to 12:00 noon in the Andrew Jackson Room at the Marriott Downtown Knoxville.

Thursday, November 14th

**Marriott Downtown Knoxville
 Andrew Jackson Room**

*Tennessee Workers' Compensation Reform in
 Depth and Case Law Update*

11:00 am – 12:00 Noon

Presented by Fredrick R. Baker, Kelly A. Campbell,
 Michael W. Jones and Andrew J. Hebar



Fredrick R. Baker

In 2013, the Tennessee General Assembly enacted sweeping Tennessee Workers' Compensation reform legislation. This reform legislation will take effect July 1, 2014, and will drastically impact all major aspects of the practice and handling of Tennessee Workers' Compensation claims, including:

- Construction of the statute
- Calculation of permanent disability awards
- Establishment of an administrative Court of Workers' Compensation Claims
- Creation of the Ombudsman Program
- Definition of causation and compensable injuries
- Elimination of trial court jurisdiction
- Modification of the standards on medical panels.

The *Tennessee Workers' Compensation Handbook*, 5th Edition, by attorney Fred Baker, is the comprehensive resource for anyone who interacts with the Tennessee workers' compensation system. It is designed for HR personnel, attorneys, paralegals, risk managers, claims adjusters, mediators, benefits managers, claims analysts, and judges. Now fully updated and edited to include the upcoming 2014 legislative changes, the *Tennessee Workers' Compensation Handbook*, 5th Edition, gives clear, authoritative guidance that will help you navigate the challenges of the new Tennessee workers' compensation landscape.

WORKPLACE INVESTIGATIONS: MORE LIMITATIONS BY NLRB/EEOC



**Edward H.
Trent**



**Howard B.
Jackson**

For years, the Courts have emphasized the importance of conducting proper investigations. Someone complains of sexual harassment? Better investigate promptly but thoroughly before deciding the next steps. Otherwise, you may be guilty of ignoring or condoning harassment. Some employee apparently engaged in misconduct? Better investigate before determining what corrective action, if any, is appropriate. Otherwise, it is easier for the employee to claim that the employer acted because of bias against age, or gender, or disability, versus a reasonable determination that the employee in fact engaged in the misconduct.

Now the U.S. Equal Employment Opportunity Commission (“EEOC”) and the Courts, and the National Labor Relations Board (“NLRB”), are saying that the investigation itself can get the employer into trouble? What’s a Human Resources professional to do? The simple answer is that employers must conduct proper and effective investigations, just as before.

In recent years, two circumstances have emerged that can cause difficulty during the investigation stage. One seems obvious. The other is more subtle. Both can be managed by someone with a firm understanding of what constitutes protected activity by an employee that is protected under Title VII of the Civil Rights Act of 1964 (“Title VII”).

First, the EEOC has recently taken the position that employers must not tell witnesses who are interviewed during investigations that the witness is required to keep the interview confidential, on pain of discipline or discharge. This runs contrary to the practice, and instinct, of many employers. Often, the employer and the accuser want the entire process to remain as confidential as possible. There are many good reasons why maintaining such confidentiality is desirable. The EEOC’s new view shifts the playing field to some extent.

Second, the National Labor Relations Act (“Act”) gives employees the right to engage in concerted activity for mutual aid and protection regarding wages, hours and working conditions. These rights apply to all workplaces over which the NLRB has jurisdiction. The NLRB asserts jurisdiction over employers whose business includes at least \$50,000 per year in interstate commerce. Using that standard, the majority of employers are subject to the Act.

An employee’s right to engage in concerted activity for mutual aid and protection extends to occasions when the employer is investigating alleged workplace misconduct. The employee’s rights under the Act are not suspended because an investigation is taking place. Accordingly, there are things an employee may do that the employer dislikes, but the activity may be protected.

Who conducts an investigation is important. Most organizations should have one or more persons who are designated to lead investigations and who are trained in doing so. Circumstances that may warrant bringing in an outside investigator include when the allegations involve such a high ranking official that the impartiality of an internal investigator might be questioned. The organization’s employment counsel may assist in selection of the outside investigator, working with the outside investigator to oversee and direct the investigation.

A few tips and considerations:

1. The investigation should be both prompt and thorough.
2. Remember that electronically stored documentation is almost always important; the investigation should include a search for e-mails and other documents that should be preserved.
3. The completed investigation file should be a separate file, and preserved separate and apart from personnel files.

For more in depth information on workplace investigations, Ed Trent and Howard Jackson will participate in presenting this topic at a breakout session on Friday, November 15th, at 9:45 am to 10:45 am in the Riverview Room at the Marriott Downtown Knoxville.

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CONGRATULATIONS EDWARD H. TRENT



The Firm is pleased to announce that Ed Trent was recently selected by his peers for inclusion in *The Best Lawyers in America*© 2014 in the field(s) of Employment Law/ Management and Litigation/Labor and Employment. Ed is a Member of the Firm in the Knoxville, Tennessee office, which he joined in 2011. His practice includes labor and employment law matters in both state and federal court and before state and federal agencies. Ed's broad range of experience includes jury trials in employment discrimination cases, including the defense of appeals before federal and state appellate courts, day-to-day preventative counseling and advice, training for supervisor and human resources personnel on managing the workplace and complying with federal, state and local employment laws and regulations. Ed also works with churches on child protection issues and employment law matters, including filing an amicus brief in the case of *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S.Ct. 694 (2012), upholding

the "ministerial exception" to the application of state and federal employment laws to religious organizations. Ed received his Bachelor of Science degree in Accounting from the University of Florida and his law degree from Duke University School of Law. He has been admitted to practice in the United States District Court, Eastern and Middle Districts of Tennessee, the United States Court of Appeals, Eleventh Circuit, and the United States Supreme Court. Ed is Board Certified in Labor and Employment Law by The Florida Bar.

EEOC'S STRATEGIC ENFORCEMENT PLAN



**Fredrick J.
Bissinger**



**Anne T.
McKnight**

In December 2012, the U.S. Equal Employment Opportunity Commission ("EEOC") approved its Strategic Enforcement Plan for Fiscal Years 2013-2016. With the number of charges filed with the EEOC still on the rise, up 22% over the past decade, this Strategic Enforcement Plan ("SEP") will serve as the framework for achieving the EEOC's mission to "stop and remedy unlawful employment discrimination." Overall, the SEP demonstrates an increased emphasis on making enforcement a top priority, and a corresponding willingness to litigate more cases. It also focuses on prevention through education and outreach. The EEOC's last Strategic Plan (2007-2012) was issued by the Bush administration, and this new one reflects the priorities of the Obama administration.

The EEOC identified six major priorities for national enforcement in the private, public, and Federal sectors. Criteria for determining these priorities included issues that: have a broad impact; involve developing areas of the law; affect workers who may be unaware, reluctant, or unable to exercise their rights; involve practices that impede or impair full enforcement of anti-discrimination laws; and may be best addressed by government enforcement. The six major priorities are briefly outlined below and addressed more extensively in subsequent sections of this paper:

1. Eliminating barriers in recruitment and hiring;
2. Protecting immigrant, migrant and other vulnerable workers;
3. Addressing emerging and developing issues;
4. Enforcing equal pay laws;
5. Preserving access to the legal system; and
6. Preventing harassment through systemic enforcement and targeted outreach.

For more information on the EEOC's Strategic Enforcement Plan, Fred Bissinger will present *EEOC Strategic Enforcement Plan* on Thursday, November 14th, in the Main Ballroom from 10:25 AM to 10:45 AM. In addition, Fred and Anne McKnight will present a panel discussion on the EEOC's Strategic Enforcement Plan with guest panelists Sarah Smith and Sylvia D. Hall of the EEOC and Beverly L. Watts, Executive Director of

Thursday, November 14th

**Marriott Downtown Knoxville
James Polk Room**

EEOC's Strategic Enforcement Plan

2:45 pm – 3:45 pm

Moderated by Fred Bissinger
and Anne McKnight

Friday, November 15th

**Marriott Downtown Knoxville
James Polk Room**

EEOC's Strategic Enforcement Plan

9:45 am – 10:45 am

Moderated by Fred Bissinger
and Anne McKnight

the THRC, on Thursday, November 14th, at 2:45 PM to 3:45 PM and Friday, November 15th, from 9:45 AM to 10:45 AM in the James Polk room at the Marriott Downtown Knoxville.

FLSA COMPLIANCE IN DEPTH



Carol R. Merchant



Bob E. Lype

Friday, November 15th

**Marriott Downtown Knoxville
William Blount North**

FLSA Compliance in Depth

9:45 am – 10:45 am

Presented by Carol R. Merchant
and Bob E. Lype

Not many people know that the Department of Labor is the second-largest enforcement agency in the Federal government. Only the Department of Justice is larger. And, even with a proposed budget cut for the Department of Labor of \$24.4 billion for fiscal year 2014 from what was allocated for fiscal year 2013, enforcement agencies like the Wage and Hour Division will actually see a budget increase. Acting Secretary of Labor Seth Harris and the administration clearly believe that during these difficult economic times, ensuring that workers receive all the wages required by the law is of vital importance.

This continued increased focus on enforcement coupled with the explosion of class action litigation, as well as the addition of several hundred new investigators hired at the Department of Labor, make it more likely that bigger numbers of employers will find themselves faced with compliance issues in the coming years. This makes it all the more important for employers to have a solid understanding of the requirements of the Wage and Hour laws, and particularly the Fair Labor Standards Act (the “FLSA”). Of course, each State has its own set of Wage and Hour laws as well, and these laws must be taken in to consideration for compliance purposes, however, this article will focus on the requirements of the FLSA. The FLSA, enacted in 1938, establishes minimum wage, overtime pay, record keeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.

For more in depth information on the Fair Labor Standards Act, Carol Merchant and Bob Lype will be presenting FLSA Compliance in Depth on Friday, November 15th, at 9:45 am to 10:45 am in William Blount North at the Marriott Downtown Knoxville.

EMPLOYER NEGLIGENCE OR EMPLOYEE MISCONDUCT



Terri L. Bernal



Karen G. Crutchfield

Thursday, November 14th

**Marriott Downtown Knoxville
William Blount North**

Employer Negligence or Employee Misconduct

2:45pm – 3:45 pm

Presented by Terri Bernal
and Karen Crutchfield

As an employer, it is important to be aware that in addition to legal exposure under various employment laws, employers can be found legally responsible for the actions or omissions of their employees. Determining whether an employee is negligent and thus imputes liability to his or her employer, or whether an employee’s misconduct is considered not to be “legally connected” to his or her employment, is an extremely fact-intensive analysis. Therefore, an employer should always be cognizant of its employees’ actions in order to protect the company’s interests.

Under the doctrine of *respondeat superior*, which literally means “let the master answer,” an employer can be vicariously liable for the torts an employee commits while acting within the scope of his or her employment. To recover under the theory of *respondeat superior*, a Plaintiff must prove:

- The person who caused the injury was an employee;
- The employee was on the employer’s business; and
- The employee was acting within the scope of his or her employment when the injury occurred.

Employers may face significant liability for employee misconduct as well as for their own actions regarding the hiring, retention, training and supervision of their employees. Employers need to be aware of these risks and take proactive steps to reduce any potential for liability. Those steps should include training employees, particularly supervisors, in how to recognize and handle these issues.

For more information on the liability of Employers, Terri Bernal and Karen Crutchfield will present *Employer Negligence or Employee Misconduct* on Thursday, November 14th from 2:45pm to 3:45 pm in the Andrew Jackson Room of the Marriott Downtown Knoxville.