BV-SHRM NEWSLETTER

CHAPTER NO. 0330 ◆ JULY 2014

MONTHLY PROGRAM & LUNCHEON

TOPIC: **81 Tips, Developments, and Strategies for Employee Leaves of Absence**
Joint meeting with BVASTD

WHEN: **July 10, 2014**

TIME: 11:30: Lunch, Networking, & Announcements
12:00 Program

WHERE: **Hilton Garden Inn**
3081 University Dr. (east side of Highway 6, across from Veteran's Park)

COST: $12/ BV-SHRM member
$15/ non-members
Note: The guest price is now $15

SPEAKER: **Katrina Grinder**, Attorney, Katrina Grinder & Associates

RSVP: Please ***RSVP by noon, Thursday, July 3*** to rsvpprograms@gmail.com.

MENU: TBD

PROGRAM DETAILS

"81 Tips, Developments and Strategies for Employee Leaves of Absence"

Employee Leaves not only require accurately navigating FMLA, ADA, Worker's Compensation, and USERRA law as well as your organization's policies and procedures, but the organization must also keep out of hot water from the DOL, the EEOC and other entities. In this talk, Katrina Grinder will highlight a few of the things that organizations need to consider when administering leave and identify the missteps that could land you in the courtroom.

SPEAKERS BIO

Katrina Grinder holds a BS from Oklahoma State University and a JD from the University of Tulsa. She is board certified in Labor and Employment Law and has experience as a former partner for Bracewell & Giuliani, LLP as well as acted as a trial attorney for the Civil Rights Division of the US Department of Justice.

In addition to being active with the State Bar of Texas and the Texas Bar Journal, she has won several awards including Texas Superlawyer as well as recognition for her work with "Background Checks, Social Media and Other Arresting Developments" as well as "Advanced Leave Issues." She has authored several articles and books surrounding employment law.

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NEWS flash!

Please notify Krystal Broussard of any changes to your contact information.
krystal@boydreadymix.com

Upcoming Events

MARK YOUR CALENDARS

Chamber After Hours
July 17, 2014, 5:30-7:00 p.m.
Watercrest

EEOC's 17th Annual EXCEL Training Conference
EXamining Conflicts in Employment Laws
August 12-14, 2014
San Diego, CA
http://www.eeotraining.eeoc.gov/EXCEL2014/index.htm

HR Southwest
October 5-8, 2014
Ft. Worth, TX
Registration opens Mar. 3

2014 Workplace Diversity Conference & Exposition
October 13-15, 2014
New Orleans, LA
Sheraton New Orleans

DIVERSITY MATTERS

Diversity Dates for July

July 4	**Independence Day – US**
July 6	**Running of the Bulls – Spain**
July 9	**Martyrdom of the Bab – Baha'i**
July 11	**World Population Day**
July 14	**Bastille Day – France**
July 26	**Disability Independence Day, anniversary of 1990 signing of the ADA**
July 29	**Eid al Fitr – Islam**
July 30	**World Friendship Day**

Quote:

It is time for parents to teach young people early on that in diversity there is beauty and there is strength.
\- Maya Angelou

Are you in? BV-SHRM is.

LinkedIn

BV-SHRM has created a LinkedIn account and we encourage members to connect with us through this social media.

Visit us and become a Fan of BV-SHRM on facebook

Be on the lookout for the above logo!

It will be a featured symbol this year as we expand the marketing of our chapter!

PRESIDENT'S PIECE

Howdy!

On July 4th we will celebrate our nation's Independence Day. Americans from coast to coast will venture out onto their lawns, open their grills, break out the hot dogs, march in parades, listen to music and light the obligatory sparkler or two. But often forgotten in the midst of the summer fun is the true historical meaning of July 4th. On July 4, 1776, the Declaration of Independence from Great Britain was formally adopted. Obviously the Declaration is significant for many reasons, but at its core, it infused into our culture most of what we have come to believe and value: our beliefs in liberty, equality, and individual rights, including the right of every person to pursue happiness. These are the very values that guide us in our careers and decisions as Human Resource professionals, and these are the ideals that we actively pursue for ourselves and our employees every day.

Additionally, regarding the Fourth of July, please make note that our monthly meeting will be held on Thursday, July 10, due to the holiday week. This meeting will be a joint meeting with our friends from BV-ASTD, and will be held at the Hilton Garden Inn as usual. Please be sure and RSVP by Thursday, July 3 because of the July 4th holiday.

We also ask you to mark your calendars on Tuesday, September 16 for the BV-SHRM Annual Business Seminar. Diana Dean will have more information regarding the programs and the agenda at our upcoming meeting, but this is an event you and your employees will not want to miss!

Happy Fourth of July to all of you! I look forward to seeing you on July 10!

Sincerely,

Katherine

Share Your Ideas

The Board always welcomes your comments and suggestions. See an interesting article online or have a process that could benefit other members? Share it with your BV-SHRM Chapter.

AFFILIATE OF SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

WORKFORCE READINESS

Independence Day Job Fair
Wednesday, July 2
10:00 a.m. – 2:00 p.m.
Center for Regional Services
Sponsored by Workforce Solutions
www.bvjobs.org

MEMBER NEWSLETTER

LEGAL BRIEFS

Welcome to Legal Briefs for HR, an update on employment issues sent to over 5000 individual HR professionals, in-house counsel and business owners plus HR and legal professional organizations (who have been given permission to republish content via their newsletters and websites), to help them stay in the know about employment issues. Anyone is welcome to join the email group . . . just let me know you'd like to be added to the list and you're in! Back issues are posted at www.munckwilson.com under Media Center/Legal Briefs and you can also join the group by clicking on "Subscribe."

A special salute on Father's Day eve to the dads who taught their young 'uns about right and wrong . . . apparently some got the message and others did not:

1. **OSHA Giving Out Mulligans** – OSHA and the NLRB announced that complainants who whiff on the 30-day deadline for filing a complaint under OSHA can now march over to the NLRB instead. Since unsafe working conditions may, in some cases, be an unfair labor practice this gives new life to otherwise stale claims. OSHA plans to train their personnel to divert Johnny-come-too-lately to the NLRB and their more generous six month filing deadline.

2. **K-State Wins!** – No, not on a basketball or tennis court, but in a court of law. And this 10th Circuit decision will leave employers doing a touchdown dance. The story begins with an assistant professor, Grace, who had a one-year contract to teach three semesters (fall, spring, summer) but before the fall term began, she was diagnosed with cancer. She received a paid six-month leave during the fall semester but was not medically ready when spring approached, and she asked for the entire semester off. The U refused, citing its policy that limits leaves to six months. Grace sues under the Rehab Act, since KSU is s recipient of federal funding, claiming a failure to reasonably accommodate her disability. The district court tossed her claim and the 10th Circuit affirmed. Why? While she was a qualified teacher and was certainly disabled, she wasn't able to perform the essential functions of her job even with a reasonable accommodation. The court observed that "requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation. After all, reasonable accommodations – typically things like adding ramps or allowing more flexible working hours – are all about enabling employees to work, not to not work." *Hwang v. Kansas State* **University** (10th Cir. May 2014). The court also noted that the EEOC's guidance says an employer does not have to retain an employee unable to perform her essential job functions for six months just because another job she can perform will open up then. An employer doesn't have to do so much "because six months is beyond a reasonable amount of time." Keep in mind, this is not an endorsement of automatic termination of employment after six months of absence in every instance. If a brief amount of additional time off, even beyond what is required by law or normally offered under an employer's time-off policies, would enable a qualified person with a disability to return to work that brief amount of time would be seen as reasonable. Here, another semester on top of the one that had just elapsed was just too much.

3. **Water. Rest. Shade. Repeat.** – OSHA has a new webpage designed to remind employers of outdoor workers that water, rest and shade are part of their duty to provide a safe workplace, free of recognized hazards. You can check it out at https://www.osha.gov/SLTC/heatillness/index.html. Industries with workers at particular risk are agriculture, construction, landscaping and transportation. Per the OSHA website, 31 workers died and 4120 were sickened from the heat during 2012. Some states, like CA, mandate water/rest/shade. If you've got outdoor workers in CA, check out http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB435 and http://www.dir.ca.gov/Title8/3395.html for more info.

4. **Contractor Conundrum** – A big box hardware store that offers professional installation services (e.g., appliances, flooring, doors, windows) has agreed to settle a lawsuit claiming that the installers were misclassified as contractors and denied the pay and benefits enjoyed by employees of the store. The installers, who are both individuals and small business entities, were certified as a class in August 2013 and if a judge blesses the deal, they will split the $6.5 million settlement which had a 25% kicker for plaintiffs' attorney fees. *Shepard v. Lowe's HIW, Inc.* (N.D. Cal. 5-14). The evidence of Lowe's "right to control," as alleged by the class included designating the customers whom Plaintiffs would perform installation for; requiring the customer to pay Lowe's and then Lowe's would pay the installers; requiring the installers to refer to themselves as being from Lowe's and wearing Lowe's shirts and hats; directing the work Plaintiffs performed for customers, providing training for the installers and prohibiting the installers from working for anyone else. The settlement may not be the end of costs arising from the dispute, as state and federal agencies may come looking for unpaid income taxes, UI taxes and workers' comp premiums. Both the plaintiffs' bar and cash-strapped government agencies continue their quest to identify and monetarily punish employers who err when it comes to proper classification of their workers. If you have contractors, you should be checking and double-checking to see if your relationship is correctly structured and documented.

5. **Wording Matters** – The NLRB struck a clumsily worded handbook policy on solicitation in the workplace which said "Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. Working hours do not include meal breaks or designated break periods." See the problem? The Board said the rule limits solicitations to non-working hours AND non-work areas which is a Section 7 violation. Solicitations in work areas during nonwork times should be fair game. The employer argued that the rule, as written, OKs solicitation in work areas when both employees are on nonwork time, but that's not how the Board reads it. *Food Services of America, Inc. and Paul Louis Carrington* (360 NLRB No. 123 5-14). Lesson learned? Have your handbook policies periodically reviewed by someone who specializes in labor and employment matters who can pick up on and correct what may look like a perfectly fine policy.

6. **Broad Restriction Can Mean No Restriction** – Employees were subject to a post-employment restrictive covenant that prohibits solicitation of the company's customers. The restriction made "past, present or prospective future customers or clients" off limits. Employees didn't like it, so after they resigned they went to court to ask the judge to opine on enforceability (a pre-emptive strike referred to as filing for a declaratory judgment aka a "dec action"). The judge sided with the employees, saying it was reasonable for the employer to protect customer relationships in which the affected employees were involved but not future, unknown ones. In some states, a court will modify the offending clause by removing the part which creates the problem or changing a few words and then enforce the restriction. In Arkansas, they do not. Instead the judge wrote "How close a noncompete clause comes to being just broad enough does not matter – if it misses by an inch, it misses by a mile." *Morgan v. West Memphis Steel & Pipe, Inc.* (E.D. Ark. 5-14). Each state has its own recipe for enforceable restrictive covenants so [1] find out what the law requires in each state where you have employees; [2] do not try to make a "one size fits all" form to cover multiple states with varying approaches; and [3] do not overreach, especially in those states like AR that have an all or nothing approach.

7. **New Restriction Can Mean No Restriction** – Employee signs employment agreement containing noncompete upon hire, in a state (PA) where new employment is good consideration to support the noncompete (but continued employment, if the noncompete is signed after employment begins, is not sufficient unless there is an additional benefit to the employee such as a promotion). Later, the employer asks employee to sign a new version of the employment agreement with a noncompete, which says that it supersedes all prior agreements between the parties. See what happened? A perfectly good, enforceable noncompete was just replaced with one that is not enforceable. Employer is not worried, though, because PA has a law called the Uniform Written Obligations Act (UWOA) that says a signed, written agreement cannot be found to invalid for lack of consideration if the agreement says "the signer intends to be legally bound." Because noncompetes in employment are generally disfavored, the court found in favor of the employee and refused to enforce the noncompete saying the UWOA may apply to other agreements in PA, but not to noncompetes. *Socko v. Mid-Atlantic Systems of CPA, Inc.* (Penn. Sup. Ct. May 2014). See the last sentence in item 6 and add this . . . [4] do not impose a noncompete during any phase of employment (e.g., prehire, upon hire, long after hire) without knowing what type of consideration will work; and [5] if you've got an enforceable noncompete in place be very careful when using "supersedes" provisions in subsequent employment-related agreements . . . carve out that existing noncompete so that it will remain in force,

8. **Coming Attractions** – The spring version of the executive branch's Semiannual Regulatory Agenda is out and contains clues as to which regulations may be in your immediate future and which ones are dying a slow, painful death.

    1. From the Wage and Hour division of the Department of Labor comes the news that proposed revisions to the "white collar" regulations will appear in November (probably as soon as the election cycle is complete). They will likely increase the minimum salary level, which has been at $455/week since 1994, and revise job duties tests in a way that expands the number of workers who do NOT qualify for an exemption. They are also scrambling to publish implementing regulations for the President's February 2014 Executive Order 13658 which increases the minimum wage for workers of certain federal contractors (and they did . . . see "He Proposed" below). The FMLA will get a new definition of "spouse" to synch up with the U.S. Supreme Court's decision on same-sex marriages in *United States v. Windsor*. The initiative that seems to have lost wind is the "right to know" project which, if enacted, would require employers to advise new hires in writing whether they are employees or contractors and if an employee, exempt or nonexempt from the FLSA's minimum wage and overtime requirements. This new hire notice would be provided along with a virtual road map to the DOL so that new hires could file a complaint if they did not agree with what they had just been told.
        1. **He Proposed** – On June 12, the Secretary of Labor released a proposed rule to raise the minimum wage for workers on federal service and construction contracts to $10.10 per hour. The comment period has begun with the goal of issuing a final rule by October 1. The change would apply to new contracts and replacements for expiring contracts arising from solicitations issued on or after January 1, 2015. The DOL is providing initial guidance and encouraging contractors to modify their pay systems ASAP so that affected workers will get an immediate raise on New Years' Day. Read more about it at http://www.dol.gov/opa/media/press/whd/WHD20141131.htm.
    2. From the EEOC, they are tackling proposed amendments to the ADA and GINA. Two of note address employer wellness programs and may finally put to rest employers' unease with offering monetary "carrots and sticks" tied to employee participation in those programs. While the Departments of Treasury, Labor and Health & Human Services have issued nondiscrimination rules applying to wellness programs over the years, the EEOC has not and the other agency's rules contain disclaimers stating that compliance may result in violation of other laws, such as the ADA (which is enforced by the EEOC). At last, employers may be able to know if financial inducements and/or penalties are an invitation to an ADA cause of action or not.

9. **IRS on *Windsor* Decision and Retirement Plans** – An April 4 notice from the IRS at http://www.irs.gov/Retirement-Plans/Treatment-of-Marriages-of-Same-Sex-Couples-for-Retirement-Plan-Purposes helps plan administrators understand and apply the requirement of recognizing as "spouses" participants in same sex marriages. The Notice explains that plans are not required to (but may) recognize same

sex marriages before the date *Windsor* was announced, June 26, 2013. Plans that currently define "spouse" by reference to the Defense of Marriage Act (DOMA) or as a person of the opposite sex will need to amend their plans by the later of December 31, 2014 or as provided in Revenue Procedure 2007-44.

10. **Who's the Boss?** – Simple question, but the answer can make a huge difference in whether an employer is held vicariously liable for the misdeeds of its supervisory staff. Remember back in 1998 when the U.S. Supreme Court set the standard for employer liability in cases of sexual harassment in its *Ellerth* and *Faragher* decisions? The Supremes said employers would be strictly liable for employee harassment perpetrated by a supervisor coupled with a detrimental tangible employment action (e.g., victim fired, demoted, pay cut). They also said in the absence of a tangible employment action, the employer can avoid vicarious liability for the supervisor's harassment of an employee if the employer had exercised reasonable care to prevent and correct such misdeeds AND the alleged victim failed to take advantage of the preventive and corrective measures (referred to as an affirmative defense). Fast forward to June 2013, when the Supremes decided in the *Vance v. Ball State University* decision that a "supervisor" is a person who has the authority to take tangible employment actions (e.g., hire, fire, promote, give a raise). Read together, the 1998 and 2013 decisions meant that the employer's vicarious liability for harassment of an employee by a supervisor only happens when the harasser can effect hires/fires AND [1] there was either a detrimental tangible employment action; or [2] there was no detrimental tangible employment action but the employer failed either half of the two-part affirmative defense. Some members of Congress are not happy with that outcome and have filed the Fair Employment Protection Act of 2014 which, if passed, would broaden the definition of "supervisor" to include those with the authority to direct the daily work activities of the victim of the allegedly discriminatory conduct. Further, it would apply to most federal statutes which prohibit workplace discrimination, including Title VII, ADEA, ADA, Rehab Act, GINA and more. Their argument is that the *Vance* definition of "supervisor" ignores the realities of the workplace where individuals who lack hire/fire authority can still wreak havoc on others, especially in retail, restaurant, health care, housekeeping and personal care businesses. The version in the House (HR. 4227) has 52 sponsors and Senate version (S.2133) has 15, so it has some traction. Stay tuned.

11. **Stated Differently** – Here are some hot topics for you multi-state employers:

    1. **Illinois** – The IL Wage Payment and Collection Act has been amended, effective January 1, 2015, to allow payment of wages to employees via payroll cards, so long as employee participation is completely voluntary. As soon as the governor signs the bill (HB 5701 - Job Opportunities for Qualified Applicants Act), employers of 15+ employees will be prohibited from asking job applicants questions about criminal history until the interview or after a conditional offer of hire is made. The effective date is January 15, 2015.

    2. **Kentucky** – KY is the 47th state to enact a data breach notification statute, which will take effect on July 14, 2014. Only AL, NM and SD have no similar law.

    3. **Louisiana** – Effective August 1, 2014, employers may not request or require job applicants or employees to disclose their social media account usernames and passwords, with the usual exceptions for workplace investigations to ensure compliance with applicable laws or to further an investigation into workplace violence.

    4. **Minnesota** – Effective May 29, 2014, employers may not discriminate against or penalize an applicant or employee based on the person's status as a qualified patient using medical cannabis or where the qualified patient tests positive for cannabis components or metabolites unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment. "Medical cannabis" must be delivered in the form of a liquid, including an oil, pill or vaporized delivery but does not include use of dried leaves, such a smoking.

    5. **New York** – The State Assembly passed and the Senate is considering a bill (A4791) which, if passed, will prohibit state entities from contracting with any business that requires employees or independent contractors to sign an arbitration agreement for claims under Title VII or any tort related to discrimination, sexual assault or harassment, intentional infliction of emotional distress, false imprisonment or negligent hiring. There is an exemption for collective bargaining agreements.

    6. **New York (Rochester)** – Effective November 18, 2014, employers may not inquire about a job applicant's criminal history before an interview takes place, or if there is no interview, before a conditional offer of hire is made. Private sector employers with fewer than four employees are not included.

    7. **Oklahoma** – Effective November 1, 2014, employers may not request or demand usernames or passwords from applicants or employees to their personal social media accounts.

    8. **Texas (Houston)** – Effective June 27, 2014, the Houston Equal Rights Ordinance (HERO) bans discrimination against employees on the basis of sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity or pregnancy. The law will initially apply only to employers with at least 50 employees and then expand to those with 25 (in May 2015) and then to those with 15 employees (in May 2016). Those headcounts are based on total number of employees, not just the number of employees in Houston. Complaints implicating protected categories under federal law (e.g. sex, race, national origin) will be directed to the TWC HRD or EEOC. Those that do not (e.g., sexual orientation, gender identity) will be handled by the Houston Office of Inspector General. The IG's office will attempt conciliation

upon finding a violation and if conciliation fails, the matter can be litigated by a City Attorney in municipal court and face a criminal misdemeanor fine of up to $5000. The ordinance does not require employers to provide separate bathrooms for transgendered customers or workers.

9. **Washington (Seattle)** – The City Council approved an increase in the minimum wage to $11. 00 per hour for most with the earliest effective date starting with April 1, 2015 and the effective date and amount varying depending upon the size of the employer, whether the employer offers health care meeting certain minimums and whether some of the employee's pay is in tips. The rate is already slated to rise to $15 per hour. It affects employees who regularly work in Seattle and also those who work there occasionally with the trigger set at more than two hours of work in a two-week period. Employers are divided into Schedule 1 (more than 500 ees in the U.S.) and Schedule 2 (less than 500 ees in the U.S.). Schedule 1 employers' rates will rise quicker than those for Schedule 2 employers. Heads' up franchisees . . . any franchisee associated with a franchisor or a network of franchisees that collectively have more than 500 ees are considered to be Schedule 1 employers. Several ballot initiatives have been filed, in an attempt to repeal this increase, and a legal challenge is expected from the International Franchise Association.

10. **Wisconsin** – Effective April 10, 2014, employers may not request or require job applicants or employees to disclose their personal Internet account usernames and passwords. Employer may require access to employer-provided or paid-for devices, conduct certain disciplinary actions and investigations where there is cause to believe the employee transfer the employer's proprietary data to a personal account or similar misconduct, restrict access to certain sites via the employer's systems and devices and more.

12. **Last Call** – I hope to see you at one or more of my upcoming presentations at the Video Game Law Conference (June 23 in Plano; topic is Women in Gaming), TAB/SHRM Employment Law Symposium (July 17 & 18 in San Antonio; topic is Money Matters: Wage and Hour Update), the North Texas Compensation Association meeting (August 21 in Dallas; topic is Money Matters: Wage and Hour Update) and the North Texas SHRM conference (September 5 in Denton; topic is TBA).

13. **For the Birds** – If you like being tweeted and want breaking news on employment law changes (and the occasional random cheer for K-State), follow me on Twitter. I'm at @amross.

Until next time,

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