BV-SHRM NEWSLETTER

CHAPTER NO. 0330 ◆ MAY 2015

May's Program and Luncheon proudly sponsored by:

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MONTHLY PROGRAM & LUNCHEON

TOPIC: **Disability Employment Training for HR Staff and Managers/Supervisors**

WHEN: **May 7, 2015**

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: $15/ BV-SHRM member
$20/ non-members or late RSVP
Note: The guest price is now $20

SPEAKER: Kristi Avalos, Accessology

RSVP: Please ***RSVP by noon, Friday, May 1*** to rsvpprograms@gmail.com.

MENU: Chicken Parmesan, Linguini Marinara, salad, bread, tea and water

PROGRAM DETAILS

Disability Employment Training for HR Staff and Managers/Supervisors
This presentation will help supervisors/managers/HR professionals understand who is covered by disability civil rights laws, what employment elements are covered, and how meet your responsibilities in an "interactive process". Achieving an interactive process is broken down into five steps in order to effectively meet reasonable accommodation requests. Attendees will be able to determine essential vs. marginal functions of the job; defining the job in very specific terms assists in the job selection process, providing reasonable accommodations and in evaluation of staff. Also covered will be special problems during employment.

SPEAKERS BIO

Kristi J. Avalos founded Accessology in November 1990 as a direct result of her involvement in national disability related issues. Kristi has more than 30 years' experience leading the charge for accessibility compliance and disability-related issues. Through various experiences in working with disability regulations, and the panic associated with full compliance to such regulations, the need for dependable assistance was clear. Kristi was instrumental in the development of a program for people to assess an "expert's" knowledge of compliance matters. Through this effort the need for a strategically linked national organization devoted solely to assisting businesses, state and local governments and agencies in the practical applications of regulatory compliance became apparent.

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Upcoming Events

MARK YOUR CALENDARS

Chamber After Hours
May 21, 2015, 5:30-7:00 p.m.
Physician's Center

Central Texas HRMA Conference
May 12, 2015
Killeen, TX
http://cthrma.shrm.org/2015-annual-cthrma-conference

Gulf Coast Symposium
May 13-15, 2015
Reliant Center
Houston, TX
http://www.hrhouston.org/page/235

HR Southwest
October 25-28, 2015
Ft. Worth, TX
http://www.hrsouthwest.com/

DIVERSITY MATTERS

Diversity Dates for May
Asian/Pacific American Heritage Month
Older Americans Month
Jewish American Heritage Month
National Mental Health Awareness Month

1	**Flores de Mayo/Int'l Labor Day/May Day/Lei Day/Beltane (Gaelic)**
3	**Buddha's Birthday**
9-15	**Armed Forces Week**
10-16	**National Women's Health Week**
17	**Anniversary of Brown vs. Board of Education Decision**
21	World Day for Cultural Diversity for Dialogue and Development
23	**Declaration of the Bab (Baha'i)**
23-25	**Shavuot (Jewish)**
24	**Pentecost (Christian)**
25	**Memorial Day**

Are you in? BV-SHRM is.

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

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.

PRESIDENT'S PIECE

Howdy!

A big thanks to everyone who attended our April luncheon. We appreciate the members who are expanding our Chapter's reach by bringing guests to the meetings each month. We welcome visitors and hope everyone comes away from the meeting knowing they have learned something new, met someone they didn't know, and enjoyed a good meal.

We are planning another outstanding Business Seminar in September. This is the Chapter's annual initiative to reach Brazos Valley businesses at the C-suite level, with exceptional speakers and great networking opportunities. It's a full day of diverse topics and relevant information that can impact the way business gets done. Start thinking today about which CEO, CFO or COO you want at your table! There is the possibility of additional continuing education units for other-then-HR certifications and licenses. More to come on that.

Looking forward to seeing you all May 7 at the Hilton Garden Inn. Have a great week.

Respectfully,
Retha

CERTIFICATION CORNER

There is a lot going on in this corner of the world!

1. We are working on a fall certification class. At the current time, it will be a multi-week program and we will concentrate on PHR/SPHR certifications through HRCI. Certification continues to be key in our profession. If you have questions or are interested in participating, contact Alyssa Wisnoski.
2. SHRM-CP and SHRM-SCP certifications. The window is open for those who are already certified (PHR/SPHR) to earn a SHRM certification with just a tutorial. To find out more, go to the SHRM Pathway at http://www.shrm.org/certification/pathway/pages/default.aspx
3. We currently offer HRCI CEUs for our monthly luncheons and business seminar. We are in the process of becoming approved to offer SHRM certification CEUs. We will let you know when those become available.

MEMBER NEWSLETTER

LEGAL BRIEFS

Welcome to Legal Briefs for HR, an update on employment issues sent to over 6000 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."

Spring! Here is a bountiful bouquet of HR issues . . . some are sweet, some not so much, some may tickle your nose:

1. **Mama Mia! Part Two** – In LB4HR #7-2014, I wrote about guidance issued by the EEOC in July 2014, opining that many pregnancy-related conditions should be treated as ADA qualifying disabilities and be subject to a reasonable accommodation requirement. The guidance was published without a comment period, in an apparent attempt to beat announcement of a decision by the U.S. Supreme Court in *Young v. UPS*. The Supremes have spoken and they didn't accept the arguments of either Ms. Young, the EEOC or UPS. The back story is a pregnant part-time driver who was denied light duty when she asked for it, based on a 20-pound lifting restriction. UPS' position was that light duty was only for those with occupational injuries and ADA-qualifying disabilities and a healthy pregnancy is neither. UPS won with that argument at both the district court and 4th Circuit levels, but the Supreme Court reversed and remanded. It's majority (6-3) opinion says Ms. Young can make a case for discrimination if she prevails at the end of the *McDonnell-Douglas* burden shifting framework. It starts with her making out a prima facie case, which she has already been done. The burden shifts to UPS to show its legitimate, non-discriminatory reason for denying her request. Then it's back to Ms. Young, who must show the reason UPS gives is pretext. In the meantime, UPS has voluntarily modified its light duty policy, to include women limited by pregnancy. It may be hard for them to win out since it already accommodates many others who are not pregnant, so where is the undue hardship? In short, reliance on a facially neutral policy that has stood years but has a disparate impact on a protected class (here, pregnant women) may spell trouble.

2. **Silicon Settlement** – Here's another update from a prior posting (LB4HR#4-2014) on the class action prompted by a number of big tech companies having "no poaching" agreements between them, which were found (by the DOJ, in an earlier proceeding) to diminish competition to the detriment of employees who were deprived of access to better job opportunities. The first three defendants (Lucasfilm, Pixar, Intuit) settled for $20 million prior to certification of the class. The remaining defendants (Apple, Google, Intel, Adobe) tried to settle shortly after the class was certified, in April 2014, by offering $300 million which was rejected by the court as too small. The August 2014 offer of $324.5 million was also rebuffed. In March 2015, there is now a $415 million offer which appears to be on its way to being approved in a hearing set for July 2015.

3. **Just Whistle** - The SEC announced its first enforcement action under the whistleblower protections of the Dodd-Frank Act. At issue was the employer's use of mandatory confidentiality agreements signed by witness employees during internal investigations, which the SEC opined had the potential to deter employee reporting of securities violations. The employer agreed to pay a $130,000.00 penalty and amend its confidentiality statement, as explained in the SEC's press release at http://www.sec.gov/news/pressrelease/2015-54.html#.VRwcovnF_To.

4. **"Ban the Box" Going Nationwide?** – Nearly 200 interest groups have banned together and sent a letter to President Obama, asking him to require federal contractors to "ban the box." The "ban the box" movement wants employers to remove questions about prior convictions from employment applications, in hopes that more ex-offenders will be hired if that little tidbit comes up later in the interview process. These bans exist on a smaller scale, at the state or local level, and vary in their scope and whom they apply to (e.g., contractors only, private sector employers).

5. **Maxed Out Maternity Leave** – Vodafone is offering a minimum of 16 weeks of paid maternity leave and new moms can receive full pay while working 30-hour weeks for the first six months back on the job. For more info see http://www.bbc.com/news/business-31761572?print=true. The U.S. DOL has taken up the drumbeat with its catchy "Lead on Leave" campaign, which bemoans U.S. policy on paid maternity leave when compared to other countries. An entire webpage has been set up for this at http://www.dol.gov/featured/paidleave/. Let the benefits wars begin!

6. **Freeze Frame** - Effective March 27, 2015, the definition of "spouse" was modified to expand FMLA rights to married, same-sex couples. Under the prior wording, the couple would be seen as spouses if they lived in a state that recognized same-sex marriages. The new version looks to the "place of celebration" to determine eligibility, regardless of where the couples chooses to live. For couples marrying outside of the U.S., the current rule is preserved. It recognizes them as spouses for FMLA purposes if the marriage was valid

where entered into and would be considered valid in at least one U.S. state. The states of Texas, Arkansas, Louisiana and Nebraska filed for an injunction and temporary restraining order on the final rule, which was granted in the U.S. District Court, Northern District of Texas, Wichita Falls Division, on March 26, 2015.

7. **More Fun With FMLA** – If you fancy yourself as an expert on all things FMLA, then this annual compilation is a must-read! Each year, a subsection of the ABA Labor and Employment section amasses a summary of pretty much every FMLA case heard during the prior year. Pour yourself a big mug of coffee and snuggle up with 252 pages of "are you kidding me?" at http://www.fmlainsights.com/wp-content/uploads/sites/311/2015/03/FMLA-decisions-ABA-2015.pdf.

8. **NLRB GC on Handbook Rules** –On March 18, 2015, the General Counsel of the NLRB issued Memorandum GC 15-04 entitled "Report of the General Counsel Concerning Employer Rules." The 30-page document begins by reminding employers that the mere maintenance of a work rule may violate Section 8(a)(1) of the NLRA if the rule has a chilling effect on employee's Section 7 activity, which can occur via an express restriction or three types of indirect restriction -- language which employees would reasonably construe to prohibit their Section 7 activity; a rule that was promulgated in response to a union or other Section 7 activity; or a rule that was actually applied to restrict Section 7 activity. Part I of the paper contrasts handbook policy statements that the NLRB has found unlawful against wording that it believes is lawful. Part II focuses on the policies from a single employer's handbook, showing the "before" and "after" versions of policies on handbook disclosure, social media, conflict of interest, confidential information, employee conduct, and no distribution/solicitation. A recurring theme in the commentary is that placement of the policy matters. Some statements which would be unlawful standing alone, become lawful when juxtaposed with other policy statements that tend to narrow the effect. The fine art of policy writing just became even trickier. The GC's report is posted at http://www.nlrb.gov/reports-guidance/general-counsel-memos.

9. **Nice Try** – So what do you do if you are not happy about having a job as a prison guard where you must occasionally be available to work eight hours of mandatory overtime and possibly even 16 hours if there is an emergency, like a riot? Mr. Copple decided to ask for a religious accommodation of his belief, as a Sun Worshipping Atheist, which requires that he get sunlight, get fresh air and get eight hours of sleep each day, among other things. When his request was denied, Mr. Copple resigned and sued for religious discrimination, failure to accommodate and constructive discharge. His employer won the first round, on summary judgment, and the Court of Appeal affirmed. Noting that there was no addressing of fundamental and ultimate questions having to do with deep and imponderable matters, the Court decided this was a healthy lifestyle and not a religion. *Copple v. CA Department of Corrections and Rehabilitation* (CA App. 3-15).

Weigh In on Women at Work – The DOL is updating its 1994 survey of women's issues and employers are invited to comment and follow the discussion. On February 26, 2015, the DOL's Women's Bureau issued a Proposed Information Collection Request for a "Survey of Working Women." The most recent survey, entitled "Working Women Count!" was published in 1994. The purpose of the survey is to identify women's current employment issues and challenges and how these challenges relate to job and career decisions, and findings from surveys are used to inform DOL rulemaking and other policy initiatives. The comment period closes on April 27, 2015. For more info see http://www.gpo.gov/fdsys/pkg/FR-2015-02-26/pdf/2015-04047.pdf. Funny story . . . when I Googled "Working Women Count" to get a copy of the 1994 survey, I found it but I also found "women counts" for Tiger Woods, Gene Simmons (of the rock band, KISS) and Wilt Chamberlain. I think they will need a different name for the report, this time around.

10. **Calendar This** – Break out your 2015 calendar and pencil in the 22nd Annual University of Texas School of Law Labor and Employment Law Conference for May 12 and 13. We will once again be at the AT&T Conference Center in Austin and yours truly will present the Federal Regulatory Update on May 12. The full agenda and registration info can be found at https://utcle.org/conferences/EL15. Would love to see you there!

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

    1. **California** – Effective January 1, 2015, the CA Labor Code was amended to require a client employer to share civil liability with contractors such as payrolling, temp staffing and employee leasing companies for the payment of wages and provision of workers' comp insurance. The law does not allow contractual shifting of liability from the employer to the third party provider, but you can still include an indemnity clause to seek relief when the third party errs.

    2. **Florida (Osceola County)** – In a move very similar to that already taken by Dade County, Osceola County passed a wage theft ordinance to provide a remedy to employees who are not paid in full or at all. The definition of employer and employee are very broad, to include contractor relationships, and allows a claim over a violation valued at $60 or more if brought within one year. If a violation is found, the worker is entitled to treble (3x) the back pay owed, plus attorney's fees and costs, and the employer can have its local business tax receipt revoked.

    3. **Hawaii** – The HI Supreme Court found that an employer, a health care system, violated state law when it refused to hire a radiological technician due to his prior conviction for possession with intent to distribute crystal meth. The Court opined that the conviction had no rational relationship to the position sought and briskly dispensed with the employer's arguments that he would have access to syringes, drugs, patient charts and vulnerable patients. *Shimose v. Hawaii Health Systems Corporation*.

    4. **Maryland** – A Maryland Court of Appeals, in dicta, cites to the strong public policy of Maryland and urges other MD courts to reject choice of law clauses in employment agreements of MD residents which provide for application of another state's law. The case was

a wage dispute between a MD resident against his VA-based employer. Even though this employment had no choice of law provision, the court went out of its way to say MD had a stronger interest in imposing its views on the dispute. A good reminder that even carefully crafted and agreed upon choice of law clauses may not be upheld during litigation. *Cunningham v. Feinberg* (MD Ct. App 1-15).

5. **Texas** – The Texas Supreme Court upheld the exclusive remedy of the Texas Workers Compensation Act, in a case involving claims that seem to be outside of the Act. The plaintiff has a serious workplace injury and engaged in a dispute over WC benefits with the employer's third party administrator which lasted for years. Frustrated with the process, he sued using theories of negligence, gross negligence, misrepresentation, fraud and more. The plaintiff characterized these as independent injuries, unrelated to anything he could recover under the Act. The Supremes said, essentially, the Act is all you get. *In Re Crawford & Company* (Tex. 3-15).

6. **Washington (Seattle)** – Effective April 1, 2015, employers must pay covered employees (those who work at least two hours in a two-week period) at least $11.00 per hour, under a phased-in increase to the city minimum wage that will max out at $15.00 per hour. Starting next year, large employers (more than 500 employees) will have to pay a bit more than the smaller employers, which prompted the filing for an injunction by the International Franchise Association to "enjoin the city from treating franchisees as large, national companies rather than the small, locally-owned businesses they are." The court said no and the IFA said it will appeal.

7. **Wisconsin** – On March 9, 2015, WI became the 25th Right to Work state. Right to work is often misunderstood and confused with being an at-will state. What right to work means is that it would be unlawful for employers or unions to require, within a collective bargaining agreement, that employees become union members or pay union dues as a condition to keeping their jobs.

12. **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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