



Brazos Valley-SHRM Newsletter

#0330

SEPTEMBER 2012

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Chapter Meeting & Program

Please join us for our September Chapter Meeting & Program.

Tommy Simmons, J.D., currently Legal Counsel to Commissioner Tom Paulken, has practiced employment law on the side of management and operated an internet-based employment law information site focused on the needs of employers before shifting to work for the Texas Workforce Commission.

This session will cover the most important pro-

visions of the Texas Unemployment Compensation Act and the Texas Payday Law, how to respond to unemployment and wage claims, how to protect the company's interests in the appeal process, and ways to minimize a company's exposure to such claims and the cost of losing a claim or appeal.

We'll be meeting at the Brazos Valley Council of Governments (BVCOG)/ Workforce Solutions Brazos Valley, 3991 E.

29th, Bryan, TX 7703, on Thursday, September 6. Lunch will be served from 11:30 AM to 12:00 Noon. The program will begin at 12:00 Noon and end at 1:00 PM. The cost is \$12 for BV-SHRM members and first time guests and \$15 for those who RSVP late or do not RSVP.

If you plan on attending the meeting, please RSVP to RSVPprograms@gmail.com by Tuesday, September 4 at 12:00 noon.

Business Seminar (Sign up soon!)

Please join us for our Business Seminar:

Tuesday, September 18
8:00 am -5:00 pm
Brazos Valley Workforce Solutions, Center for Regional Services, 3991 E 29th St., Bryan, TX

Cost is \$100 before Sept. 7 (student price available) and features two excellent speakers focusing on Communication and Conflict Resolution.

The seminar has been

approved for 6.5 general HRCI Credits. It's a great program to offer to managers too!

[Click here](#) to go to the website for registration and more information.

President's Message

I hope this note reaches everyone doing well. The college students are back and that means it is football season again. I hope everyone had a very enjoyable summer and you had the opportunity to relax a little. It doesn't seem like it slowed down at all around town, at least in the HR arena. This fall brings us many great events. We have the BV-SHRM Business

Seminar on Sept 18th, HR Southwest in Fort Worth October 14-17th, the SHRM Leadership Conference in Washington D.C. November 15-17 and as always our Holiday Luncheon on December 6th. I look forward to seeing everyone on September 18th at the Business Seminar. I have heard our guest speaker, DeDe Church numerous times and she is always very

good. Again, I hope your Summer was great and you will be blessed during the upcoming Fall season.

See you soon,
Stacy

Diversity Calendar

- 3—Labor Day
- 5—Be Late for Something Day
- 8—Physical Therapy Day/Literacy Day
- 9—Wonderful Weirdos Day
- 14—Stand Up To Cancer Day
- 18—Water Monitoring Day
- 21—Miniature Golf Day
- 28—Ask a Stupid Question Day/
Native American Day
- Hispanic Heritage Month

Certification Survey!

We are looking for people who might be interested in a Spring Study Group for the PHR/SPHR exam.

We need at least 10 members to participate, and of those , at least 5 need to purchase the SHRM learning system. This is what allows us to get the leader's guide and associated materials.

If you are interested, please contact Liz Galvan at lgalvan1984@gmail.com. Make sure you let her know if you're also willing to purchase the SHRM system.

It's an investment in your career!

Upcoming Meetings & Events

National SHRM

<http://www.shrm.org>

Strategy Conference

REGISTRATION NOW

OPEN

October 3-5, 2012

Palm Springs, CA

Workflex Conference

REGISTRATION NOW

OPEN

October 23-24, 2012

Chicago, IL

Diversity & Inclusion Conference & Exposition

REGISTRATION NOW

OPEN

October 22-24, 2012

Chicago, IL

SHRM—Texas State Council

<http://texas.shrm.org/>

The HRSouthwest Conference

REGISTRATION NOW

OPEN

October 14-17, 2012

Fort Worth, TX

Brazos Valley—SHRM

<http://bv-shrm.shrm.org/>

Location: BVCOG/Workforce

Solutions Brazos Valley

November 1, 2012

Chapter Annual Holiday Program

Location Hilton

December 6, 2012

BV-SHRM Business Seminar,

DeDe Church and Sarah Sarahan

(DeDe Church & Associates)

Location: BVCOG/Workforce

Solutions Brazos Valley

September 18, 2012

Joint Meeting with ASTD

Speaker: Frank Keck

Location: Brazos Center

October 4, 2012

November Chapter Meeting &

Program, Topic & Speaker TBD

Register as a BV-SHRM Member

If you haven't visited the Chapter's recently updated website to "register" as a member, we encourage you to do so.

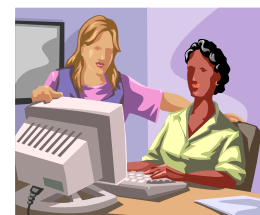
The web address to register is <http://bv-shrm.shrm.org/user/register>.

You'll need to create a "Username", enter in your "E-mail address", enter in some "personal information"

and then click on the "Create new account" button.

Once you are "approved" as a current member, you will have access to the online "Membership Directory", you will be able to participate in online Chapter surveys and you will be able to log in and edit/update your personal information as needed.

Please note that current Brazos Valley SHRM members will not be charged a membership fee for registering their information on our new website.



Certification—Winter 2012

Winter 2012 Window: 12/01/2012 through 01/31/2013

CERTIFICATION EXAM QUALIFICATIONS:

PHR Eligibility

4 years of demonstrated professional HR experience with less than a Bachelor's degree

2 years of demonstrated professional HR experience with a Bachelor's degree

1 year of demonstrated professional HR experience with a Master's degree or higher

SPHR Eligibility

7 years of demonstrated professional HR experience with less than a Bachelor's degree

5 years of demonstrated professional HR experience with a Bachelor's degree

4 years of demonstrated professional HR experience with a Master's degree or higher

EXAM APPLICATION SUBMISSION DEADLINES AND FEES:

	Regular Dead- line SHRM Member+	Regular Dead- line Non-SHRM Member	Late Dead- line SHRM Member*	Late Deadline Non-SHRM Mem- ber*
PHR	\$250	\$300		
SPHR	\$375	\$425		
Deadline Date	10/05/2012	10/05/2012	11/09/2012	11/09/2012

+To receive the SHRM Membership discount, you must have a current SHRM membership and you must provide your membership number on the application.

*A \$75.00 nonrefundable late fee is applied to all applications submitted after the regular deadline.

Legal Briefs for HR

Welcome to Legal Briefs for HR, an update on employment issues sent to over 5000 HR professionals, in-house counsel and business owners all over the U.S. 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."

Here's what's smokin' hot, so try to stay cool:

1. **How SAD** - In what appears to be the final chapter in this SAD story, the 7th Circuit has upheld a jury's findings that a Wisconsin school failed to reasonably accommodate a teacher by refusing to transfer her from a windowless classroom to one with natural light. *Ekstrand v. School Dist. of Somerset* (7th Cir. June 2012). The disability at issue is Seasonal Affective Disorder (SAD), a type of depression triggered by the lack of exposure to natural sunlight. The employer initially won on summary judgment, but upon appeal the 7th Circuit affirmed on the constructive discharge claim but reversed and remanded on the failure to accommodate. Once in the hands of a jury, they decided moving her to a vacant schoolroom with windows was not an undue hardship and awarded the teacher/plaintiff \$2 million (which the court reduced to \$133,00 plus \$375,000 in attorneys' fees and costs). I first wrote about this case in the October 2009 issue of LB4HR, when it was remanded to the district court. The jury's decision came on October 5, 2010 and the most recent chapter was penned on June 26, 2012. The End. I think.

2. **Really Sad** - If you can stomach discussion of child molestation and don't mind digging into a 267-page report, the Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky (aka the Freeh Report) presents a tale of woefully inadequate investigation of and response to disturbing reports, further complicated by a lack of control exercised by several departments, including human resources. The report concludes with a tidy list of recommendations, starting on page 127, that may give many organizations (not just universities) a "to do" list to tackle, pronto. You can find the report posted at www.thefreehreportonpsu.com/REPORT_FINAL_071212.pdf.

3. **Politically Correct** - The onslaught of candidates' ads signals that an election year is in full swing and, as an employer, if you are not aware of related employee rights, that swing just might hit you in the face. As a reminder:

1. **Protected Activity** - Certain states (i.e., CA, CO, CT, DC, LA, NY, ND, SC and WA) offer employees statutory protection from employer

interference with their right to run for or hold office, some political activities in the workplace, some political speech in the workplace or broadly prohibit employment discrimination based on lawful activities that occur after hours and off premises.

2. **Time Off to Vote** - Most states require job-protected time off to vote (in some cases, with pay) if the employee does not have "x" nonworking hours during which to vote on election day. Some states (e.g., CA) require posting a notice that details employees' voting leave rights.

3. **Solicitation and Distribution of Campaign Materials** - The NLRB generally will recognize a carefully worded policy that bans solicitations and distribution of materials related to nonwork causes and organizations, and will allow an exception for a limited number of charitable causes. If the policy is consistently enforced, refusing a labor organizations campaign efforts will usually not result in a viable unfair labor practice claim. If you have a such a solicitation/distribution policy, apply it to the political campaign solicitations and distribution in your workplace, too.

4. **Hot Stuff** - The other season we are enduring is the hot blast of summertime. Although not every state has a statute like CA's (which requires employers to provide breaks with shade and cool water for those who work outside) OSHA takes the position that employers' general duty to provide a workplace free from recognized hazards includes managing exposure to extreme heat. If you want to go high tech, OSHA is offering a smartphone app which combines heat index info from NOAA with the individual's location to determine a heat risk index and suggests measures to avoid heat-related illness. The app is available for use with Android, Blackberry and iPhone at www.osha.gov/SLTC/heatillness/heat_index/heat_app.html.

5. **HR Mgr as Cat Woman?** - Ever heard the story of the cat's paw? In legal circles, the cat's paw theory means that an employer can be held liable for discrimination where the final decision maker had no bias, but relied on input from a non-decision maker who did. The theory has been used by plaintiffs, with success, in Title VII cases and was recently utilized in a Section 1981 case. Section 1981 is a Civil War-era statute to protect the rights of all persons, regardless of their race, to "make and enforce contracts." Courts have held that these "contracts" could also be employment relationships (even at-will ones) and that the law could be used to seek a remedy for termination of employment and/or retaliation based on race. Section 1981 has some appeal to plaintiffs since both the employer and individual defendants can be named in the lawsuit, unlike Title VII which defines the employer as the entity to be sued, and not individuals. The Company and related entities went bankrupt, so that left a supervisor and the HR Mgr as logical targets of the peeved former employee. Supervisor settles pre-trial, so the HR Mgr is the lone person on the hook at trial. The bad news is that the court found that the cat's paw theory could be used in Section 1981 claims. The good news, at least for the HR Mgr, is that the plaintiff was lacking evidence and was unable to show retaliatory intent in the HR Mgr passing along the paperwork to incorporate that resulted in termination of plaintiff's employment. *Smith v. Bray* (7th Cir. May 2012).

6. **NLRB Nitpick** - I hope you are sitting down and have no blood pressure concerns, because this one may have steam coming out of your ears. The NLRB's Acting General Counsel has opined that a policy or employment agreement that creates an at-will relationship and says that it can only be altered by a writing signed by (usually, the CEO or other officer) is an unfair labor practice. How? Because it does not account for the possibility that a union might negotiate a different relationship between employer/employee and that omission creates a chilling effect on employees, who may think voting for a union would be futile. This doesn't say much for the Acting GC's opinion of the brain power of the average American worker, does it? To further make the point, unfair labor practices were filed against two employers in AZ. The ALJ agreed with the NLRB in one and the employer conceded defeat via settlement in the other. This interpretation seems destined to falter if/when subject to scrutiny by the full Board and/or the courts, so most employers are not scrambling to modify that provision in their handbooks, offer letters and employment agreements. If you are a pessimist and want immediate cover, just change the language to "unless modified by a written agreement signed by the [CEO] or other duly authorized representative" since this does not specify the parties to the agreement and could mean a labor union.

7. **More Board Bits** - Here's what happens when two federal agencies are the "rock and hard place" with an employer in the middle. ICE audits I-9s of employer, which voluntarily agrees to enroll in E-Verify but fails to inform the union which reps their employees. Employer initially tells union it had to enroll, based on federal contractor status. That's not right, so union files complaint with NLRB alleging unilateral repudiation and/or modification of the CBA. Employer settles with NLRB by agreeing to withdraw from E-Verify, reinstate individuals who were discharged while tentative non-confirmations (TNCs) were pending (or who were not allowed to contest their TNCs) and provide them with backpay and lost benefits. Lesson learned? Check your CBA before signing up for E-Verify . . . there's a decent chance the union must be informed before you do. And make sure the folks who effect discharges know the rules pertaining to the TNC process, so that they don't pull the trigger too soon.

8. **Don't Mess With Mama** - Mama returns to work at a convenience store after the birth of her child. Mama is nursing, and the PPACA amendment to the FLSA provides that employers must provide nonexempt workers with a private place, other than a restroom, to express breast milk. Employer offers the store managers' office. New owner buys the store and within weeks, installs a live video camera in the office. Mama says the camera makes her uncomfortable and she is told to put a bag over it. Mama complains some more and store owner does nothing. Mama says her milk production is dropping and store owner writes her up for unsatisfactory job performance. Mama quits. Mama sues under the PPACA and later amends her complaint to include retaliation and constructive discharge. That was smart, mama, because the PPACA has no private right of action for violations of the requirements (of providing unpaid time off to express breast milk) . . . her only recourse is to complain to the U.S. Dep't of Labor. However, there is a remedy for retaliation under both PPACA and the FLSA, and those write-ups were not long after mama complained. Mama just provided another classic example where there is no violation of the substance of the underlying statute, but the employer's allegedly retaliatory response to an employee complaint creates a fresh claim. *Salz v. Casey's Marketing Co.* (N.D. Iowa July 2012).

9. **One Size Does Not Fit All** - IL based company had three employees in CA sign employment agreements containing noncompetes, with an IL choice of law provision (presumably to avoid the effect of CA statute banning noncompetes between employee/employer except in very narrow, identified circumstances (e.g., sale of a business)). CA court held that the noncompetes were not only unenforceable, but their mere existence results in the employer's affirmative liability for unfair business practices under the CA Business and Professional Code, section 17200 et seq. *Arkley v. Aon Risk Services Companies, Inc.* (C.D. Cal. June 2012). This is a great example of why multi-state employers should be wary of trying to create a single noncompete to use in every state where they have employees. To refresh on the basics, [1] noncompetes are a creature of state law, either via statute or common law; [2] each state has its own definitions of what interests are protectable, what type of consideration is adequate, the permissible scope of the restrictions and whether or not an overbroad agreement can be "fixed" by a court wielding its "blue pencil" to pare back the offending language; and [3] your choice of law provision will likely not have the desired effect if the jurisdiction where the covered employee resides is more protective of individual's "right to mobility" than the law you chose. For another example of a noncompete quirk, see New Hampshire, below.

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

1. **Delaware** - Eff. July 12, the DE Dep't of Labor has been statutorily authorized to begin identifying construction industry employers found to have misclassified employees as independent contractors by posting their names on the agency website. Apparently public shaming is back in vogue.

2. **New Hampshire** - Eff. July 14, noncompete and nonpiracy agreements are void and unenforceable unless provided to the applicant or employee prior to or concurrent with an offer of employment or an offer of change in job classification. Signatures are not discussed, but the signing and dating of the agreement by the employee will provide evidence of compliance with this new requirement. An employee subject to a change in job classification who is already bound under an existing agreement probably does not need to sign a new one, but make sure the language reflects the employee's continuing obligation under that cir-

cumstance.

3. **New York** - Eff. July 1, 2013, the Dignity for All Students Act (DASA) is expanded to address cyber-bullying and actions occurring off campus that create an actual or foreseeable risk of substantial disruption with the school environment. Students and their parents can make verbal or written reports of harassment to the school and districts are required to promptly investigate.

4. **Ohio** - Eff. Sept. 6, 2012, OH creates a six-year trial program which will offer employers a tax credit for employees who will work from home and be paid at least 131% of the federal minimum wage.

5. **Pennsylvania** - Eff. January 1, 2013, E-Verify is mandated for all new hires of construction contractors/subcontractors on public works projects. Prior to beginning work on the project, the contractor/subcontractor must provide the awarding agency a certification of compliance.

6. **Rhode Island** - Eff. January 1, 2013, the state minimum wage will increase to \$7.75/hour. The current rate is \$7.40/hour.

7. **South Carolina** - Eff. June 7, 2012, SC beefs up its "right to work" statute with fines of \$1000 to \$10,000 for violations, treble damages to individuals harmed by a violation and allowing posted notices that explain employees' rights under the law. For an explanation of right to work laws and a map showing which states have such laws, check out www.nrtw.org.

8. **West Virginia** - Eff. July 1, 2012, texting while driving is a primary offense which can result in a citation. Speaking on a phone without hands-free equipment remains a secondary offense (meaning no citation unless done at the same time as a primary offense, like running a red light) until July 1, 2013 when it will also become a primary offense. There are exceptions to these prohibitions for emergency responders in the course of their duties and for others using their device to report a fire, traffic accident, road condition, or other emergency.

11. **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.



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