Federal Bar Association
Labor and Employment Law Section
Fall 2015

The Labouring Oar

Message from the Chair

By Craig Cowart

It is hard to believe this will be the last message I will share as Chair of the Labor and Employment Law Section. New Section officers will be elected at the Annual Meeting on September 10–12 in Salt Lake City, and the Section will move into a new year of exciting events.

The Labor and Employment Law Section is wrapping up a successful year, and we as members of the Section should be proud of our contributions. The Section distributes quality publications to its members on a regular basis. In addition to our quarterly newsletter, *The Labouring Oar,* the Section also publishes Circuit Updates with important information about developments in labor and employment law decisions from federal appellate courts. Contributors from all over the country make our publications possible, and the Section is very grateful for their contributions. I want to personally thank Corie Tarara for her tireless and outstanding work coordinating all of the Section publications as Chair of the Section Committee on Publications and Public Relations this past year. She received great support from Brian Rochel and Jim Hammerschmidt in her efforts, and they have my gratitude for their hard work.

The Section also provided excellent programming during the past year. From our biennial labor and employment law seminar held several months ago in New Orleans to webinars and video CLE events throughout the year, the quality of Section programming has been outstanding. Please keep your eyes open for programming presented by our Section and participate. You will not be disappointed. Outstanding programming is only possible because of the dedication of our Programming and CLE Committee who plan, organize, and execute the Section's programming offerings. The Committee has been led this past year by Donna Currault who, along with all of the Committee members, have done amazing work. Thank you!

I also want to express my thanks to all of the Section officers, board members, committee chairs, and committee members. You have all given of your time to support the work of our Section, and your work and contributions are greatly appreciated.

The Section will play a large role at the Annual Meeting and Convention in Salt Lake City on September 10-12. Please join us for our joint presentation with the Veterans and Military Law Section entitled "Returning our Warriors to Work – Employment Law Issues." We also look forward to seeing you at the Labor and Employment Law Section meeting to be held on Friday afternoon during Annual Meeting. Please join us to learn more about the Section and how to get more involved. ■

See you in Salt Lake City,

Craig A. Cowart
Chair, Labor and Employment Law Section

A Look at What's Inside

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Analysis: What *Obergefell* Means for Employers

Cynthia A. Bremer and Colton D. Long[1]

"No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than they once were . . . .They ask for equal dignity in the eyes of the law. The Constitution grants them that right." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (June 26, 2015). With these words, the Supreme Court held that the right to marry is fundamental and integral to a person's liberty, and therefore protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This seminal decision ushers in a new age for members of the LGBT community. *Obergefell* was, perhaps, a predictable end to the Supreme Court's evolution in its constitutional analysis of same-sex marriage. Two years prior to *Obergefell*, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court ruled that the definition of marriage under the federal "Defense of Marriage Act" ("DOMA") (which defined marriage under federal law as the union between one man and one woman) constituted an "unusual deviation from the usual tradition of recognizing and accepting definitions of marriage," thereby depriving "same-sex couples of the benefits and responsibilities that come with the recognition of their marriages." *Id.* at 2693. The Supreme Court therefore ruled that DOMA violated the Fifth Amendment's Equal Protection Clause. Although the direct impact for same-sex couples of these two decisions is clear, questions regarding the indirect impact of *Windsor*, and especially the more recent *Obergefell*, remain outstanding.

First, some background. As the Supreme Court notes in *Obergefell*, it first took up the issue of the legal status of same-sex relationships in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Supreme Court in that case upheld as constitutional a Georgia law criminalizing certain "homosexual acts." *See Obergefell*, 135 S. Ct. at 2596. A decade later, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down an amendment to the Colorado Constitution that aimed to "foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation." *Obergefell*, 135 S. Ct. at 2596. In 2003, the Court overruled *Bowers* in the seminal case *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). In overturning *Bowers*, the *Lawrence* Court held that laws criminalizing same sex intimacy "demea[n] the lives of homosexual persons." *Lawrence*, 539 U.S. at 575; *see also Obergefell*, 135 S. Ct. at 2596. Then, in *Windsor*, the Supreme Court struck down DOMA's definition of "marriage" as between one man and one woman. The logical next step in the Supreme Court's gay marriage jurisprudence was *Obergefell*.

Obergefell stems from challenges to Kentucky, Ohio, Michigan, and Tennessee state laws that banned same-sex marriage. The two questions before the Supreme Court were: (1) Does the U.S. Constitution, including the Equal Protection and Due Process clauses of the Fourteenth Amendment, require all states to perform same-sex marriages?; and (2) Does the U.S. Constitution require states to recognize same-sex marriages legally performed elsewhere? The Supreme Court answered "yes" to both, thereby requiring all 50 states to license and/or recognize valid same sex marriages between two people. Here are some considerations employers should make in light of the Court's recent *Windsor* and *Obergefell* holdings:

The Obvious: Same Sex Marriage is Legal and Recognized in Every State.

Of course, the clear result of *Obergefell* is what it means for employees nationwide: they can enter into a same-sex marriage in any state (barring any local government delays or temporary impediments). But keep in mind that employees may decide not to enter into same-sex marriages, even if they are in a same-sex relationship. This must be remembered before employers rush to eliminate "domestic partner" (as opposed to "spousal") benefits from their books.

For instance, many large employers in the United States offer "domestic partner" insurance coverage and other benefits to employees who are in committed same-sex relationships. At first blush, it would seem that employers should simply transition these benefits out because same-sex marriage is now legal. But there are many reasons why same-sex couples might opt not to rush to the nearest chapel. Reasons for this may be personal, legal, social, or financial. Moreover, some defiant local officials have stated their intent to reject the Supreme Court's decision and refuse marriage licenses to same-sex couples pending further guidance from their State.[2]

Given the above, employers should not rush to remove domestic partnership benefits, pending further developments and guidance on *Obergefell*.

The Family and Medical Leave Act: Windsor's Footprint.

While *Obergefell* constitutes a sweeping change for Americans, *Windsor*'s holding likely had a broader impact on U.S. employers. The reason for this is simple: because *Windsor* ruled that DOMA's limited definition of "marriage" was unconstitutional, federal law has changed to ensure consistency with *Windsor*. One such post-*Windsor* change is the Department of Labor's February 25, 2015 Final Rule revising the definition of "spouse" under the Family and Medical Leave Act ("FMLA"). *See* 29 C.F.R. § 825.102. The Rule, as amended, changes the regulatory definition of spouse to mean: "the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into."

When coupled with *Obergefell* which now *requires* all 50 states to recognize same-sex marriage, all married same-sex couples will be covered under the FMLA. Thus, employees in same-sex marriages will now be afforded the right under the law to take leave to care for their spouse or a family member arising out of a same-sex marriage. Moreover, *Obergefell* has significantly impacted state challenges to the FMLA's new regulatory definition of "marriage." For instance, four states (Louisiana, Nebraska, Arkansas, and Texas) all obtained preliminary injunctions against enforcement of the Final Rule by

arguing that states should not be forced to observe same-sex marriages performed in other states where same-sex marriage is legal. But pursuant to *Obergefell*, the U.S. Constitution requires states to recognize same-sex marriage. Thus, the Supreme Court's *Obergefell* holding obliterates the viability of the four states' arguments in support of their preliminary injunctions. Indeed, on July 17, 2015, citing the Supreme Court's *Obergefell* decision, all four states voluntarily dismissed the action because *Obergefell* "resolv[ed] all substantive issues raised in [the] lawsuit." *Texas et al. v. United States et al.*, Civ. Action No. 7:15-cv-00056-O, *1, Dkt. No. 46 (N.D. Tex. July 17, 2015).

In sum, *Obergefell*'s impact on the Department of Labor's Final Rule will likely benefit employers by permitting consistent and predictable FMLA policies across the country.

Title VII: Obergefell Changes Little (For Now).

For now, *Obergefell* likely changes little in the Title VII realm. It is important to note that *Obergefell* does not broaden the protected classes under Title VII. But employers should be sure to stay abreast of the latest legal developments, as *Obergefell* may eventually spur legislative changes to expressly include gender identity and/or sexual orientation as a protected class (the EEOC already interprets Title VII as prohibiting discrimination based on gender identity or sexual orientation). Or, in the absence of legislative action, judicial interpretation of Title VII may change. Indeed, in the July 15, 2015 EEOC decision, *Baldwin v. Fox*, 2012-24738-FAA-03 (July 15, 2015) the EEOC determined that "sex discrimination" under Title VII includes "sexual orientation discrimination," noting that even though Title VII does not expressly provide for sexual orientation discrimination protections "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 13 (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998)). This EEOC decision represents a potential judicial expansion of Title VII into sexual orientation discrimination, and one that may be litigated for years to come.

Moreover, depending on Congress's political allegiances over the next several years, *Obergefell* may spark a flurry of advocacy in support of the Employment Non-Discrimination Act ("ENDA"), which aims to proscribe discriminatory hiring and employment practices due to a person's sexual orientation or gender identity. ENDA has been introduced in every Congress since 1994.

Finally, *Obergefell* may impact employers indirectly, vis-à-vis an employee's Title VII-protected "sincerely held religious belief(s)" regarding same-sex marriage. Employers should brace themselves in the event that they encounter any workplace conflict or conduct by employees who vociferously oppose the direct societal implications of *Obergefell*.

Other Potential Legal Implications.

There are other laws applicable in the employment context that will largely remain unaffected by *Obergefell*. For instance, *Obergefell* will have very little impact on Americans with Disabilities Act ("ADA") "association" discrimination claims, premised on an employee's relationship or association with a disabled person, regardless of whether the applicant or employee has a disability. As currently drafted, there need not be a marriage between the parties, let alone an opposite-sex marriage, for the "association discrimination" provision to apply. *See, e.g.*, *Saladin v. Turner*, 936 F. Supp. 1571, 1581 (N.D. Okla. 1996) (employer liable for associational discrimination where employee was suspended because of his association with his male partner who had been diagnosed with AIDS). Indeed, in *Larimer v. Int'l Bus. Machs. Corp.*, 270 F.3d 698 (7th Cir. 2004), the Seventh Circuit included in its examples of what it termed the "rarely litigated" ADA association discrimination claims a situation where "the employee's homosexual companion is infected with HIV and the employer fears" infection through the employee. *Id.* at 699.

Nor is *Obergefell* likely to impact the immigration statuses of employees; *Windsor* affected immigration issues much more directly than *Obergefell* ever will. After *Windsor*, the Department of Homeland Security promptly began reviewing immigrant visa petitions filed on behalf of same-sex spouses in the same manner as those submitted on behalf of opposite-sex spouses. Further, marriage for immigration purposes is defined as any valid marriage recognized where the marriage is performed, and the United States Citizenship and Immigration Services does not take into consideration one's state of residence when making this determination.

Conclusion

In sum, the direct effects of *Obergefell* are limited, and largely beneficial, for employers and employees. For employers, *Obergefell* provides certainty on a national level regarding the applicability of employee benefits for same-sex spouses. For employees, *Obergefell* will have a direct, positive impact on employment-related spousal benefits in states in which same-sex marriage was not recognized pre-*Obergefell*. Moreover, *Obergefell* signals a sea change in the rights afforded to same-sex married couples on a uniform and national scale. To that end, employers should be aware of other potential legal and regulatory changes on the horizon. ■

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Should the Interns Be Paid? The Second Circuit Adopts a New Test to Determine Whether Interns Are Employees Under the FLSA

Caitlin M. Gadel & Richard L. Sharp II

On July 2, 2015, the Second Circuit adopted a new test to use to determine if an intern is an employee under the FLSA. In *Glatt v. Fox Searchlight Pictures* (Nos. 13-4478-cv, 13-4481-cv) ("*Fox*") and *Wang v. Hearst Corp.* (No. 13-4480-cv) ("*Hearst*"), the Court declined to follow the Department of Labor's (DOL) six-factor test to determine if there was an employment relationship between an intern and a for-profit business. Instead, the Court set forth its own seven-factors to be weighed and balanced when determining the status of an intern.

In both *Fox* and *Hearst* the plaintiffs worked as unpaid interns. The plaintiffs contended that Fox Searchlight Pictures and Hearst Corp. and violated the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) by failing to pay them minimum wage and overtime. Plaintiffs in both *Fox* and *Hearst* also sought class certification. In *Fox*, the district court determined that the interns had been improperly classified and should have been considered employees and granted the motion to conditionally certify the nationwide FLSA collective. In *Hearst*, the district court denied the plaintiffs' partial summary judgment motion, and denied the plaintiffs' motion to certify the class. *Fox* and *Hearst* were argued in tandem on appeal.

The central issue on appeal in both *Fox* and *Hearst* was to determine when an unpaid intern must be considered an employee under the FLSA, and be paid for his or her service. NYLL and the FLSA define employee in nearly identical terms, and in an entirely unhelpful manner, and the Supreme Court has yet to address this specific issue.[1] However, in 1947, the Supreme Court in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), determined that railroad brakemen trainees did not need to be treated as employees under the FLSA. In reaching this decision, the Court found that the railroad brakemen trainees did not displace any regular employees, the trainees did not expect to receive any compensation and would not necessarily be hired upon successful completion of the course, the training course was similar to one offered by a vocational school, and the employer received no immediate advantage from work done by the trainees. The Supreme Court's decision in *Portland Terminal* influenced the DOL, which released informal guidance on determining if trainees are employees in 1967, and then published similar guidance in their 2010 Intern Fact Sheet.

The DOL's 2010 Intern Fact Sheet states six factors that must be met for an intern to be considered an employee:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The district court in *Fox* used these factors to determine the status of the plaintiffs but did not require that all six factors be met in order to conclude that the plaintiffs were employees. On appeal, the plaintiffs continue to urge the court to adopt a test that is similar to the DOL's 2010 Intern Fact Sheet, and similar to the *Portland Terminal* decision. This type of test would mean interns would be considered employees whenever their employer receives and immediate advantage from the intern's work. However, the Court determined that the DOL's six-factor test was too rigid because it attempted to force the particular facts used in the *Portland Terminal* to all workplaces, which is not the case in the modern internship.

Defendants, on the other hand, suggested a more nuanced test that would determine whether the intern or the employer received greater benefits from the relationship. The Second Circuit agreed that "the proper question is whether the intern of the employer is the primary beneficiary of the relationship." This test focuses specifically on the benefits the intern derives in exchange for the work and allows for flexibility when looking at the economic reality of the situation.

In the context of unpaid internships, the Court set forth the following, non-exhaustive, set of considerations:

1. The extent to which the intern and employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggest that the intern is an employee—and vice versa.
2. The extent to which the internship provides trainings that would be similar to that which would be given in an educational environment including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant education benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internships.

Contrary to the DOL's six-factor test where all factors must be met, when applying the above considerations, the Second Circuit requires the weighing and balancing all of the circumstances. Under the totality of the circumstances, no single factor is dispositive, and not every factor needs to favor the one party. The Second Circuit emphasized that by focusing the

inquiry on the education aspect of the internship, this approach reflects the modern internship whereas DOL's test was derived a 68-year-old Supreme Court decision where the brakemen only had one week of training and no formal education. Likewise, the court noted that this new, seven-factor test still honors the Supreme Court's decision in *Portland Terminal* as nothing in that decision required a specific factor to be present in order for the workers to be paid as employees.

Both *Fox* and *Hearst* also reversed the conditional certification of the cases. After setting forth the new seven-factor test, the Court noted that an "intern's status as an employee is a highly individualized inquiry." Specifically the inquiry into the formal education pieces of the seven-factor test will differ with each intern.

The Second Circuit's decision is seen largely as a win for employers. First, by rejecting the DOL rigid all-or-nothing intern test and establishing a more flexible approach, interns will have a harder time proving they are subject to minimum wage and overtime protections. Likewise, the court does not offer much guidance on how to weigh and balance the non-exhaust list. However, the court emphasized that the internship should tie-in with the intern's formal education, a factor that was not at all relevant before this decision. Therefore, lower courts will have large discretionary power on determining whether interns are subject to minimum wage and overtime protections. In light of this decision, companies should review their policies regarding internships. If the employer still wishes to offer unpaid internships, the employer should tell the interns that there is no expectation of compensation and make sure that the interns receive an educational benefit during the internship. ■

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Endnotes

[1]FLSA defines "employee" as an "individual employed by an employer." 29 U.S.C. §203(e)(1). FLSA defines "employ" as "to suffer or permit to work." *Id.* §203(g). NYLL defines "employee" as "any individual employed, suffered or permitted to work by an employer." 12 N.Y.C.R.R. §142-2.14(a).

Much Ado About Little: *EEOC v. Abercrombie*

Daniel Lowin

For the amount of buzz it generated among employment lawyers, *EEOC v. Abercrombie & Fitch* is not a particularly surprising decision – arguably, its most noteworthy feature is that Justices Scalia and Ginsburg agreed on something. In *Abercrombie*, the Court held that a company cannot make a hiring decision motivated by a desire to avoid accommodating an applicant's religious practice, regardless of whether the company actually knows that the applicant will require such an accommodation.

Substantively, *Abercrombie* neither expands nor constricts the rights granted to current and potential employees under Title VII. Now, as before, employers still are required to make employment decisions without regard to applicants' or employees' religion and (when necessary) accommodate their religious practices unless doing so would create undue hardship. However, by tying hiring decisions to motive rather than actual knowledge *Abercrombie* likely will affect the interview and hiring process, particularly with respect to the extent companies inquire into religious accommodations before making a conditional offer of employment. Contrary to conventional wisdom, in the wake of *Abercrombie,* interviewers may need to ask questions about an applicant's religion during the interview. Accordingly, both sides of the employment law bar should be aware of the potential this creates for increased litigation, and corporate counsel should take this as an opportunity to provide additional training and guidance for Human Resources and management personnel.

The Decision

Factually, *Abercrombie* presented a relatively simple scenario: teen-clothing juggernaut Abercrombie & Fitch declined to hire Samantha Elauf for a retail position because it suspected she would require a religious accommodation to its dress code, based on the fact that she wore a headscarf to her interview.

More specifically, the assistant store manager who interviewed Ms. Elauf – and found her to be otherwise qualified – suspected Ms. Elauf was a Muslim and would have to wear a hijab to work, in violation of the company's "Look Policy" – which (among other things) prohibited store employees from wearing "caps." The assistant manager communicated her belief up the ladder to the store manager and then to the district manager, who ultimately agreed with her suspicion and directed her not to hire Ms. Elauf (rather than make an exception to the Look Policy). Notably, no one at Abercrombie actually knew Ms. Elauf's headscarf held religious significance; she was not asked nor did she volunteer information about it during her interview.

Ms. Elauf reported her case to the EEOC, who (on her behalf) brought and prevailed on a Title VII claim against Abercrombie in the Northern District of Oklahoma.

However, the Tenth Circuit reversed and awarded summary judgment for Abercrombie, concluding that Title VII requires an employer to actually know that an applicant requires a religious practice accommodation in order to be liable for failing to provide one. On appeal, the Supreme Court almost unanimously concluded otherwise.

Writing for the majority, Scalia explained that Title VII's "disparate treatment" provision – which (among other things) prohibits employers from making adverse hiring decisions based on an applicant's need for a religious accommodation – does not require that the employer actually knew the applicant needed an accommodation. "Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."[1] He explained that an employer cannot decline to hire an applicant based on a desire to avoid a suspected accommodation, and conversely an employer can decline to hire an applicant it knows requires an accommodation as long as it isn't motivated by the desire to avoid the accommodation.[2] But on the facts established, Abercrombie's decision plainly was motivated by the company's desire to avoid accommodating a suspected religious practice, and so the court reversed and remanded the case for renewed consideration.

What Does This Mean?

Abercrombie is not likely to throw a wrench into the majority of hiring scenarios. This is because even if motive (rather than actual knowledge) suffices to trigger the accommodation requirement, in most cases the distinction will collapse: an employer likely won't be motivated to turn away an otherwise-qualified applicant in order to avoid accommodating a religious practice without some reason to think the applicant has a religious practice requiring accommodation.

Equally important, *Abercrombie* doesn't alter the underlying legal duties Title VII imposes on companies: the law still prohibits an employer from discriminating against current or potential employees on the basis of their religious beliefs and practices unless it can show that any sort of accommodation would impose "undue hardship on the conduct of the employer's business."[3] In other words, the substantive law still generally requires employers to accommodate religious practices and provides individuals a right against religious discrimination in the workplace.

Instead, the most significant takeaway from *Abercrombie* draws from the Court's statement that "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."[4] This means that once a company suspects an applicant will require a religious accommodation it cannot skirt its duty to accommodate by claiming willful ignorance on the subject. *Abercrombie* therefore is likely to alter hiring and interviewing conventions because it suggests that in some cases an employer might be permitted—or even required—to discuss religion with an applicant prior to making a conditional offer.

The canonical view, of course, is that the less a company knows about its applicants' religious beliefs and other protected characteristics prior to making an offer of employment, the better for everyone—for the employer, to know that it can decline to hire an applicant that isn't a good fit without risking a discrimination lawsuit, and for the applicant, to know that the company made its decision fairly and not based on an improper (protected) characteristic. And as long as there is no question that an applicant can perform the essential job functions without any accommodation, the axiom holds up. But under *Abercrombie*, once an employer suspects that an applicant requires a religious accommodation it should (and possibly must) engage the applicant in an interactive dialogue before making any adverse decisions, or else risk an expensive discrimination suit hinging on its motivations. Accordingly, notwithstanding the Court's distinction between Title VII and the Americans with Disabilities Act, *Abercrombie* indicates that employers probably should treat religion like disability in the hiring context: ignore it (at least) until a conditional offer has been extended unless there is an obvious reason to address it earlier.

In many cases an applicant's religion, like many disabilities, will not be obvious. In those cases, the employer's best practice remains waiting after a conditional offer has been made before inquiring about any necessary accommodations. However, if there is an obvious issue involving religion or disability, the employer should address it before making any adverse employment decisions. For example, if an applicant shows up for a warehouse loading position in a wheelchair the interviewer shouldn't ignore the subject; instead, he or she should initiate a dialogue with the applicant to determine whether the applicant can perform the essential job functions with or without a reasonable accommodation. Similarly, if an applicant interviews for a "no hats" position wearing a hijab or a yarmulke, *Abercrombie* indicates the interviewer should broach the topic then rather than ignore it—even if only by asking the applicant the reason for wearing the headgear (understanding that, depending on the answer, the company might need to provide an accommodation).

Because *Abercrombie* does not alter the underlying substantive duties of employers to provide religious accommodations, its immediate effects will be felt more strongly by employment law advisors than by litigators. Thus, attorneys counseling corporate clients might suggest that their Human Resources groups take some or all of the following preventive measures:

- Providing additional training to managers, interviewers, and other personnel that make employment decisions, explaining that they should avoid stereotyping applicants or employees and focus on basing their decisions on objective factors, but if they suspect or know that someone will require a religious practice accommodation they should follow up on it to determine whether an accommodation must be provided.
- Reviewing company policies to identify possible sources of conflict between those policies and well-known religious practices, and evaluating possible accommodations for cases of conflict. For example, a company is unlikely to face undue hardship from making a dress code accommodation, but a restaurant that only does business on week-

ends truly might not be able to accommodate an applicant that cannot work on Saturdays or Sundays for religious reasons.
- Reviewing its job descriptions to determine whether any functions almost certainly could not be subjected to an accommodation, and evaluating how it would prove undue hardship for such cases.

Finally, as discussed above it seems reasonable to infer that questions regarding religious practices could become more common during the interview process – and this in itself might lead to an increase in Title VII litigation, because asking such questions is a double-edged sword. If the employer asks an applicant about his or her religion and then declines to hire the applicant, it could face the same discrimination action as it would have pre-*Abercrombie*; but if, instead, the employer does not pursue the question even though it suspects the applicant might require an accommodation, under *Abercrombie* it could now face an action claiming that the no-hire decision was improperly motivated by its suspicion.

In either case, the bottom line is that it is in everyone's best interest for companies to make employment decisions without regard to candidates' religion or any other protected characteristic. And here, *Abercrombie* does not alter the substantive requirements of Title VII: employers still must accommodate applicants' and employees' religious practices absent undue hardship. The new twist is simply that, post-*Abercrombie*, the employer has the burden of following up on any suspected accommodations, and it might be forced to address the issue as early as the initial interview. ■

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Endnotes

[1]*EEOC v. Abercrombie*, No. 14-86, slip op. at 3 (S. Ct. June 1, 2015).

[2]*See id.* at 5.

[3]42 U.S.C. §2000(j).

[4]*Abercrombie*, No. 14-86, slip op. at 5.

Proposed Rule Issued on Revising Exemptions From FLSA Minimum Wage and Overtime Requirements

Gregory P. Abrams

On June 30, 2015, the U.S. Department of Labor (DOL) issued its long-awaited proposed rule updating and revising the Fair Labor Standards Act (FLSA) regulations governing the so-called "white collar" exemptions from the FLSA's minimum wage and overtime requirements. Currently, to qualify for these exemptions, employees generally must meet certain criteria related to their job duties and be paid on a salary basis of at least $455 per week and at least $100,000 annually for the highly compensated employee exemption.

The new regulations, which follow President Obama's March 2014 memorandum directing the DOL to revisit the white collar exemptions, would increase the weekly salary level applicable to most of these exemptions to an estimated $970 per week and to about $122,000 annually for highly compensated employees. The DOL also proposes automatically updating the salary level on an annual basis. Although the DOL has not revised the duties test applicable to the exemptions, it is considering doing so "to ensure that these tests fully reflect the purposes of the exemption." If the DOL's proposed rule becomes effective, it would significantly increase the number of employees eligible for overtime under the FLSA — estimated at close to five million more employees in the first year alone.

Background

The FLSA mandates that certain employees receive a minimum wage and premium pay if they work more than 40 hours in one workweek, unless they qualify for one or more exemptions. The "executive," "administrative," and "professional" exemptions generally require that employees engage in certain job duties and be paid a predetermined and fixed salary that meets a minimum specified amount and is not subject to reduction because of variations in the quality or quantity of work performed.

Under the current regulations, an executive, administrative, or professional employee must be paid at least $455 per week ($23,660 per year for a full-year worker). The highly compensated employee exemption sets a minimum annual compensation of at least $100,000.

DOL's Proposed Revisions

The DOL's new rule, its first update to the salary level test since 2004, reflects its concern that if the salary level test is "left at the same amount over time … the effectiveness of the salary level test as a means of determining exempt status diminishes as the wages of employees entitled to overtime increase and the real value of the salary threshold falls." Or, as the DOL further explains, the new regulations would correct for the salary levels set in 2004 being "too low" for the white collar exemptions.

Accordingly, the DOL proposes to set the standard salary level to the 40th percentile of weekly earnings for full-time salaried workers. If this standard is adopted, the DOL projects

the salary level to be $970 per week or $50,440 per year. The DOL also proposes setting the highly compensated employee annual compensation level to equal to the 90th percentile of earnings for full-time salaried workers ($122,148 annually). The DOL is also considering whether to allow nondiscretionary bonuses and incentive payments to satisfy a portion of the standard salary level test but does not propose specific regulatory changes.

In addition, to avoid these new salary levels becoming "outdated," the DOL proposes automatically updating the salary and compensation thresholds each year, using either a fixed percentile of wages or the consumer price index. The DOL seeks comments on which methodology would be most appropriate. The DOL would publish the revised salary and compensation levels annually (at least 60 days before the updated rates would become effective).

The DOL does *not* offer any proposals to modify the duties tests for the exemptions because updating the salary level "will assist in screening out employees who spend significant amounts of time on nonexempt duties and for whom exempt work is not their primary duty." However, the DOL does invite comments as to the effectiveness of these tests, as it is "concerned" about exempt employees performing a disproportionate amount of nonexempt work. Possible revisions identified by the DOL include requiring overtime-ineligible employees to spend a specified amount of time performing their primary duty or otherwise limiting the amount of nonexempt work he or she may perform, as well as adding to the regulations additional examples for how the exemption may apply to particular occupations.

Implications of the DOL's Proposed Rule

Most obviously, the DOL's proposed rule would significantly enlarge the pool of employees eligible for overtime compensation, and in doing so, increase employers' labor costs.

The DOL estimates that its proposed rule would lead to approximately five million currently exempt employees becoming eligible for minimum wage and overtime protection. The agency estimates that almost six million employees would be affected by this change within 10 years, and more than $1 billion in wages would be paid to newly overtime-eligible employees.

The DOL's suggestion that the proposed rule could reduce litigation costs remains to be seen. Notwithstanding the DOL's view that the new rule would simplify the identification of overtime-eligible employees, battles likely will continue to be waged over whether potentially exempt employees qualify for the duties test that the DOL, at least as of now, has left unchanged. The plaintiffs' bar also would have millions more potential clients to raise unpaid overtime compensation claims for alleged "off-the-clock" work and other theories. And employers also would have to contend with aggrieved employees if employers reduce their wages, modify their schedules or terminate them to avoid the new salary levels.

The public comment period will last 60 days. In light of what should be extensive commentary from multiple stakeholders on this issue, a Final Rule should be expected sometime in 2016.

The DOL's announcement on the proposed rule and other information are available on the U.S. Department of Labor website. ■

Gregory Abrams practices labor and employment law with Faegre Baker Daniels LLP in Chicago. He defends employers in individual and class wide employment litigation across the country and counsels clients on a variety of employment matters.

Please join us at the FBA's Annual Meeting in Salt Lake City on September 10-11, 2015

On Thursday, Sept. 10, L&E Section Members Donna Phillips Currault and Corie Tarara will join with members of the Military Law Section to present a CLE entitled "Returning Our Warriors to Work." This program will address employers' obligations under the Uniformed Services Employment and Reemployment Rights Act, the Family and Medical Leave Act, and the Americans with Disabilities Act. We hope that you will join us for this upcoming presentation.

Next Supreme Court Term Promises Significant Class Action Ruling

Alison G. Fox & Sean R. Somermeyer

Next term, the U.S. Supreme Court will decide whether Congress has the power to grant jurisdiction to plaintiffs who have suffered no concrete harm by authorizing them to sue based solely on violations of federal statutes. The Court's decision may have wide-reaching implications for companies facing class action lawsuits. Indeed, if the Court affirms the lower court's ruling in the case, it will become easier for plaintiffs to maintain many types of class action claims, including some employment claims.

Background

Spokeo operates a website that collects information on individuals from various publicly-available sources. Employers, among others, can purchase information from Spokeo for use in evaluating potential hires.

Thomas Robins sued Spokeo on behalf of a class of consumers claiming violations of the Fair Credit Reporting Act (FCRA), which allows recovery of $100 to $1,000 in statutory damages, as well as punitive damages and attorney's fees — without proof of any actual harm — for willful violations of various procedural and accuracy requirements. Robins claimed Spokeo published inaccurate information about his age, wealth, marital status and education.

The district court dismissed the case for lack of standing, finding Robins' alleged injury too speculative and insufficient to meet the constitutional requirement of "concrete and particularized harm." The district court concluded that the FCRA could not provide standing without a showing of actual injury, expressing concern that otherwise, "federal courts will be inundated by web surfers' endless complaints."

The Ninth Circuit reversed, holding that the alleged violation of Robins' rights under the FCRA was enough to confer standing. The Ninth Circuit determined that the FCRA "does not require a consumer to wait for unreasonable credit reporting procedures to result in the denial of credit or other consequential harm before enforcing her statutory rights." Rather, Congress could treat violations of statutory rights as "concrete, de facto injuries" such that the statutory violation alone becomes a "legally cognizable injur[y]" sufficient for constitutional standing.

Implications of the Supreme Court's Decision

The Supreme Court will hear *Spokeo, Inc. v. Robins* next term. The Court agreed to hear *Spokeo* just three years after it granted review of the same question in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010). In *Edwards*, the Court heard oral argument but then dismissed the case without decision, stating only that certiorari had been "improvidently granted." 132 S. Ct. 2536 (2012).

The FCRA and statutes like it have become increasingly attractive to the plaintiffs' class action bar. Laws that allow automatic statutory damages for willful violations lend themselves to common proof and avoid the need for individualized damages analyses. In its certiorari petition, Spokeo emphasized the extraordinary settlement pressure created in these circumstances: "The implication is drastic and absurd: the lesser the injury, the easier the path to class certification, the broader the class, the greater the damages exposure, and—inevitably—the larger the settlement." Spokeo urged the Court to address the issue both because circuit courts are split in their approaches and because recent courts of appeals decisions had certified classes in cases that could impose billions of dollars in damages without any showing of harm.

The Supreme Court's decision in *Spokeo* will impact many laws with statutory damages similar to the FCRA, including the Telephone Consumer Protection Act, the Electronic Communications Privacy Act, the Video Privacy Protection Act, the Truth in Lending Act, the Fair Debt Collection Practices Act, the Electronic Fund Transfer Act, the Latham Act and ERISA. Some of these laws provide statutory damages as high as $2,500 per violation, in addition to punitive damages and attorney's fees.

If the Supreme Court decides plaintiffs must show actual harm to invoke federal court jurisdiction, classes (and exposure) will be smaller, and class certification will be more difficult, as defendants mount challenges to class certification based on individualized harm and damages issues.

An affirmance in *Spokeo*, on the other hand, will encourage plaintiffs' attorneys to bring more class actions under the laws listed above. Standing based solely on technical statutory violations threatens to render traditional class-certification requirements of commonality and predominance meaningless and to pressure defendants into settling claims based solely on unbearable risk and exposure, regardless of the merits of their defenses.

The Supreme Court's decision in *Spokeo* is expected by June 2016. ■

Alison Fox is a partner with Faegre Baker Daniels in South Bend, Indiana, practicing in employment litigation and counseling. She defends employers before agencies and courts, and assists them in finding effective and creative solutions that minimize legal risks while achieving client business objectives. Sean Somermeyer is an associate in the Minneapolis office of Faegre Baker Daniels, where he focuses his practice on litigating employment law disputes.

Analysis continued from page 3

practice on complicated contract and compensation disputes, non-compete litigation, Title VII litigation, wage and hour law, and franchisor-franchisee relations. Colton graduated, with distinction, from the University of Iowa College of Law.

Endnotes

[1]The authors would like to thank Nonnie Shivers of the Ogletree Deakins Phoenix office for her tremendous contributions to this article.

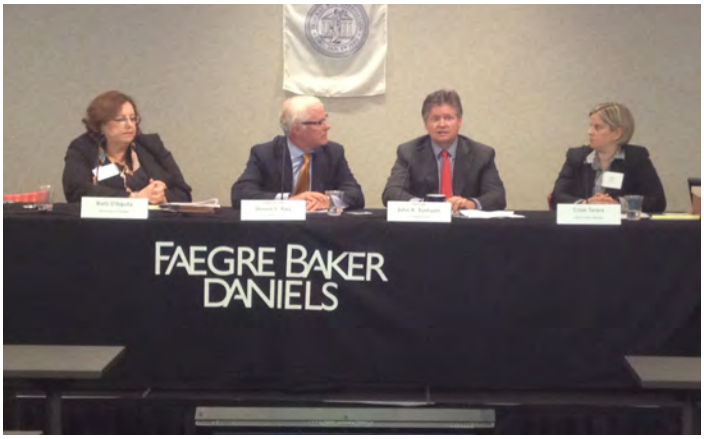
[2]Notably, recent decisions by the Eighth Circuit have reinforced *Obergefell*'s holding. These Eighth Circuit decisions should serve as a harbinger to any states wishing to take a defiant stand against *Obergefell*. On August 11, 2015, the Eighth Circuit issued orders regarding laws/constitutional provisions in Arkansas, South Dakota, and Nebraska that denied same-sex couples the right to marry. The district courts in Arkansas, South Dakota, and Nebraska all had ruled that the state laws and constitutional provisions denying same-sex couples the right to marry violated (or "likely" violated) the U.S. Constitution. While those cases were on appeal, the Supreme Court issued its ruling in *Obergefell*. The Eighth Circuit affirmed the district courts' holdings in all three of those cases, stating that, pursuant to *Obergefell*, laws denying same-sex couples the right to marry violated the U.S. Constitution. *See* Case Nos. 15-1186; 15-1022; 1501452.

The FBA's Government Relations Committee is seeking members' comments to pending legislation in Congress that will impact class action litigation, specifically the Fairness in Class Action Litigation Act of 2015 (H.R. 1927), which is available at www.cbo.gov/publication/50693. If you have any comments that you would like the L&E Section to share with the FBA's Government Relations Committee, please forward your comments to Steve Griffith at sgriffith@bakerdonelson.com by Monday, Sept. 28, 2015.

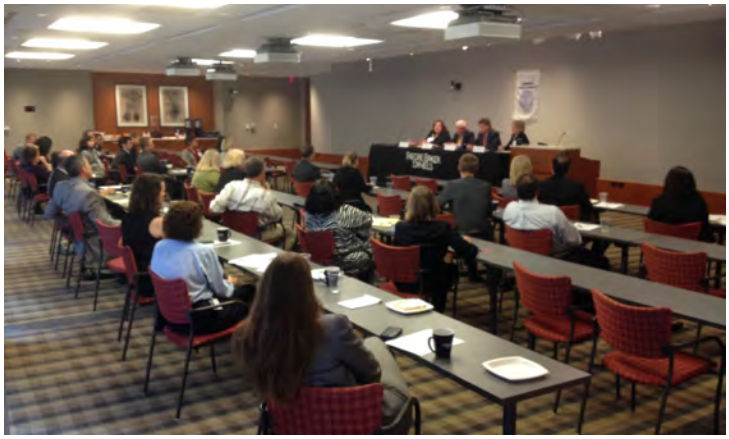
Committee on Programming & CLE

Donna Currault

The L&E Section worked with the FBA and MyLawCLE to present two 2-hour CLE sessions earlier this summer. On July 28, 2015, Robert C. Divine of Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C. presented L&E practitioners with information about "What Recent Immigration Developments Mean to Employment Lawyers." This 2-hour presentation is still available for viewing at http://www.mylawcle.com/product/fba-what-recent-immigration-developments-mean-to-employment-lawyers/. The following day, July 29, 2015, Jessica Summers and Ethan Don from Paley Rothman provided guidance in a 2-hour CLE entitled "From Hire to Fire: Effectively Managing Critical Junctures in the Employer-Employee Relationship." This presentation is also available at http://www.mylawcle.com/product/fba-from-hire-to-fire-effectively-managing-critical-junctures-in-the-employer-employee-relationship/. We encourage you to take advantage of these valuable programs. ■



L-R: Barb D'Aquila, Magistrate Judge Rau, Chief Judge Tunheim, and Corie Tarara



The CLE attendees

Labor and Employment Section Sponsors Half-Day CLE

On August 26, 2015, the L&E Section sponsored the MN Chapter's Second Annual Half-Day CLE geared toward labor and employment practitioners. The CLE kicked off with an introduction by L&E Section Chair, Craig Cowart, who educated approximately 50 attendees about the benefits of the L&E Section, including the monthly circuit updates and quarterly newsletter, *The Labouring Oar*.

The first topic, "What's New at the EEOC in the Wake of Recent Supreme Court Decisions", was moderated by Brian Rochel of Teske Micko Katz Kitzer & Rochel. The attendees enjoyed an excellent discussion with panelists Juli Bowman, the District Director of the EEOC Chicago District Office; EEOC trial attorney Nicholas Pladson; and pulled-from-the-crowd EEOC Minneapolis office acting Director Julie Schmid! The attendees were provided with valuable insight concerning the EEOC's take on conciliation in light of *Mach Mining, LLC v. EEOC,* No. 13-1019 (April 29, 2015), as well as current and upcoming electronic notice initiatives.

The second topic was "Employment Law Implications Following the 2014 U.S. Supreme Court Term: *Abercrombie, Integrity Staffing, UPS, and Obergefell*." Moderated by Joel Schroeder of Faegre Baker Daniels (and L&E Section Chapter Representative), the panelists each provided an overview of the recent decisions and possible implications and practical advice. Thank you to Rachhana Srey, Nichols Kaster for her discussion of *Integrity Staffing;* Brett Strand, 3M Labor & Employment Counsel for his discussion of *UPS;* Amy Taber, Prime Therapeutics Employment & Litigation Counsel for her discussion of *Obergefell;* and Nicole Truso, Faegre Bake Daniels, for her discussion on *UPS*.

The CLE concluded with "Improving Collegiality and Civility in Employment Litigation", moderated by L&E Section Secretary, Editor of *The Labouring Oar,* and Chair of the Publications and Public Relations, Corie Tarara, of Seaton, Peters & Revnew, P.A. The Chapter was honored to have as panelists, U.S. District Court for the District of Minnesota, Chief Judge John R. Tunheim and Magistrate Judge Steven E. Rau, and Barb D'Aquila of Norton Rose Fulbright. The lively discussion provided the attendees with a reminder that our profession, while adversarial, must strive toward civility and collegiality for the benefit of our clients, ourselves, and the profession.

The Minnesota Chapter appreciates and thanks the L&E Section for its sponsorship and continued support in providing this benefit to its members, and to all the speakers for their participation. ■

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L-R: Nicole Truso, Rachhana Srey, Brett Strand, Amy Taber, and Joel Schroeder

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