

# EMPLOYMENT LAWSCENE ALERT: SUPREME COURT TO DECIDE PREGNANCY ACCOMMODATION CASE

On December 3, 2014, the United States Supreme Court will hear oral arguments in *Peggy Young v. United Parcel Service Inc.*, No. 12-1226, and the outcome could have a significant impact on employers and their pregnant employees.

Peggy Young was a UPS delivery driver. She went out on leave for in vitro fertilization and, when she returned, had lifting restrictions. Although workers who had temporary restrictions from on-the-job injuries, were disabled, or had lost their Department of Transportation certification were allowed temporary alternate assignments, Ms. Young was denied a similar accommodation for her pregnancy-related restriction. In 2008, she filed a discrimination suit based on the claim that UPS violated Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act by refusing to accommodate her pregnancy by letting her perform light duty work. UPS rests its argument on the fact that federal law does not require special treatment or accommodations for pregnant employees, and that its facially neutral policy cannot become discriminatory simply because it does not extend the privilege to pregnant employees. Under UPS' policy, any worker who was injured or had a condition that did not stem from work was not accommodated. Although the United States District Court for the District of Maryland and Fourth Circuit Court of Appeals agreed with UPS, the United States Supreme Court granted certiorari in July 2014.

Interested parties on both sides have weighed in on the case by filing amicus briefs. Most recently, on October 31, 2014, the U.S. Chamber of Commerce filed a brief supporting UPS that stated that Ms. Young's interpretation would blur the line between intentional and unintentional pregnancy bias and should not be allowed to go forward. They, and other groups, have advocated that federal law requires only that pregnant and non-pregnant workers receive equal treatment, not that pregnant employees should get preferential treatment.

The outcome of this case will help guide employers on whether and when employers are required to provide work accommodations to pregnant employees when they provide them to non-pregnant employees who are similar in their ability or inability to work. The Supreme Court's decision could signal a shift in the law and enforcement of law related to pregnant employees that has already been evident elsewhere. In July, the EEOC issued additional guidance on pregnancy discrimination and accommodations, which stated that employers should offer accommodations to pregnant employees in the same way that accommodations were offered to non-pregnant employees with similar abilities or disabilities to work. The EEOC's guidance is not binding legal authority but, instead, the agency's interpretation of

how the law should be implemented. The Supreme Court now has the option to embrace the EEOC's more expansive interpretation of the PDA or to reign in the EEOC and limit what accommodations employers are required to give to pregnant employees. The Pregnant Workers Fairness Act, which would require reasonable accommodations for pregnant employees, is also pending in the House of Representatives.

Employers should monitor the outcome of this case and, depending on the outcome, review their policies to ensure that they are compliant with the law.

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## **EMPLOYMENT LAWSCENE ALERT: WHAT THE MIDTERM ELECTION RESULTS MEAN FOR LABOR AND EMPLOYMENT LAW**

In the midterm elections on Tuesday, November 4, 2014, the Republican Party gained a majority in the U.S. Senate. Now with control of both the House and the Senate, it is likely that the GOP will introduce legislation in an attempt to stop many of the current administration's employment agendas. Although President Obama maintains veto power, the Republican Party could curtail certain efforts that are currently being made.

Areas for employers to watch for potential changes include the NLRB and other federal administrative agencies. As this blog has covered recently, the NLRB has been aggressive in its enforcement of the National Labor Relations Act, and the penalties for violators have been stiff. There is currently proposed legislation to alter the composition of the NLRB from five members to six, three being from each major political party.

Increased congressional hearings that will scrutinize the Obama administration's labor and employment agenda are also likely. A target of these hearings may be the EEOC, which has also been pursuing an aggressive agenda of discrimination cases that some consider to be an attempt to expand the reach of Title VII.

Control by the Republicans of both the House and Senate could lead to budget cuts for federal agencies that enforce labor and employment laws as well. While this would not change the laws themselves, it would restrict the agencies' ability to enforce them.

Republicans will also have the ability to block or hold up nominations for various posts in the administration related to labor and employment law. There is speculation that Secretary of Labor Thomas Perez could be nominated to take over for U.S. Attorney General Eric Holder when he resigns. If that happens, the Republicans will have a larger, and likely more

employer-friendly, say in who takes over as Secretary of Labor.

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## **O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. RANKED IN 2015 "BEST LAW FIRMS"**

O'Neil, Cannon, Hollman, DeJong and Laing S.C. has been ranked in the 2015 "Best Law Firms" list by *U.S. News and World Report* and *Best Lawyers*® in the following areas:

- Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law
- Commercial Litigation
- Construction Law
- Corporate Law
- Product Liability Litigation-Defendants
- Family Law
- Personal Injury Litigation-Plaintiffs
- Securities/Capital Markets Law
- Trusts and Estates Law
- Litigation-Bankruptcy
- Mergers and Acquisitions Law
- Real Estate Law
- Tax Law

Firms included in the 2015 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a ranking signals a unique combination of quality law practice and breadth of legal expertise.

The 2015 Edition of "Best Law Firms" includes rankings in 74 national practice areas and 120 metropolitan-based practice areas.

The *U.S. News—Best Lawyers* "Best Law Firms" rankings, for the fifth consecutive year, are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process. Clients and peers were asked to evaluate firms based on the following criteria: responsiveness, understanding of a business and its needs, cost-effectiveness, integrity and civility, as well as whether they would refer a matter to the firm and/or consider the firm a worthy competitor.

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# EMPLOYMENT LAWSCENE ALERT: NLRB DECISION INCREASES EMPLOYER RISK IN UNFAIR LABOR PRACTICE LITIGATION

In a move that could significantly increase the risk associated with unfair labor practice litigation for employers, the National Labor Relations Board (“NLRB”) issued a decision on October 24, 2014 that stated it has authority to order expanded remedies for violations of the National Labor Relations Act (“NLRA”) that are “egregious and pervasive.”

In HTH Corporation, 361 NLRB No. 65 (2014), the NLRB recognized violations by a Hawaii hotel chain for repeated violations of the NLRA, including unlawfully terminating an employee for engaging in protected activity, eliminating contributions to unionized employees’ retirement plans, maintaining an unlawful anti-solicitation policy, bargaining in bad faith, and failing to comply with NLRB orders.

The NLRB ordered, among various other remedies, the employer to reimburse both the NLRB General Counsel and the union for several years of litigation expenses, including counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, per diems, and other reasonable expenses. In addition to expenses, the employer must comply with increased posting requirements. Typically, employers who are found in violation of the NLRA must post, for 60 days, a notice informing employees of their rights under the NLRA and a statement that the employer will not violate those rights. In HTH, because of the egregious and pervasive conduct, the NLRB required the employer to post the standard notice and an Explanation of Rights, outlining employees’ core rights under the NLRA and giving specific examples of violations, for three years. In addition, the company will be required to give all new hires in that three year period copies of the notice and the Explanation of Rights. The NLRB is also requiring the company to publish the notice and the Explanation of Rights in two local publications twice a week for eight weeks.

And, although the NLRB did not exercise its right to do so in this particular case, it did note that front pay is an available remedy under the NLRA as part of a make-whole remedy. Front pay is money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. The NLRB did not specify how front pay would be calculated in the event that reinstatement was not awarded and left that question for a later decision.

This decision underscores the NLRB’s recent aggressive enforcement agenda and the NLRB’s willingness to deal the unions a winning hand in unfair labor litigation. The NLRB is active in

enforcing the NLRA and will continue to use its broad discretionary powers to do so. This decision is likely to increase unfair labor practice charges being filed, as now unions have additional incentive to pursue such claims because they can recover their costs, and employers will be pressured to settle such charges to avoid the risk of liability for the union's costs and fees.

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## **O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. HOSTS CLE SEMINAR FOR SMALL FIRM AND SOLO PRACTITIONERS**

On October 8, 2014, O'Neil, Cannon, Hollman, DeJong and Laing S.C. hosted a Continuing Legal Education seminar focusing on legal issues of interest to Wisconsin small firm and solo practice attorneys. Approximately 70 attorneys attended the event. The firm's Managing Shareholder, Jim DeJong, presided over the event.

Chad Baruch of Dallas, Texas was the keynote speaker for the seminar. Attorney Baruch spoke on effective legal writing. He also spoke on constitutional law issues and moderated a panel discussion on corporate drafting issues. Bob Gagan, President of the State Bar of Wisconsin, also participated in the seminar. Attorney Gagan discussed the resources available from the State Bar of Wisconsin to assist small firm and solo practice attorneys.

A number of O'Neil, Cannon, Hollman, DeJong and Laing S.C. attorneys spoke at the event, including:

- Randy Nash and Greg Mager discussed State Bar of Wisconsin projects with State Bar President, Bob Gagan.
- Dean Laing presented on several litigation issues, including the impact of social media research in litigation and emerging deposition and expert witness practice issues.
- Pete Faust, Doug Dehler, Joe Maier, and Joe Newbold participated in a panel discussion with Chad Baruch on corporate document drafting issues.
- Joseph Gumina presented on recent developments in labor and employment law.
- Grant Killoran presented on legal and practical issues related to the handling of electronically stored information.
- Seth Dizard, Melissa Blair, and Tim Van de Kamp participated in a panel discussion on recent developments in creditors' rights, bankruptcy and receivership law.

If you would like any additional information regarding the seminar, including copies of the seminar materials, please contact Grant Killoran via e-mail at [grant.killoran@wilaw.com](mailto:grant.killoran@wilaw.com) or by

telephone at 414.276.5000.

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## **ATTORNEY MAGER PRESENTS AT THE COLLABORATIVE FAMILY LAW COUNCIL OF WISCONSIN SEMINAR**

Attorney Gregory S. Mager presented at the Collaborative Family Law Council of Wisconsin's Second Saturday on October 11, 2014. The Council's Second Saturday program is designed to inform the general public regarding collaborative divorce.

Mr. Mager is a member of the Collaborative Family Law Council of Wisconsin, and a shareholder with O'Neil Cannon

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## **ATTORNEY MAGER PRESENTS AT WISCONSIN STATE BAR'S WORKSHOP**

Attorney Gregory S. Mager presented "Civil Procedure, Evidence, and Pretrial Discovery" and "Temporary Hearings—A Panel Discussion" in August, 2014 at the State Bar of Wisconsin's 33<sup>rd</sup> Annual Family Law Workshop in Sturgeon Bay, Wisconsin.

Mr. Mager is the Director of the Family Law Section of the State Bar of Wisconsin, and a shareholder with O'Neil Cannon

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## **BEST LAWYERS® HONORS 14 ATTORNEYS IN 2015**

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 14 lawyers have been named to the 2015 Edition of *Best Lawyers®*, the oldest and most respected peer-review publication in the legal profession.

*Best Lawyers*® has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in over 65 countries. Lawyers on the *Best Lawyers in America*® list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. would like to congratulate the following attorneys named to the 2015 *Best Lawyers in America*® list:

- James G. DeJong - Corporate Law, Mergers and Acquisitions Law, and Securities/Capital Markets Law
- Seth E. Dizard - Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, and Litigation-Bankruptcy
- Peter J. Faust - Corporate Law, and Mergers and Acquisitions Law
- John G. Gehringer - Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Dennis W. Hollman - Corporate Law, and Trusts and Estates
- Grant C. Killoran - Litigation-Health Care
- Dean P. Laing - Commercial Litigation, Personal Injury Litigation-Plaintiffs, and Product Liability Litigation-Defendants
- Gregory W. Lyons - Commercial Litigation and Litigation-Insurance
- Patrick G. McBride - Commercial Litigation
- Thomas A. Merkle - Family Law
- Steven J. Slawinski - Construction Law

Since it was first published in 1983, *Best Lawyers*® has become universally regarded as the definitive guide to legal excellence. *Best Lawyers*® is based on an exhaustive peer-review survey. Over 52,000 leading attorneys cast more than 5.5 million votes on the legal abilities of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers*® is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers*® “the most respected referral list of attorneys in practice.”

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## **EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL DETERMINES THAT**

# MCDONALD'S IS A JOINT EMPLOYER WITH ITS FRANCHISEES

In a decision that could have far reaching implications for industries that rely on the franchisor/franchisee business model, the NLRB's General Counsel, Richard Griffin, Jr., determined that 43 unfair labor practices charges against McDonald's, USA, LLC may move forward under a "joint employer" theory finding that McDonald's should be held liable along with its independently owned franchisees based upon allegations that the franchisees violated worker's rights in responding to workplace protests. The NLRB General Counsel's decision to move forward against McDonald's not only attempts to extend liability under the National Labor Relations Act to franchisors for acts of its franchisees, but it may also open the door for unions to more easily organize multiple independently owned franchise locations operating under agreement with a single franchisor.

The "joint employer" theory is a legal concept that treats two allegedly separate employers as one. The "joint employer" theory does not depend upon the existence of a single integrated enterprise, but, rather, assumes in the first instance that companies are "what they appear to be" - independent legal entities that have merely chosen to handle jointly... important aspects of their employer-employee relationship. Typically, a joint employer relationship is found between two companies where the non-employing company actively and significantly exerts control over the same employees on those matters governing the essential terms and conditions of employment such as hiring, firing, discipline, supervisions, and direction.

The NLRB General Counsel's decision to target McDonald's as a joint employer comes in unison with big labor's recent efforts to protest wage and benefits levels for fast food workers. These recent protests over wages and benefits is big labor's attempt to attack the franchisor/franchisee business model by deeming independently owned stores to have the deep pockets of its franchisors - ignoring the economic realities of the franchisor/franchisee business model. For example, the SEIU has staged protests at different fast food establishments across the country demanding wages as high as \$15/hour for all fast food workers based upon the fallacy that that such wages are appropriate given the corporate franchisor's finances. Wage demands of this type ignores the economics of operating an independent and locally-owned franchise where wages and benefits are often set based upon local market conditions as well as a franchisee's own profit and loss rather than upon the finances of its franchisor.

The NLRB General Counsel's decision to move forward with complaints that attempts to now treat McDonald's as a joint employer with its franchisees provides ammunition to big labor to further its war over wages and benefits against fast food franchisees by blurring the line

between a small independently and locally-operated franchisee and its affiliated large corporate franchisor. In addition, with the NLRB willing to make clear that a corporate franchisor can now be held liable for unfair labor practices as a joint employer with its franchisees, it is only logical that the NLRB's next step will be to permit unions to organize fast food establishments based upon petitioned collective bargaining units that consist of multiple franchisee locations of a single franchisor even though the locations are independently owned and operated by different independent owners.

The NLRB General Counsel's decision to treat McDonald's as a joint employer does not currently have the effect of law. Once the NLRB issues the complaints, these cases will have to proceed through the adjudicative process leading up to a hearing before an administrative law judge before the cases might reach the full National Labor Relations Board for a decision.

Given the political make-up of current NLRB members, political ideologies will definitely pave the way for the NLRB's General Counsel's viewpoint on joint employer liability to prevail against McDonald's before the NLRB despite three decades of legal precedent that would hold otherwise. Needless to say, the battle will not end at the NLRB, as it would be expected that this issue will most likely wind-up before the U.S. Supreme Court who will make the ultimate decision on this important issue.

At this point, the NLRB will try to achieve settlement with McDonald's before proceeding to hearing with these cases. It would be expected that McDonald's will oppose any attempts to settle these cases and try to move these cases beyond the NLRB and into the courts where strong legal precedent has mostly rejected the joint employer theory for businesses set up under the franchisor/franchisee business model. It is in the federal court system where McDonald's has the best opportunity to defeat the NLRB's new approach against the fast food and other industries that rely on the franchisor/franchisee business model.

We will keep you informed of these cases before the NLRB as they develop.

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## **EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES UPDATED ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION**

On July 14, 2014, the U.S. Equal Employment Opportunities Commission ("EEOC") issued updated enforcement guidance regarding the Pregnancy Discrimination Act ("PDA") and the Americans with Disabilities Act ("ADA") as they apply to pregnant workers. The EEOC's guidance discusses a number of issues related to pregnancy discrimination and other

pregnancy related issues and provides insight into the agency's interpretation of those issues and employers' obligations under the PDA and ADA relative to pregnant employees. The EEOC also issued a question and answer sheet about the EEOC's enforcement guidance and pregnancy related issues and a fact sheet for small businesses.

Among a number of other issues, the EEOC's guidance discusses:

- The PDA's coverage as it relates to current pregnancy, past pregnancy, and a woman's potential to become pregnant or intended pregnancy.
- Discrimination based on lactation and breastfeeding and other medical conditions related to pregnancy or child birth.
- When employers may be required to provide light duty for pregnant employees.
- The prohibition against forcing an employee to take leave because she is pregnant and other issues related to parental leave.
- When employers may have to provide reasonable accommodations to employees with pregnancy-related impairments.
- Other legal requirements affecting pregnant workers, such as the Family and Medical Leave Act and Section 4207 of the Patient Protection and Affordable Care Act (requiring employers to provide "reasonable break time" for breastfeeding employees to express breast milk).
- The EEOC's proffered best practices for employers in handling pregnancy-related matters in the workplace.

The EEOC's updated guidance provides a clear indication of the EEOC's position and interpretation relative to the PDA and ADA as they relate to pregnancy discrimination and other pregnancy related issues in the workplace. While this guidance may provide some insight into the agency's position and likely enforcement efforts, employers should remember that it is merely guidance and does not have the force and effect of law.

One of the more controversial elements of the EEOC's new guidance arises from the EEOC's position that employers' failure to treat pregnant employees the same as non-pregnant employees similar in their ability or inability to work is a violation of the PDA. This becomes problematic for employers who have traditionally reserved light duty positions for workers with restrictions resulting from an on-the-job injury while not providing light duty to employees who have similar temporary restrictions. The EEOC takes the position that the PDA requires employers who offer light duty work to employees who have restrictions resulting from injury on the job to offer that same light duty work to a pregnant employee with the same restrictions.

In light of this new guidance, employers should reevaluate their practices and policies related to pregnancy and pregnancy-related issues, especially with regard to requests for accommodation, and more carefully consider each and every employment action and decision involving pregnancy in the workplace.