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TWENTY-SIXTH ANNUAL
CORPORATE COUNSEL SYMPOSIUM
TUESDAY, OCTOBER 27, 2015

No Good Deed Goes Unpunished: Risks Employers Face When Trying To Be the "Good Guy"

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1. PowerPoint

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Creating a Culture of Entitlement

Benefits, even if generous, may:

- **Become expectations of employees;**
- **Form the basis for disparate treatment claims;**
- **Be federally regulated;**
  - ***See Musmeci v. Schwegmann Giant Super Markets*, 159 F. Supp. 2d 329 (E.D. La. 2001) (employer's distribution of grocery vouchers to retired employees who met certain requirements had created an ERISA-covered benefit plan).**
- **Have tax implications; or**
  - **The IRS treats actual gift of holiday turkeys as a de minimis fringe benefit (not taxable income), while a gift card for a holiday turkey is considered taxable income. *See* 26 C.F.R. §1.132-6(e)(1); TAM 2004-37-030 (April 30, 2004).**
- **Require engaging in collective bargaining to change such practices.**

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Creating a Culture of Entitlement: Bonuses

- **Problems with bonuses in a union context:**
  - **Discretionary gifts that are not compensation for services are not among "terms and conditions of employment"**
  - **But if gifts and bonuses are "so tied to the remuneration which the employees received for their work that they were in fact part of it, they are in reality wages"**

***NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir. 1965)**

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Creating a Culture of Entitlement: Bonuses

- ***NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir. 1965)**
  - **Union contended employer "unilaterally" ended Christmas bonus without bargaining over it**
  - **Factors for setting the challenged bonus:**
    - **Previous three months' business**
    - **Economic outlook and . . .**
    - **"The general Christmas spirit that prevails at the time"**
  - **HELD: Bonus was not part of wages**
    - **No consistency or regularity in awarding the bonus**
    - **No uniformity in or basis for the amount**
    - **Bonuses not tied to remuneration**
    - **Whether bonus was paid depended on financial condition of employer**

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Creating a Culture of Entitlement: Bonuses

- ***Kitsap Tenant Support Servs., Inc.*, 2015 NLRB LEXIS 560**
  - **In early December 2012, employer granted its bargaining unit employees a holiday bonus, as it had done in holidays past. The employer admitted that it exercised discretion in deciding whether to give the bonus and the amount. The Union first learned of the bonus in January 2013.**
  - **"It is well settled that employers must negotiate with the collective-bargaining representative of its employees concerning discretionary changes in wages, hours, or working conditions, which are mandatory subjects of bargaining. Thus, there can be no question that Respondent was obligated to notify and bargain with the Union about the December 2012 bonus, even if it had a past practice of giving such bonuses."**
  - **Failure to do so violated NLRA Section 8(a)(5) and (1).**

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Creating a Culture of Entitlement: Bonuses

- ***SMI/Division of DCX-CHOL Enters., Inc.*, 2014 NLRB LEXIS 725**
  - **Employer passed out crisp $100 bills to reward employees for their efforts in meeting employer's $1 million sales mark for the month, but did not notify or bargain with Union prior to distribution.**
  - **Employer had previously provided gifts (movie tickets, food, raffle prizes) to its employees without prior bargaining or notification to Union.**
  - **HELD: The $100 bonus here was not a gift, but instead was a form of compensation that was subject to the duty to bargain, given the "clear nexus" between employees' production and the bonuses received.**
    - **Bonus was awarded because employees, though collectively, reached a performance and production goal.**
    - **Employer had promised additional bonuses if production goals were met in future months.**

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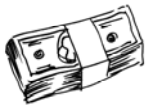
Creating a Culture of Entitlement: Bonuses



- **Problems with bonuses in the FLSA context:**
  - **"Regular rate of pay" on which overtime is calculated includes "all remuneration for employment," with specific exceptions:**
    - **NOT "discretionary bonuses"**
    - **NOT "gifts and payments in the nature of gifts on special occasions"**

***See* 29 CFR 778.208; 29 CFR 778.212**

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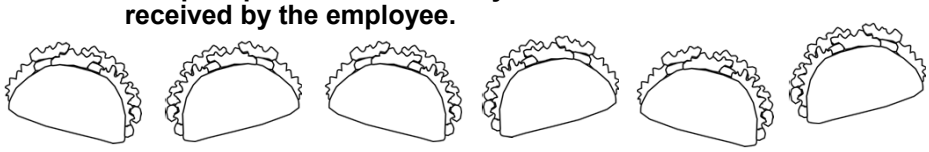
Creating a Culture of Entitlement: Bonuses

- ***Rodriguez v. Taco Bell Corp.*, 2013 WL 5877788 (E.D. Cal. 2013) (denying motion to dismiss)**
  - **Plaintiff alleged that Defendant incorrectly calculated overtime wage rates because the overtime rate failed to take into account the meal and drink discounts provided by Defendant.**
  - **In other words, Plaintiff alleges that the "true" regular wage rate earned by Taco Bell employees consists of the hourly rate paid plus the value of any meal and drink discounts received by the employee.**



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Creating a Culture of Entitlement: Parties

- ***Chicago Tribune*, 326 NLRB 1057 (1998)**
  - **Employer held a brunch at the Drake Hotel for bargaining unit employees 3 days before the decertification election.**
    - **Adults (management, unit employees, spouses, guests) dined in one room with poinsettias on the table, and were able to bring the flowers home with them.**
    - **Children were served in a separate room with Santa Claus and were given stockings with candy and a small stuffed animal.**
    - **Although brunch ended around 1p.m., free parking and babysitting was available until 3p.m. Valet parking and coat check was also made available.**
    - **Entire event cost approximately $8,000, or $333 per unit employee.**
    - **Invitation indicated there would be an opportunity for employer to answer any questions that employees, spouses, and friends, may have about the decertification election.**
    - **Employer made an antiunion speech at the event.**
  - **NLRB: The brunch was an event which would reasonably tend to interfere with employee free choice, and a new election must be conducted.**

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Creating a Culture of Entitlement: Parties

- ***But see Sequel of New Mexico LLC, d/b/a Bernalillo Academy*, 2014 NLRB LEXIS 963**
  - **Employer held a holiday party for employees on the first day of the election without a past practice of holding such parties.**
    - **Invitation to staff holiday party was issued the same day that decertification petition was served on the parties.**
    - **Party was for nonunit and unit employees and their guests**
    - **65 people attended the party, which was held at a BBQ restaurant and featured appetizers, drinks, and a buffet**
    - **Employer also provided food and smoothies at its facilities for those employees required to work during the party**
  - **NLRB: No prejudice to the election – temporal connection insufficient**
    - **No evidence re: cost of the food and drinks in relation to employer's stated purpose.**
    - **All employees were invited, attendance was voluntary, no one was paid to attend.**
    - **No mention of Union or election at the party**
    - **"Where free food and drink is otherwise unobjectable, proximity to the election is insufficient to create special circumstances warranting new election."**

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Gold Star Performance Reviews

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Gold Star Performance Reviews

- ***Aly v. Mohegan Council, Boy Scouts of America*, 711 F.3d 34 (1st Cir. 2013)**
  - **Egyptian-American Muslim alleged Title VII and state law discrimination claims against his employer, BSA, on the basis of his religion and national origin.**
  - **Jury verdict in favor of Aly; employer sought judgment as a matter of law.**
- **JMOL denied; First Circuit affirmed:**
  - **"While Aly's proffered evidence of discrimination was not extensive, it could reasonably lead to an inference of discriminatory intent and a showing of pretext," particularly because, among other factors, the record revealed consistent performance reviews noting Aly's commitment to the Council.**

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Gold Star Performance Reviews

- ***Haigh v. Gelita USA, Inc.*, 2009 WL 2835164 (N.D. Iowa 2009)**
  - **Defendant sought summary judgment on Plaintiff's claim under the Americans with Disabilities Act.**
  - **A prima facie case under the ADA requires that Plaintiff show he is qualified to perform the essential functions of the job, with or without reasonable accommodation, which requires a showing that he possesses the requisite skill, experience, education and other job-related requirements for the position.**

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Gold Star Performance Reviews

- ***Haigh v. Gelita USA, Inc.*, 2009 WL 2835164 (N.D. Iowa 2009) *cont'd***
- **Plaintiff's consistent receipt of overall annual performance review ratings of "good" while employed at Defendant created a genuine issue of material fact as to as to whether he possessed the requisite skill, experience, education and other job-related requirements for the position.**

Wellness Gone Wrong

- **According to testimony by the Kaiser Family Foundation to the EEOC:**
  - **94% of employers with over 200 workers have wellness programs**
  - **63% of employers with less than 200 workers have wellness programs**
- **According to the American Benefits Council (ABC), the trend is from:**
  - **"wellness" (physical/mental health) to**
  - **"well-being," which includes a health component, as well as financial security, both when active and when retired**

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Wellness Gone Wrong

- ***Recent EEOC* Litigation**
  - **EEOC's ADA Claims**
    - **Biometric Testing**
    - **"Involuntary"**
      - **Surcharge - $500**
      - **HSA Contributions - $250 to $1,500**
      - **Nicotine Surcharge - $1,000 to $2,000 (flexible requirements)**
      - **Up to $4,000 for failure to participate**
  - **Employer's Defenses**
    - **Safe Harbor**
    - **Program "voluntary"**
      - **No discipline or loss of coverage**
      - **Characterizes core "penalty" at $42/month**

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Wellness Gone Wrong

- *EEOC* Litigation
  - Procedural Posture: Preliminary injunction standard; no irreparable harm
  - Merits reserved for another day
    - "[I]ntriguing legal questions that relate to important public interest considerations . . ."
    - "[G]reat uncertainty persists in regard to how the ACA, ADA and other federal statutes . . . interact."

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Wellness Gone Wrong

- *EEOC* Litigation
  - ADA statutory and regulatory scheme
  - ACA – Presupposes rewards and penalties.
    - "A reward may be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost sharing mechanism . . . , the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan." 42 U.S.C. § 2705(j)(3)(A).
  - GINA says that an employer may collect Genetic Information as part of a wellness program as long as:
    - There is "prior, knowing, voluntary and written authorization"
    - Only the employee (or family member) and the "licensed health care professional" see the information
    - Not disclosed to employer except in aggregate terms

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Wellness Gone Wrong

- ***EEOC* Litigation**
  - **Safe Harbor?**
    - ***Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012)**
    - ***Barnes v. Benham Group*, 22 F. Supp.2d 1013 (D. Minn. 1998)**
  - **Voluntary?**
    - **EEOC—Cost of not participating "crosses the line"**
    - **Honeywell—Voluntary**
      - **Amount less than "Affordable Care" threshold (9.5% of family income)**
      - **Less than 30-50% of allowable reward under HIPAA for health-contingent programs**
  - **Genetic?**

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Wellness Gone Wrong

- **WCA, Minn. Stat. 176.021, Subd. 9: "Injuries incurred while participating in voluntary recreational programs sponsored by the employer, including health promotion programs, athletic events, parties, and picnics, do not arise out of and in the course of the employment even though the employer pays some or all of the cost of the program."**
  - **Exclusion does NOT apply when employee was ordered or assigned by the employer to participate in the program.**

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Wellness Gone Wrong

- ***But see McConville v. City of St. Paul*, 528 N.W.2d 230 (Minn. 1995) (injuries incurred by employee in employer's vehicle accident while being transported from park where employees participated in wellness program to place of employment were NOT excluded from WCA coverage).**

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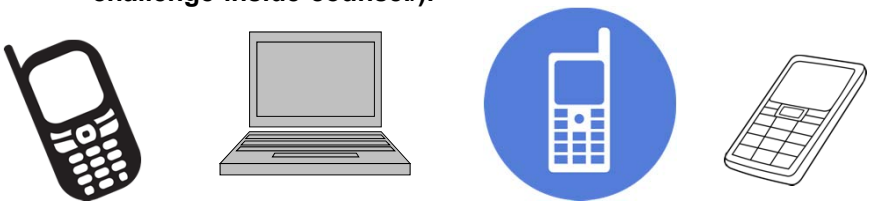
Bring Your Own Device Downfalls

- **Fortune 1000 inside counsel consider BYOD issues to be their number one electronic discovery challenge.**
  - **3 N.Y.Prac., Com. Litig. in New York State Courts § 27:27 (4th ed.) (citing Hartman, BYOD: The #1 EDiscovery Challenge for Inside Counsel, February 17, 2014, available at http://www.4discovery.com/2014/02/17/byod-1-ediscovery-challenge-inside-counsel/).**



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Bring Your Own Device Downfalls

- Employees may resist discovery on privacy grounds
  - What if company litigation is against the owner of the device?
  - What if litigation is against the company?
- *See, e.g., Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F. Supp. 2d 987 (C.D. Cal. 2012)
  - In action by former employee to invalidate employer's post-employment restrictive covenant, employee moved to quash subpoena of his cell phone service provider and for protective order.
  - Court: Employee had limited expectation of privacy in his cell phone account, and disclosure of telephone numbers, cell site information, and date, time, and duration of calls did not represent a significant intrusion of his privacy.
- But note – privacy issues are very state (and fact) specific!

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Bring Your Own Device Downfalls

- Engage both legal and IT employees in addressing these concerns:
  - How to ensure personal devices comply with record retention policies and legal requirements
  - What to do with litigation holds
  - How to protect company data on unsecured device
  - How to enforce BYOD policies

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No-Fault Attendance ≠ No Risk ✓✓✓

- **No-fault attendance policies have historically been the basis for various lawsuits, including disability discrimination, FMLA, and unemployment disputes.**
- **"If an employer has a 'no fault' policy, which does not distinguish between excusable and non-excusable absence, and if the employer therefore fails to keep track of any reasons given by the employee for an absence, the employer will obviously have a more difficult time proving misconduct than it would under an attendance policy that records fault."**
  - ***Johnson v. Division of Emp. Security*, 318 S.W.3d 797, 808 n. 10 (Mo. Ct. App. 2010) (evidence insufficient to support a finding of misconduct where record disclosed very little information on employee's absences).**

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No-Fault Attendance ≠ No Risk ✓✓✓

- **But, courts are recognizing that *if* attendance is an essential function of the job, then an employee who cannot comply with attendance requirements is not a qualified individual under the ADA.**
  - ***EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015)**
    - **Regular and predictable on-site job attendance was both an essential function of, and a prerequisite to perform other essential functions of, employee's resale-buyer job, and so, due to employee's repeated absences (which were due to her IBS), she was not qualified for her position, and employer did not fail to reasonably accommodate her disability by refusing her request to telecommute up to four days per week.**

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No-Fault Attendance ≠ No Risk ✓✓✓

- **And an employee who cannot perform essential functions of the job even with accommodation of telecommuting is not a qualified individual under the ADA.**
  - ***Doak v. Johnson*, 798 F.3d 1096 (D.C. Cir. 2015)**
    - **Employee of U.S. Coast Guard who suffered from, among other things, depression, hypothyroidism, and migraines, could not perform essential functions of her job even with her desired schedule accommodation of 11:00 a.m. start time, with optional weekend hours and the ability to telecommute, and therefore, termination by Coast Guard was not disability discrimination in violation of the Rehabilitation Act.**

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Telecommuting Troubles

- ***Meachem v. Memphis Light, Gas & Water Div.*, 2015 WL 4866397 (W.D. Tenn. 2015)**
  - **Pregnant employee worked as an attorney for Defendant, primarily managing workers' compensation claims, employment issues, and litigation.**
  - **She was restricted to 11-week bed rest at 23 weeks and made an official accommodation request to work from bed, which was denied.**

Telecommuting Troubles

- ***Meachem v. Memphis Light, Gas & Water Div.*, 2015 WL 4866397 (W.D. Tenn. 2015) *cont'd*.**
  - **Court denied employer's motion for summary judgment, finding numerous issues of material fact existed, including:**
    - **Whether physical presence was an essential function; and**
    - **Whether telecommuting would cause undue hardship on employer's business.**