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NEWS FROM JACKSON KELLY PLLC

Jackson Kelly's Labor and Employment practice area has been dedicated to representing the interests of management and defending civil actions in many forums for more than 60 years. Attorneys like JK's own Chad Sullivan understand this specialized area of the law and its interplay between federal and state agencies. He can advise on current human resources trends and their interplay with federal and state laws and regulations.

Chad can provide defense-oriented litigation, advice, training, and other assistance, to employers and their insurance carriers. Labor and Employment attorneys regularly defend public and private employers in state and federal courts and administrative forums, in an array of employment disputes, including:

- Claims of age, race, religious, gender, and disability discrimination
- Workers' compensation discrimination
- Sexual and racial harassment
- Wrongful and retaliatory discharge, particularly involving safety-related issues
- Wage and hour, ERISA, COBRA, and Worker Adjustment and Retraining Notification (WARN) Act violations
- Family and Medical Leave Act (FMLA) and reasonable accommodation claims
- Unemployment compensation controversies
- Breach of employment contract and non-competition covenants
- Defamation and invasion of privacy

A crucial aspect of the labor and employment practice area is advising employers in an effort to avoid and prevent issues in the workplace. Jackson Kelly's Labor and Employment attorneys frequently consult with public and private employers on many topics, including:

- Employee discipline and discharge
- Handbook and personnel policy reviews
- Employee misconduct and complaint investigations
- Wage and hour issues
- Employee leave questions and interaction among Family and Medical Leave Act (FMLA), disabilities laws, workers' compensation laws, and disability benefit policies and plans
- Reduction in force (RIF) and WARN Act issues
- Drug and alcohol testing
- Employee monitoring and privacy questions

For more information on Indiana, Illinois, Missouri and Kentucky labor and employment matters contact Chad Sullivan at 812-422-9444.

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SCOTUS HOLDS UNION FEES IN THE PUBLIC-SECTOR ARE A VIOLATION OF FIRST AMENDMENT RIGHTS

In *Janus v. AFSCME, Council 31*, the Supreme Court of the United States held that "States and public-sector unions may no longer extract agency fees from non-consenting employees" and overruled *Abood v. Detroit Bd. of Ed*. 138 S. Ct. 2448 (2018).

Under the Illinois Public Labor Relations Act ("IPLRA"), if a majority of the employees in a bargaining unit voted to be represented by a union, that union became both the members' and nonmembers' exclusive representative. The union, therefore, became the only person permitted to negotiate with the employer on matters relating to the employees' employment. The public employees who declined to join the union, were required, under Illinois law, to pay "agency fees". The agency fees or union dues were automatically deducted from the nonmember's wages without consent.

A law similar to Illinois's was previously upheld by the Supreme Court in *Abood*. Under *Abood*, the agency fee covered the portion of union dues "attributable to activities that [were] 'germane'" to the union's collective-bargaining activities but could not cover "the union's political and ideological projects". However, in *Janus*, the Court overturned *Abood*'s agency-shop arrangement and found it violated the free speech rights of nonmembers because it compelled nonmembers to subsidize private speech on matters of substantial public importance despite the nonmembers' decision not to join. Therefore, the Court held that a State's and/or public-sector union's extraction of agency fees from nonconsenting employees violates the First Amendment. ■

SCOTUS UPHOLDS CLASS ACTION WAIVERS WITHIN EMPLOYEE ARBITRATION AGREEMENTS

In *Epic Sys. Corp v. Lewis*, the Supreme Court of the United States held that arbitration agreements which prohibit the employee from pursing claims as a class or collective action, requiring individualized arbitration proceedings are enforceable. 138 S. Ct. 1612, (2018).

In *Epic,* employees and employers entered into agreements stating that they would arbitrate any disputes that may arise between them. The agreement also provided that claims pertaining to different employees must be heard in separate proceedings; therefore, the agreements required individualized arbitration proceedings. Nonetheless, employees sought to litigate federal law claims and state law claims through class or collective actions in federal court. Under the FAA, federal courts are required to enforce arbitration agreements according to their terms. However, the employees claimed that the FAA's saving clause—which allows courts to refuse to enforce arbitration agreements if the agreement violates another federal law—removed this obligation because the required individualized arbitration proceedings violated the National Labor Relations Act ("NLRA"). However, the Supreme Court of the United States rejected this view.

The Court first noted that the FAA's saving clause only applies to contract defenses (i.e.,

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fraud, duress, or unconscionability) and does not save defenses "that target arbitration . . . by interfering with fundamental attributes of arbitration." By attacking the "individualized nature of the arbitration proceedings," the Court concluded that the employees sought to interfere with one of the arbitration's fundamental attributes. Therefore, the Court held that the employees' defenses did not qualify for protection under the FAA's saving clause.

Furthermore, the Court resolved the confusion surrounding the NLRA's alleged nullification of the FAA. The Court concluded that the NLRA, which guarantees and focuses on the employee's right to organize unions and bargain collectively, does not mention class or collective action procedures or indicate a clear and manifest wish to displace the FAA. Therefore, the Supreme Court of the United States held that the arbitration agreements waiving the right to class actions must be enforced because the FAA requires all federal courts to enforce such agreements, and nothing in the FAA's savings clause or in the NLRA demand otherwise. ■

A MULTI-MONTH LEAVE OF ABSENCE DOES NOT QUALIFY AS A REASONABLE ACCOMMODATION UNDER THE ADA.

In *Severson v. Heartland Woodcraft, Inc.*, the Seventh Circuit declined to hold that the ADA afforded an employee an additional three-month leave of absence after the employee's FMLA leave expired. 872 F.3d 476, (7th Cir. 2017). Furthermore, the Seventh Circuit held that a multi month leave of absence is beyond the scope of a "reasonable accommodation" under the ADA. ("ADA is an antidiscrimination statute, not a medical-leave entitlement")

In *Severson*, the employee, "wrenched his back" and aggravated his pre-existing back condition. Due to the pain, Severson left work, and requested and received a twelve-week medical leave under FMLA. Near the end of his FMLA leave and before undergoing surgery, Severson requested an extension of his medical leave. The employer denied his request and terminated his employment at the end of his FMLA leave, but invited Severson to reapply when he recovered. Severson sued Heartland for "[discriminating] against him in violation of the ADA by failing to accommodate his physical disability."

The Seventh Circuit addressed whether a multi month leave of absence qualified as a "reasonable accommodation" within the meaning of the ADA. The Seventh Circuit held that the basic requirement of a reasonable accommodation is "one that allows the disabled employee to 'perform the essential functions of the employment position.'"

The Court held that "[a]n employee who needs long-term medical leave *cannot* work and thus is not a 'qualified individual' under the ADA." Furthermore, the Court held that a long-term leave of absence is not a reasonable accommodation under the ADA because it does not give the disabled individual the means to work and instead excuses the individual from working. The Court did note that a short-term leave of absence may be a reasonable accommodation in certain situations. ■

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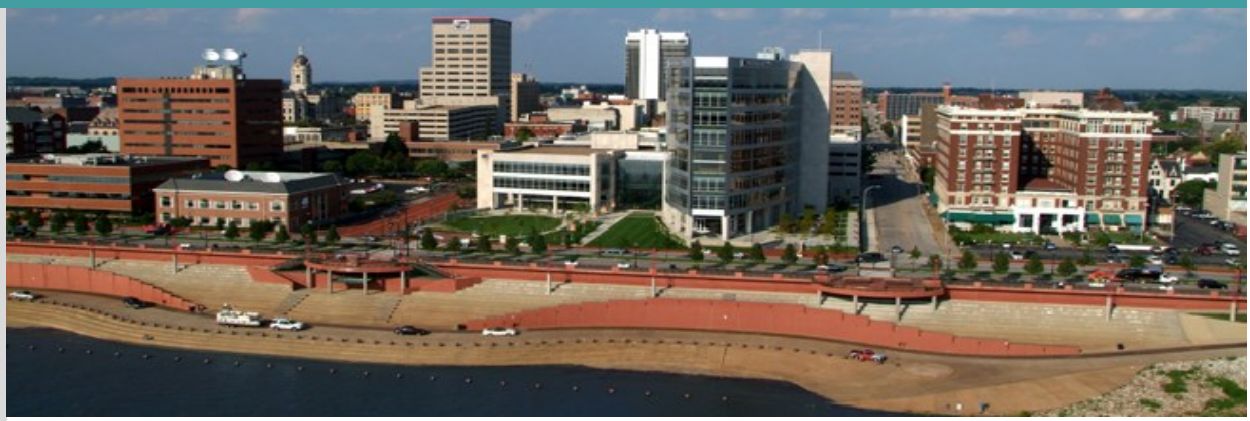

THE SEVENTH CIRCUIT DISREGARDED THE INDEPENDENT CONTRACTOR DESIGNATION IN TWO CONTRACTS BECAUSE THE REALITY OF THE RELATIONSHIP SAID OTHERWISE

In *Simpkins v. DuPage Hous. Auth.*, the Seventh Circuit applied the economic realities test and held that the district court erred in concluding that a maintenance man, contractor, and handyman was not an employee under the FLSA. 2018 WL 3045280.

Simpkins began to work for DHA in November 2009 as an "independent contractor." Simpkins and DHA entered into two "independent contractor agreements," one in 2009 and another in 2012. The agreements described Simpkins' duties as general labor. From November 2009 through May 2015, Simpkins worked full-time and exclusively for DHA. DHA issued Simpkins 1099-MISC tax forms, and Simpkins knew that DHA considered him as an independent contractor. Furthermore, DHA did not provide Simpkins with any benefits.

However, after a car accident injured Simpkins, Simpkins filed suit against DHA for failing to pay him overtime and provide disability benefits under the FLSA. The district court granted DHA's motion for summary judgment because the district court concluded that Simpkins was not an employee of DHA under the FLSA. However, on appeal, the Seventh Circuit reversed.

The Court focused on FLSA's definition of an employee. FLSA defines an employee as someone "who as a matter of economic reality [is] dependent upon the business to which [he/she] render[s] service." Therefore, the Court focused on the reality of the relationship between the employee and employer. Specifically, the Court focused on the following three factors: (1) the nature and degree of control the alleged employer exercised over the manner in which the alleged employee performed his work; (2) "the alleged employee's investment in equipment or materials required for his task;" and (3) "whether the service rendered require[d] a special skill." The Court held that because factual disputes existed with regards to all three factors, the District Court erred in concluding that Simpkins was not an employee under the FLSA as a matter of law. Therefore, the Court implicitly disregarded the designation of Simpkins as an independent contractor in two separate contracts because the reality of the relationship demonstrated otherwise. ■

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SIXTH CIRCUIT HOLDS A BREACH OF THE UNION'S DUTY TO PROVIDE FAIR REPRESENTATION IS NOT A PREREQUISITE TO A TITLE VII CLAIM AGAINST A UNION.

In *Peeples v. City of Detroit*, the Sixth Circuit, persuaded by the Seventh and Ninth Circuits, concluded that the "standards governing a duty of fair representation claim do not govern Title VII discrimination claims against a union." 891 F.3d 622 (6th Cir. 2018). Therefore, a union employee who sues its union under Title VII is not required to prove the union breached its contractual duty before proceeding with a Title VII claim.

In the case, eleven minority firefighters filed suit against the City of Detroit ("City") and their union, the Detroit Fire Fighters Association, Local 344, IAFF, AFL-CIO ("DFFA"), alleging that they were laid off in violation of Title VII. The District Court awarded summary judgment in favor of the City and the DFFA. As to the claim against the DFFA, the District Court concluded that in order to proceed with their Title VII claim against the DFFA, the Plaintiffs must first establish that the DFFA breached its duty of fair representation to them. Because the Plaintiffs could not establish a breach, the District Court awarded summary judgment in favor of the DFFA.

On appeal, the Sixth Circuit reversed the District Court's decision. Relying heavily on decisions from the Seventh and Ninth Circuits and going against this Court's ruling in an unpublished opinion, the Sixth Circuit concluded that nothing in Title VII suggests that a union employee must first prove a breach before proceeding with a Title VII claim against its union. Furthermore, the Court stated that Title VII is directed at both employers and labor organizations, and as such, labor organizations should not be treated differently under Title VII. The Court ended its reasoning by specifically stating that "Title VII protects all employees," union and non-union members. Therefore, the Sixth Circuit removed the distinction between an employer and a union in the Title VII context. ■

SEVENTH CIRCUIT FINDS THAT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION VIOLATES TITLE VII.

In *Hively v. Ivy Tech Cmty. College of Ind.*, the Seventh Circuit held that a person who experiences employment discrimination on the basis of his/her sexual orientation has experienced a form of sex discrimination for Title VII purposes. 853 F.3d 339 (7th Cir. 2017).

In the case, Hively, an openly lesbian woman, taught part-time at Ivy Tech Community College ("Ivy Tech"). After applying for six full-time positions with no success and after Hively's part-time contract was not renewed, Hively filed suit against Ivy Tech alleging discrimination on the basis of her sexual orientation. The District Court, relying on a line of Seventh Circuit decisions, granted Ivy Tech's motion to dismiss because sexual orientation was not a protected class under Title VII. On appeal, a panel of the Seventh Circuit affirmed the District Court's holding because it "felt bound to adhere to . . . earlier decisions." However, a majority of judges voted to rehear the case en banc. On en banc, the Seventh Circuit reversed its own holding.

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The question before the Court was "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex." The Court rejected Ivy Tech's argument that sexual orientation discrimination is excluded from sex discrimination because of Congress's failure to add "sexual orientation" to Title VII and the use of "sexual orientation" as a protected class in other statutes.

The Seventh Circuit concluded that "Hively's claim [was] no different from the claims brought by women who were rejected for jobs in traditionally male workplaces." In other words, the Court expressly held that the imaginary line between gender nonconformity claims and claims based on sexual orientation was in fact non-existent. Relying on the "logic of the Supreme Court's decisions" and "the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," the Court overruled its prior decisions. Therefore, a person who experiences "employment discrimination on the basis of [his or] her sexual orientation has put forth a case of sex discrimination for Title VII purposes." ■

THE SIXTH CIRCUIT HELD THAT TRANSGENDER STATUS IS A PROTECTED CLASS AND THAT THE RFRA DOES NOT PRECLUDE THE EEOC FROM ENFORCING TITLE VII.

In *EEOC v. R.G. & G.R. Harris Funeral Homes*, Inc., the Sixth Circuit Court held that discrimination on the basis of transgender status is a form of sex discrimination under Title VII. 884 F.3d 560 (6th Cir. 2018). Furthermore, the Court held that the Religious Freedom Restoration Act ("RFRA") did not preclude the EEOC from enforcing Title VII against a funeral home owner despite the owner's religious beliefs against the mutability of sex.

In the case, Aimee Stephens was born biologically male. Aimee worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. (the "Funeral Home") from April 2008 until August 2013. During the course of her employment, Aimee presented herself as a man and used her then-legal name, William Anthony Beasley Stephens. On July 31, 2013, Aimee informed Thomas Rost, the Funeral Home owner, that she is a transgender woman and intended to dress as a woman at work. Thereafter, Rost fired Aimee because of his religious beliefs "that a person's sex is an immutable God-given gift," and that he would be violating his beliefs and "God's commands" if he permitted Aimee to dress as a woman at work.

After Aimee's termination, Aimee filed a sex-discrimination charge with the EEOC. Subsequently, the EEOC filed suit against the Funeral Home for unlawfully terminating Aimee's employment because of her transgender status and for providing male employees with clothing allowances but not female employees. The District Count granted summary judgment in favor of the Funeral Home because it concluded that the RFRA precluded the EEOC from enforcing Title VII against the Funeral Home. However, on appeal,

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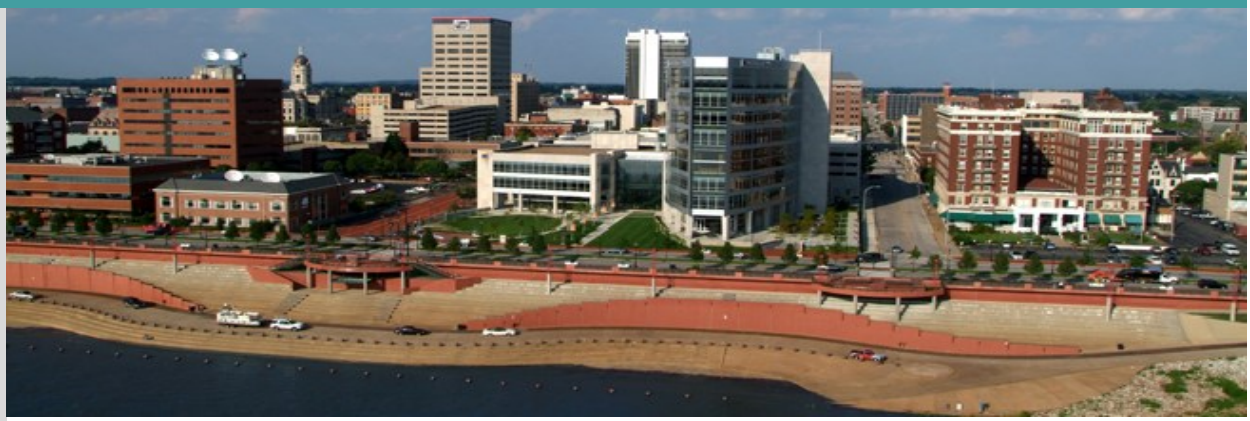

the Sixth Circuit reversed.

The Court noted that the District Court was correct in determining that the Funeral Home discriminated against Aimee because of her failure to conform to sex stereotypes. However, the Court also noted that the District Court erred in holding that transgender status is not a protected trait under Title VII. The Court held that the Funeral Home clearly engaged in improper sex stereotyping when it terminated Aimee's employment because Aimee desired to dress in a manner that contradicted with the Funeral Home's perception on how she should dress based on her sex. In reversing the District Court's holding, the Sixth Circuit concluded that transgender and/or transsexual status is a protected class under Title VII.

Furthermore, the Court rejected the Funeral Home's argument that the EEOC's enforcement would impose a substantial burden on "the Funeral Home's ability to carry out Rost's religious exercise of caring for the grieving." ■

REMINDER THAT INDIANA TRIAL RULE ALLOWS A PARTY TO FILE A REPLY BRIEF TO A RESPONSE IN A SUMMARY JUDGMENT MATTER

The Court of Appeals of Indiana answered the question on whether a party could file a reply brief to a motion for summary judgment. In *Jacks v. Tipton Cmty. Sch. Corp.,* 94 N.E.3d 712 (Ind. Ct. App. 2018), the court held that reply briefs to a motion for summary judgment were allowed under the Indiana Trial Rule 56 and Indiana precedent.

Tipton Community School was being sued for negligence after plaintiffs children were injured riding home from school. The parents of the injured children claimed that the school was negligent by failing to properly train and supervise the bus driver. In response, the school claimed no responsibility as the bus driver was an independent contractor.

When the school filed a motion for summary judgment in late 2016, Plaintiff answered by filling a response to the motion of summary judgment. Defendant filed a reply brief and supplemental designation of evidence. After plaintiff filed a motion to strike the reply, the court held a reply to a response on a summary judgment matter was allowed under the Indiana Trial Rules.

The Court answered that question in three parts, looking first into the Indiana Trial Rule 56 and its language. There, the Court found that even though there was no express language regarding reply briefs, the rule allowed for the court to "permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits."

The Court then looked into precedent and what previous Indiana courts held on this matter. The Court noted two previous cases had similar issues. In *Spudich v. Northern Indiana Public Services Co.,* 745 N.E.2d 281 (Ind. Ct. App. 2001) a reply brief was filed following a response to a

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motion for summary judgment. The Court ruled that a reply brief was "neither expressly permitted nor precluded" under Indiana Trial Rule 56, allowing the other party to submit additional evidence and a reply brief.

A decade later, the court followed the result held in *Spudich* by reiterating that reply briefs were allowed under Indiana Trial Rule 56 in *Auto-Owners Ins. Co. v. Benko,* 964 N.E.2d 886 (Ind. Ct. App. 2012). In this case, the insurer filed a response to a motion for summary judgment and the insured replied to that motion by supplementing her designation of evidence, but without a previous approval of the court, unlike *Spudich.* The court concluded there that in the absence of any direct language prohibiting reply briefs, an individual could file a reply brief with the court under Indiana Trial Rule 56.

Accordingly, the court in *Jacks* ruled that defendant's reply brief and supplemental designation of evidence were admissible and could not be stricken by the court. ■

ILLINOIS COURT ALLOWS PLAINTIFF TO SUPPLEMENT HIS CLAIM OF LIABILITY UNDER THE FEDERAL RULE OF CIVIL PROCEDURE BY A COMMON LAW NEGLIGENT SPOLIATION CLAIM

A recent District Court of Illinois ruled that an individual could bring a claim for sanctions pursuant to the Federal Rule of Civil Procedure 37 (e) and a negligent spoliation claim at the same time for a failure to preserve electronically stored information.

In *Williams v. Law et al.,* 14-cv-3248 (C.D. Ill.), the Plaintiff successfully succeeded on his claim of negligent spoliation and sanctions under the Federal Rule of Civil Procedure 37(e). Plaintiff, an inmate at the Western Illinois Correctional Center, claimed that he was severely injured when attacked by the facility guards, who then refused to provide him with medical help. After filling suit, Plaintiff requested that the video surveillance be produced. The Correctional Center was not able to produce the videos because the DVR machine deleted records every three to ten days.

In response, Plaintiff filed a motion for sanctions under Federal Rule of Civil Procedure 37(e), and pursued a negligent spoliation claim against defendants. The court ruled that Plaintiff was allowed to reach trial and seek discovery regarding the video destruction issue. By doing so, Plaintiff was able to present in front of a jury evidence regarding the destruction of the video surveillances and how it prejudiced his case.

The court held that the defendant was on notice that litigation might ensue after the alleged beating by the guards and therefore had a duty to preserve the video tapes. Because defendants deleted the only piece of evidence that could corroborate Plaintiffs story, the court allowed jury instructions to reflect the duty owed by defendant. The jury ultimately found that defendant was negligent in deleting the video recording, and that Plaintiff was entitled to compensatory and punitive

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damages on his negligent spoliation claim.

Electronically stored information can be a key source of information during litigation, and a party who has notice of potential litigation should make sure to save all the information available and avoid deleting any information that could be relevant. ■

SEVENTH CIRCUIT AFFIRMS EMPLOYER LIABILITY FOR CUSTOMER CREATING HOSTILE WORK ENVIRONMENT

In *EEOC v. Costco*, the Seventh Circuit recently affirmed an employer's liability under Title VII for a hostile work environment created by a retail customer. *EEOC v. Costco Warehouse Corp*., No. 17-2432 (7th Cir. Sept. 10, 2018). The EEOC filed a hostile work environment claim on behalf of a Costco employee who alleged Costco allowed for a sexually hostile work environment caused by a customer. The allegations were that the customer had been stalking and harassing the employee for approximately a year resulting in her needing to take an unpaid medical leave and ultimately quitting her job. A jury awarded the Costco employee $250,000.00 in compensatory damages at trial. The jury found that Costco's response to the employee's complaints of sexual harassment by the customer were "unreasonably weak." The Court noted that although Costco made some attempts to address the employee's complaint, it did not prohibit him from entering the store for more than a year after the initial complaint. ■

SCOTUS MODIFIES HALF CENTURY OLD PRECEDENT REGARDING FLSA EXEMPTIONS

In the case of *Encino Motorcars, LLC v. Navarro*, the Supreme Court modified long-held precedent calling for the narrow construction of exemptions to the FLSA. *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117 (2018). Justice Thomas provided the opinion in the 5 to 4 decision which notably changed the Supreme Court's long-held principle that the FLSA exemptions should be narrowly construed against employers seeking to apply the exemption. The high Court held:

> The Ninth Circuit also involved the principle that exemptions to the FLSA should be construed narrowly. We reject this principle as a useful guidepost for interpreting the FLSA.

Instead, the Supreme Court created a standard giving FLSA exemptions "a fair reading." Although the burden remains on employers to prove that an employee is exempt, it does significantly lessen the burden on employers attempting to apply FLSA exemptions. ■

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RECENT CHANGES IN HANDLING OF INDIANA WORKER'S COMPENSATION LITIGATION

A companion concern is the current (and changing) landscape of Worker's Compensation litigation in the State of Indiana. Tim Klingler represents employers statewide in their worker's compensation actions. Tim represents employers exclusively, and has done so for more than twenty years.

This year the Worker's Compensation Board of Indiana promulgated multiple changes to the Board's regulations regarding the reporting and administration of worker's compensation actions. The Board amended timelines for employers to offer PPI ratings, pay PPI ratings, and issue payment following the approval of settlement agreements by the Board. Additionally, the threshold criteria for mandatory reporting of workplace injuries has been expanded requiring more injuries to be reported. The amended reporting requirement brings the Worker's Compensation Code in closer alignment with the reporting requirements of OSHA.

Finally, the Board substantially increased the amount of information that must be included in written settlement agreements, especially if the injured worker is not represented by legal counsel. Since July, all voluntary settlement agreements are reviewed by Judges (rather than administrative personnel), meaning that the contents of settlement agreements now come under greater scrutiny than ever before by the Board. This has resulted in many settlement agreements being rejected by the Board, requiring the parties to revisit the settlement terms, and in some cases engage in telephone conferences with Judges to discuss specific proposed settlement terms. Two new Worker's Compensation Board Judges were appointed by Governor Holcomb at the end of November, giving even greater uncertainty to the future landscape of Worker's Compensation litigation in Indiana. ■

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