

Big Changes in Labor & Employment Law



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MARIJUANA AND EMPLOYMENT




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The Vice President of Human Resources storms into your small, windowless office and breathlessly advises of a new lawsuit against your company, Bushwood LLC. Apparently, the plaintiff, Carl, had previously applied to work at Bushwood, and indeed met all the necessary qualifications.

But just before the job offer was extended, an HR representative decided on a lark to conduct a "social media background investigation" on Carl. By looking at Carl's blog, his Facebook page, and other social media hits, the HR representative pieced together a fascinating and somewhat disturbing profile on Carl.


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Apparently, Carl is:
A devoted marijuana and tobacco smoker . . .




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Shockingly, based on this profile, the manager in charge of filling the job decided NOT to hire Carl, for "economic reasons associated with his lifestyle."
Carl lawyered up, and has now filed suit.


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Because the HR representative was smart enough not to disclose any "protected information" to the hiring manager (Carl's race, national origin, age, religion, etc.), Bushwood LLC is home free, right?


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Depending on the state, Bushwood could have run afoul of "lifestyle discrimination" or "off-duty conduct" laws that prevent employers from discriminating against employees based on their lawful off-duty conduct.

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Currently, 29 states have some type of statutory protection for lifestyle discrimination. Most statutes were originally intended to protect cigarette smokers from discrimination, but are more broadly written.

Some Examples:

- **Montana:** MCA § 39-2-313 – Employer prohibited from refusing to hire or disciplining/discharging applicant/employee for using "lawful consumable products."
- **New York:** NY Labor Code § 201-d – employer prohibited from making hiring/firing decisions because of an individual's legal use of consumable products or legal "recreational activities" outside of work hours, off of the employer's premises.

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Recreational Marijuana

Bushwood hired Carl, who later flunks a random drug screen. He tells HR, "Dude, I live in Colorado (or Washington state) . . . it's cool."


Can you still enforce your drug policy in those states?


Yes! Marijuana is still illegal under federal law, and employers can still test for it and discipline violators.

Carl then says, "I was not impaired at work even though I tested positive."


Update your substance abuse policies: clarify definition of illegal drugs – "any drug that is illegal under federal, state, or local law" or "illegal under the Federal Controlled Substance Act;" and delete references to "impairment."

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Medical Marijuana




When Carl flunks Bushwood's random test, he now tells HR, "I have a cannabis card," and reveals he has MS, and that his doctor recommends usage of marijuana.

- 21 states (including D.C.) have passed medical marijuana laws, and 13 more states have pending legislation.
- Statutory language varies, but generally authorizes individuals with qualifying medical conditions to legally use marijuana as prescribed by health care practitioners.

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Are employers obligated to permit use of medical marijuana as a reasonable accommodation under the ADA?

- So far, the courts are saying NO. Marijuana remains an illegal drug under federal law, and the ADA specifically excludes persons from coverage who are currently engaged in the "illegal use of drugs."
- We have seen NO case holding that an employer must ignore a positive drug test as a reasonable accommodation.

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BUT: Some states have statutes that forbid businesses from refusing to hire applicants with a medical marijuana card and from disciplinary or otherwise affecting employment of medical marijuana cardholders, including Arizona, Connecticut, Delaware, Illinois, Maine, and Rhode Island.


Conn. Gen. Stat. § 21a-408 (2014): "No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient . . ."

AND, AS OF APRIL 1, 2014, in Nevada, employers must now make "reasonable accommodations for the medical needs of an employee who holds a . . . valid card" provided the accommodation does not:

- Pose a threat of harm;
- Impose an undue hardship; or
- Prohibit the employee from fulfilling his/her job duties.

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In summary – It's Complicated

- ADA does *not* protect employees who use illegal drugs
- State laws legalizing medical marijuana conflict with the ADA, because now employees may seek an accommodation to use marijuana to treat their medical conditions / disabilities.
- Which states *require* accommodation for registered medical marijuana users?
 - ▣ Arizona, Connecticut, Delaware, Illinois, Maine, Nevada, New York and Minnesota.
 - ▣ Status-based decisions are impermissible – case-by-case determination required.

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What about after-hours use?

- In some states, employers cannot take actions against employees based on their lawful after-hours activities (smoking tobacco is most common).
- In a state that permits recreational marijuana use, can an employer discipline an employee for after-hours use if it is in violation of company policy?
 - ▣ The Colorado Supreme Court addressed this issue in *Coats v. Dish Network LLC*, 350 P.3d 849 (Colo. 2015), and held that the lawful activities statute did not protect the employee because marijuana use was not lawful under BOTH state and federal law.
 - ▣ CAUTION – be careful in implementing a zero-tolerance policy when there may be a medically authorized reason why the employee tested positive. Stay up to date on the law in each jurisdiction and be aware of DOT or other regs that may be applicable.

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Ohio Rejects Issue 3 – for now


- Issue 3 failed by a 64% - 36% vote
 - ▣ Issue 3's backer, ResponsibleOhio, has pledged to return with new marijuana legalization measure next year.
 - ▣ Legislators may look at medical marijuana issue.
 - ▣ Other groups collecting signatures for a 2016 ballot election (on medical and recreational marijuana) believe Issue 3 a bad plan, and that polls show Ohioans overwhelmingly support legalization of marijuana.

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Gay & Trans Issues



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Supreme Court Changes Legal Landscape for Same-Sex Marriages



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What does *Obergefell* mean for you?

- Update your FMLA policy to define “spouse” in accordance with existing law.
- Consider whether you still need domestic partner benefits or different plans/policies for unmarried couples.
- Check other policies to be sure that the definition of “spouse” is consistent – e.g., bereavement policy.

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Same Sex Harassment in the Workplace

- When people imagine a sexual harassment situation, they normally think of a male employee harassing a female one. However, that is not the only possible scenario.
- As society has grown more accepting of gay and lesbian lifestyles, such employees have become more comfortable revealing this aspect of themselves.
- One consequence of this is the increase of same-sex sexual harassment claims.

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Transgender Update

Setting the Stage . . .

What does “Transgender” mean?

- According to the American Psychiatric Association, “transgender” is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth.
- “Gender Identity” – Person’s internal sense about being male, female, or something else.
- “Gender Expression” – How a person communicates identity to others.

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OFCCP Regulations Regarding Transgender Protection

- On July 21, 2014, President Obama signed Executive Order 13672 extending workplace protections to employees in the federal contracting workplace on the bases of sexual orientation and gender identity.
- On December 3, 2014, the DOL announced the Final Rule changing OFCCP's regulations to prohibit discrimination based on sexual orientation or gender identity.
- On April 8, 2015, the Final Rule took effect. Obligations include affirmative action, inclusion of sexual orientation/gender identity in all federal contracts/subcontracts, and update solicitations for hire and workplace postings.

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How Has Corporate America Reacted?

Of the Fortune 500:

- 89% currently prohibit discrimination on the basis of sexual orientation
- 66% currently prohibited discrimination based on gender identity (only 3 did in 2000)
- 66% currently provide domestic partner health insurance benefits

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How Has the EEOC Reacted?

- EEOC is following through on making protection of transgender employees a national priority.
- EEOC recently filed its first two lawsuits alleging sex discrimination against transgender individuals:
 - ▣ Lakeland Eye Clinic: Florida-based organization of health care professionals, allegedly fired an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.
 - ▣ R.G. & G.R. Harris Funeral Homes, Inc.: Detroit-based funeral home operator fired a funeral director/embalmer after she gave Harris a letter explaining she was undergoing a gender transition from male to female, and would soon start to present (e.g., dress) in appropriate business attire at work, consistent with her gender identity as a woman. Harris's owner told the employee that what she was "proposing to do" was unacceptable.

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How Have Plaintiff Lawyers Reacted?

- We are seeing the first lawsuits filed by private employees.
- New lawsuit filed a few months ago in California against Barnes & Noble alleging transgendered employee was prevented from identifying at work, harassed, and fired when she complained of discrimination. Boss is alleged to have said that her appearance was "upsetting to customers"; that she works in a "neighborhood store" and she should "think of the children."

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What to Do Now

- Update your EEO/Harassment policies to cover gender identity and gender expression (and sexual orientation).
- Educate your management team and workforce.
- Update EEO training.
- Consider implementing Gender Workplace Transition Guidelines.

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It's All About the Restrooms . . .

- On June 1, 2015, OSHA issued a Guide to Restroom Access for Transgender Workers. In general, that guide urges employers to allow all employees to have access to restrooms that correspond to their gender identity and identifies some alternatives such as single occupant, gender-neutral facilities. This guide may be at odds with OSHA requirements for toilet rooms that are separate for each sex.
- In Executive Order 13672, President Obama required that all federal contractors allow transgender employees to access restrooms that correspond to their gender identity.




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NLRB UPDATE




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Ambush Election Rules

- April 14, 2015: restated "Ambush" or "Quickie" union election rules
 - ▣ As Short as 14-days
 - ▣ Reducing the number of pre-election briefs and hearings
- Increases requirements on employers to provide voter information up front
- Intention is to streamline union elections – making them faster and easier to achieve

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Ambush Election Rules

- 32 day average election down from 67.
- Median time for election compared to pre-petition hearing is down to 9 days from 13.
- 69% Union Success Rate is the same versus the same time period last year (April – October)
- Number of elections are unchanged (1446 in 2015 versus 1442 during the same period in 2014)
- Unit size is virtually unchanged
- NLRB says – business as usual.

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Ambush Election Rules – Why unchanged?

- Why has there been No Change?
 - Much Ado About Nothing?
 - Employers were prepared for the change?
 - Unions have failed to change?
- Pre-petition Organizing Activity is the key
 - Train to identify it
 - Recognize it
 - Counteract it ASAP.

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Confidentiality

- *Piedmont Gardens (2015)* – Reversed almost 40 years of precedent holding that witness statements are confidential from disclosure to Union in a request for information.
- Witness Statements are subject to a balancing test “Need for Confidentiality” versus “Need to process the grievance”
- *Exceptions: Witnesses may need protection, Evidence is in danger of being destroyed, Testimony may be fabricated, To prevent a cover-up*

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Joint Employer

- *Browning-Ferris Ind. of Cal., Inc. v. Teamsters, Local 350, 362* NLRB No. 186
- Old Standard - Possess AND Exercise the authority to control terms and conditions of employment for contractor workers
- New Standard - Only Possess Control
 - Indirect Control is Sufficient
- Follows A Pattern of Courts/Government Agencies regarding Independent Contractors
- Not a common unit with employees

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E-mail

- *Purple Communications*, 361 NLRB No. 126 (2014)
- Employees who are permitted to use the employers e-mail for business (or non-business reasons) must be permitted to use e-mail for union organizing
- Other union activities
- "Reasonable Restrictions"

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Northwestern Football Team


- Board exercised discretion to not apply jurisdiction to NCAA Division I Football (FBS).
- It would not promote labor stability due to the nature and structure of the FBS.
- No jurisdiction over state-run colleges and universities, which constitute 108 of the roughly 125 FBS teams. In addition, every school in the Big Ten, except Northwestern, is a state-run institution.
- The NCAA and Conferences maintain substantial control over individual teams.
- This decision is narrowly focused to apply only to the players in this case and does not preclude reconsideration of this issue in the future.

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Wage & Hour Update





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Things
\$229 million
will buy:

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Things \$229 million will buy

- **LeBron James' waterfront mansion in Miami (listed for \$15 million)**



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Things \$229 million will buy

- **A 710-year-old copy of the Magna Carta (sold in 2007 for \$21.3 million)**



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Things \$229 million will buy

- The Oakland A's (sold in 2005 for \$180 million)




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Things \$229 million will buy

- Three personal submarines (at \$ 2 million each)



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Things \$229 million will buy

- Tivi Island in Fiji (\$5 million)



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Things \$229 million will buy

- Or, you can settle a lawsuit!
- That's how much FedEx Ground paid in 2015 to settle claims that its drivers had been misclassified as independent contractors, rather than employees

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Gray v. FedEx

Reggie Gray's expenses as a FedEx driver:

- \$28,000 on 2 vans (like this one)
- \$5,000 for delivery route
- FedEx uniforms & decals for vans
- FedEx mapping software
- FedEx scanner & more...



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PROPOSED CHANGES TO FLSA RULES

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DOL Proposed FLSA Rule

- The Department of Labor has proposed a sweeping change to the minimum salary requirement for:
 - ▣ Executive exemption
 - ▣ Administrative exemption
 - ▣ Professional exemption
 - ▣ Teachers, lawyers, doctors only professionals not affected

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Two Requirements for Exemptions


A. Salary Basis Test


1. Fixed salary, not subject to deductions for variations in quality or quantity of work
2. Amount of salary must meet the minimum specified amount

B. Primary Duties Test

1. Job duties must primarily involve executive, administrative or professional duties as defined by the regulations

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DOL Proposed FLSA Rule

- The DOL is proposing to update the salary thresholds for exempt employees
- The DOL last updated these regulations in 2004
- "With this proposed rule, the Department seeks to update the salary level required for the exemption to ensure that the FLSA's intended overtime protections are fully implemented"

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DOL Proposed FLSA Rule

- Salary basis test: Increases minimum salary level
 - ▣ From \$455/week or \$23,660 annually to \$970/week or **\$50,440** annually
 - ▣ Represents 40th percentile for full-time salaried workers
- Highly compensated employee: increases minimum salary
 - ▣ from \$100,000 per year to **\$122,148** per year
 - ▣ Represents 90th percentile for full-time salaried workers
- Index the exemption's minimum salary to either wage growth or inflation and automatically adjust these levels annually

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DOL Proposed FLSA Rule

- Notice of Proposed Rulemaking published on July 6, 2015
- Comments were due September 4, 2015
- Final Rule has not yet been published
- DOL shooting for June
- Effective date to be determined

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DOL Proposed FLSA Rule

- ▣ Also solicited comments on possibility of including non-discretionary bonuses to satisfy a portion of the salary requirement
 - ▣ Limited to 10% of weekly compensation
 - ▣ Must be paid at least monthly
 - ▣ No end of year catch-up permitted
- ▣ Commissions are specifically excluded

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DOL Proposed FLSA Rule

- Outside sales exemption not affected
- Computer professional exemption not affected either

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Business Impact


- Have you reviewed to determine how this may impact your exempt positions?
- Is this a good time to reclassify?

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TOP TEN SIGNS YOU NEED AN FLSA SELF-AUDIT



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TOP TEN SIGNS YOU SHOULD CONSIDER AN FLSA AUDIT

10. You classify your technology help desk as exempt
9. You have independent contractors working side by side with employees
8. Hourly employees eat at their desks
7. You dock salaried employees for absences, tardiness, lack of productivity, fees or any other charges
6. Your employees travel regularly

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TOP TEN SIGNS YOU SHOULD CONSIDER AN FLSA AUDIT

5. You treat all employees as salaried
4. You pay bonuses to hourly employees
3. You have an automatic deduction for lunch
2. You don't track hours worked, break times or meal breaks
1. You have employees who set foot in California

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Government Contracting




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Section 503 and VEVRAA Requirements

- Effective on March 24, 2014 with certain portions on delayed roll-out based on a company's current AAP year. All contractors should be complying now.
- EO Clauses should have been updated in contractor's subcontracts and purchase orders to reflect new regulations.
- Revised "tag lines" necessary for advertisements/job postings.
- Requires benchmarks/goals for veterans and disabled individuals.
 - ▣ 7% annual utilization goal for disabled individuals.
 - ▣ Annual benchmark for hiring veterans generally based on national percentage of veterans in workforce
- Expands duration of retention to 3 years for many items.

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Section 503 and VEVRAA Requirements

- New Voluntary Self-Identification Forms are now required.
 - ▣ For disabilities, must be using specific form that cannot be modified (even if converted to electronic format).
 - ▣ Contractors should have started tracking by the beginning of your newest AAP year following March of 2014. All should now be tracking.
 - ▣ Disabled Voluntary Self-Identification: Remember, you must resurvey workforce every 5 years and provide a reminder of ability to self-identify is required at least once in intervening years.
- Must collect and analyze specific data on annual basis.

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Minimum Wage Increases

- Applies only to federal contractors and subcontractors for federal construction or service contracts entered into or amended after 1/1/2015.
- Requires minimum wage of at least \$10.10/hour (lower requirement exists for tipped employees).
 - ▣ After 2015, the minimum wage can be increased based on Consumer Price Index for Urban Wage Earners and Clerical Workers.
- Requires inclusion of clause related to minimum wage in subcontracts related to the prime contract.

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Executive Order (EO) 13672

- Prohibits federal contractors from discriminating in employment on the basis of sexual orientation or gender identity.
- Required Equal Opportunity Clauses to be amended to include sexual orientation and gender identity.
- Effective April 8, 2015 for new or modified contracts.

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Paycheck Transparency – Effective 1/11/16

- Prohibits federal contractors from discharging or discriminating against employees or applicants who inquire about, discuss or disclose compensation.
 - ▣ Clause must be incorporated into employee handbooks and disseminated to employees and job applicants.
 - ▣ Amends EO clause that will need to be included in subcontracts/purchase orders – Inclusion required in any new or modified contracts after January 11th.
- Definition of compensation is very broad for any form of payment or benefits including wages, stock options, insurance benefits and retirement contributions.

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Paycheck Transparency – Effective 1/11/16

- Several safe harbors that permit employee discipline in certain situations:
 - ▣ General Defense Provision – discipline allowed if they would have terminated regardless of whether that person was discussion compensation.
 - ▣ Essential Job Function Defense – discipline allowed if employee breaches their confidential duties by discussion compensation.
- Actions Required:
 - ▣ Update employment policies and handbooks.
 - ▣ Update subcontracts and purchase orders.
 - ▣ Train managers/supervisors that employee compensation is now a permissible discussion topic.

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Equal Pay Report (proposed rule still pending)

- Requires annual reporting of employee compensation for federal contractors and subcontractors with over 100 employees and contract(s) exceeding \$50,000 over a period of at least 30 days.
- Similar to EEO-1 report with added information on:
 - ▣ Total individual W-2 wages for all workers in job category by race, ethnicity and sex.
 - ▣ Total hours worked by all employees in job category by race, ethnicity and sex.
 - ▣ Individual pay information will not be collected.
- OFCCP will utilize to direct enforcement efforts if summary data suggests potential pay violation.

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Updates to Sex Discrimination Regulations (proposed rule still pending)

- Proposed regulations were issued in January of 2015 and comment period was extended and closed April 14, 2015.
- Regulations are anticipated to be finalized as early as this month.
- Overall goal is to update very outdated regulations related to sex discrimination including:
 - ▣ Clarifies that adverse treatment of an employee because of gender-stereotyped assumptions about family caretaking responsibilities is discrimination.
 - ▣ Clarifies that leave for childcare must be available to men on same terms as women.
 - ▣ Clarifies that compensation discrimination can result from job segregation, not just unequal pay for equal work.

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QUESTIONS?

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