



# **Human Resources Professional Interest Section Meeting**

May 11, 2023



## Today's Agenda

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- Welcome
- Upcoming Events
- Employment Law Updates



Professional Interest Section Meeting

## Professional Interest Section Meetings / Professional Development:

- May 16 - Child & Family Services (10 AM-Noon)
- June 21 - Incident Investigations and Recommendations Training
- September 19 - Pieces to the Group Home Financial Puzzle

## Upcoming Member Forum and Board of Directors Meetings:

- May 26 - Board of Directors Meeting, No Member Forum
- June 23 - Member Forum and Board of Directors Meeting
- July 28 - Member Forum / Board of Directors Meeting



Registration opens 3 weeks in advance. To register for open events, scan the QR code or go to <https://web.inarf.org/events>



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Professional Interest Section Meeting



## Human Resources

# **Employment Law Updates NLRB/EEOC/FLMA and More**

*Kevin Stella, Attorney*

*Hall, Render, Killian, Heath & Lyman P.C.*

# Employment Law Update

INARF Human Resources Section Meeting  
May 11, 2023



Presentation by:

Kevin A. Stella

Attorney

Hall Render Killian Heath & Lyman

317-977-1426

[kstella@hallrender.com](mailto:kstella@hallrender.com)





# Agenda

EEOC Enforcement Priorities

NLRB – Confidentiality and Non-disparagement

Legislative Update:

- PWFA
- PUMP Act
- SPEAK Out
- COVID-19 Vaccine Mandate
- Non-Competes

Supreme Court – Groff v. Dejoy (religious accommodations)

FMLA Opinion Letter (reduced schedule leave)

FMLA – Court Decisions

# 1. EEOC Enforcement Priorities

- Expanded categories of “vulnerable workers”
  - Developmental/intellectual disabilities
  - Arrest/conviction records
  - Temporary workers
  - Older workers
  - Low wage workers
  - Limited English proficiency
- Discrimination issues related to COVID and pregnancy
- Increasing use of Artificial Intelligence in recruiting
- Advance equal pay for all workers



## 2. NLRB – Confidentiality and Non-Disparagement

- McLaren Macomb (Case No. 07-CA-263041)
  - 3-1 decision (by party lines) says these provisions in a severance agreement were overly broad and restrained “Section 7 Rights” (e.g., the right to speak openly about labor disputes and work conditions)
- TAKEAWAY 1: Scope is for non-supervisory employees
- TAKEAWAY 2: Consider tightening these provisions in your severance agreements (or delete altogether if not necessary)
- TAKEAWAY 3: Use disclaimers
- TAKEAWAY 4: Consider legality of confidentiality provisions in other employment agreements

## 3a. Pregnant Workers Fairness Act

- Requires reasonable accommodations for pregnant employees
- Effective 6/27/23 (EEOC regulations expected)
- Closes Loopholes
  - ADA – Normal pregnancy does not rise to level of “disability”
  - Title VII/Pregnancy Discrimination Act/SCOTUS – “similar in ability or inability to work”
- TAKEAWAY 1: You probably should be doing this anyway
- TAKEAWAY 2: Limits employer discretion when choosing the accommodation
  - e.g., Can’t choose “any effective” one if something else was agreed upon during GFIAP
  - e.g., Can’t choose LOA unless no other options

## 3b. PUMP for Nursing Mothers Act

- Requires provision of private place for nursing mothers to pump that is free from intrusion (not a bathroom)
- Effective immediately (remedies were not available until 4/28/23)
- Closes FLSA Loophole: Similar rights under FLSA only applied to non-exempt staff
- TAKEAWAY 1: Non-exempt employees must be paid for this time if they are still performing duties (e.g., checking email, etc.)
- TAKEAWAY 2: You can't deduct time from exempt employees without risking destroying the "salary basis"
- TAKEAWAY 3: There are many state laws out there that might require more

## 3c. “SPEAK OUT” Act

- New Federal Legislation became effective 12/7/2022
- Designed to empower victims of sexual harassment or sexual assault
- Nondisclosure and non-disparagement clauses entered into “before the dispute” arises are unenforceable
- TAKEAWAY: Limited impact
  - Can still “settle” or “buy your way out” with waivers/releases
  - Earlier drafts of legislations would have precluded use of these provisions at any time “before a lawsuit is filed”

## 3d. COVID-19 Vaccine Mandate Ending

- White House issued a statement that Health and Human Services will “start the process to end their vaccination requirements . . .”
- CMS issued guidance indicating mandate will soon end but provided no details
- Believe CMS will likely end vaccine mandate when PHE expires on May 11
- Waiting on the release of final rule “Omnibus COVID-19 Healthcare Staff Vaccination” for more details. That could be released any day.
- Even if fed vaccine mandate ends, employers may need to continue or being to comply with applicable state law requirements
- OSHA permanent health care standard? Will it ever be released?

## 3e. Non-Competes Under Scrutiny

- FTC:
  - Issued a proposed rule that seeks to make non-competes with workers unlawful and rescind existing non-competes.
  - Comment period was to close April 19.
  - Wait and see
- Indiana legislature passed Senate Enrolled Act 7 impacting physician non-competes:
  - Will go into effect July 1, 2023 once signed by Governor Holcomb
  - Further restricts enforceability of non-competes for physicians
  - Modifies earlier non-compete restrictions passed in July 2020
  - Includes ban on non-competes for primary care physicians going forward

## 4. U.S. Supreme Court – Groff v. Dejoy

- SCOTUS will hear case of postal worker who claims he was unlawfully punished for refusing to work on Sundays
- Historically, merely allowing employees to try to switch shifts was sufficient accommodation
- TWA v. Hardison precedent: Religious exemption requests may be denied if would cause undue hardship of “more-than-diminimis cost”
- TAKEAWAY: Title VII undue hardship MUCH easier to meet than that under ADA – but will this be changed?
- TAKEAWAY: Could open whole new world of “Your policy violates my religion” cases.
- TAKEAWAY: There would be limited employer defenses because “religion” defined so broadly under Title VII.



## 5. FMLA Reduced Schedule Leave

- February 9, 2023 Opinion Letter – FMLA2023-1-A
- Employee normally works more than 8 hours per day but provides certification of 8 hour max because of chronic health issue
- Reduced schedule leave is available “indefinitely”
- TAKEAWAY 1: This is effectively a permanent transition to “part-time” status because in some scenarios the employees will never exhaust all of their FMLA
- TAKEAWAY 2: Analyze FMLA and ADA separately. Under ADA, employers generally do not have to convert from full-time to part-time as an ADA reasonable accommodation if it would cause an undue hardship, e.g., “We only have 12 hours shifts so no one to fill in the gap.”



## 6. FMLA – VanHook v. Cooper Health Systems (curbing abuse with “Private I.”)

- 2022 WL 990220 (3<sup>rd</sup> Cir. 2022)
- Facts:
  - Employee had certified intermittent leave to care for son with severe depression and anxiety
  - Use of intermittent leave steadily increasing
  - Co-workers suspecting abuse - so many absences tied to weekends and holidays - so employer hired private investigator to track her
  - Caught her running errands, going to Dunkin’ Donuts, working out, and picking up her other children without her son
  - No indication of other caretakers at the house to care for son
- TAKEAWAY 1: Mental health issues are the future of FMLA and ADA.
- TAKEAWAY 2: “Reasonable suspicion” of abuse not required to surveil
- TAKEAWAY 3: Don’t jump to conclusions. Give employee chance to explain.
- TAKEAWAY 4: Don’t overuse this tool. Could lead to interference claims or diminished morale with workforce.

## 7. FMLA – Whittington v. Tyson Foods (curbing abuse with recertifications)

- 21 F.4th 997 (8th Cir. 2021)
- Facts:
  - Employee had certified intermittent leave for depression and anxiety
  - Missed 16 consecutive days but certification form estimated “4-5 days off once or twice every 2 months for a period of 1 year”
  - Employer requested recertification but employee failed to provide and stopped communicating so was terminated
  - Employee sued for interference but employer won
- TAKEAWAY 1: Mental health issues are the future of FMLA and ADA.
- TAKEAWAY 2: Always insist on complete answers to certification questions (including estimates on absences and length of condition)
- TAKEAWAY 3: Request recertification at end of duration and when there are changed circumstances

# Questions?

For more information on these topics  
visit [hallrender.com](https://hallrender.com).

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Kevin A. Stella  
317-977-1426  
[kstella@hallrender.com](mailto:kstella@hallrender.com)

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Your participation in the brief 2-minute survey is requested.





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615 N. Alabama St., Ste. 410, Indianapolis, IN 46204

(t) 317-634-4957 / (f) 317-634-3221

[inarf@inarf.org](mailto:inarf@inarf.org) / [www.inarf.org](http://www.inarf.org)