



Annual HR Legal & Legislative Update

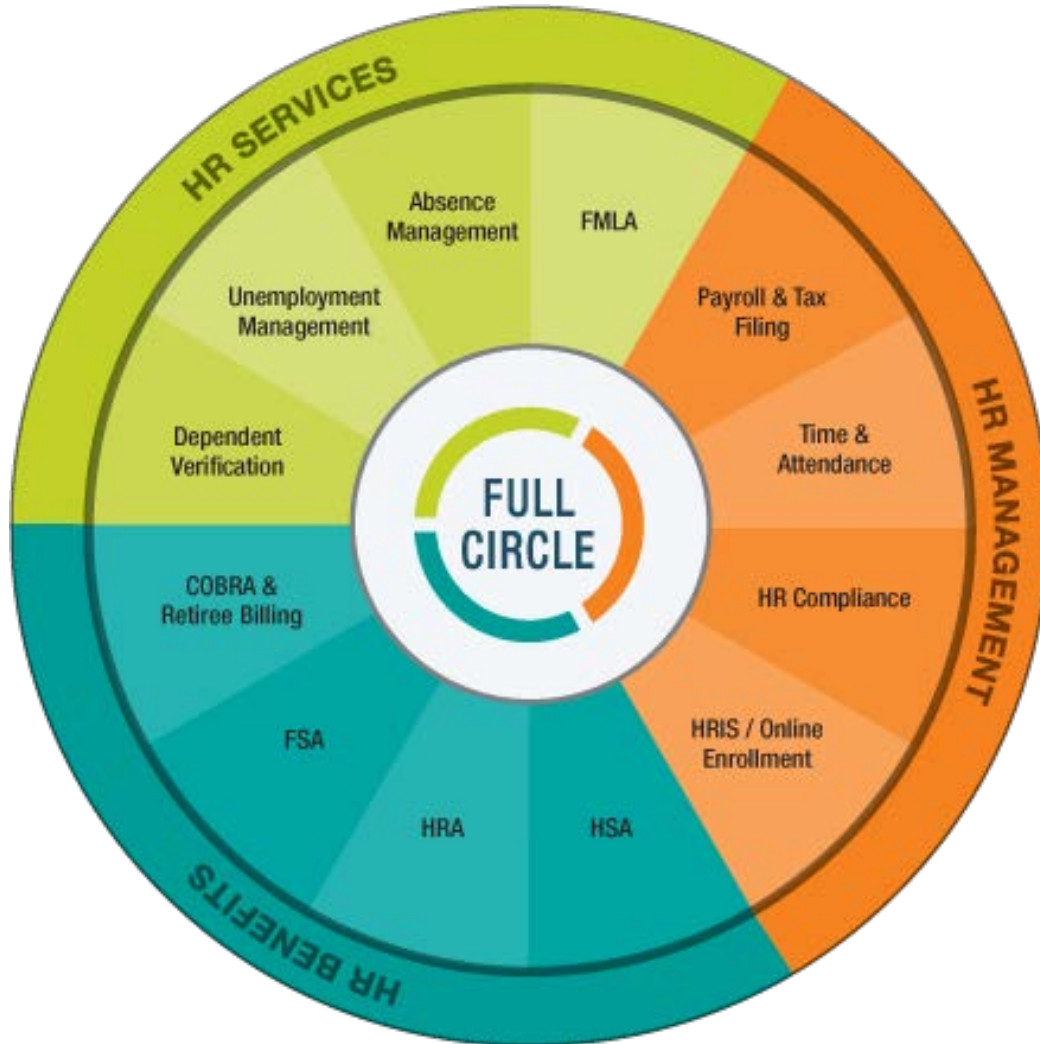
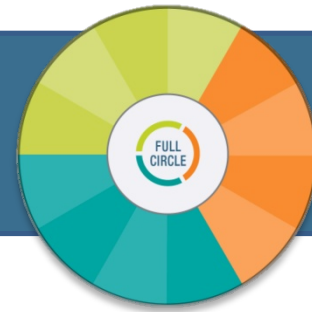
Presented by: Kevin M. McCarthy



- HR Benefits
- HR Management
- HR Services

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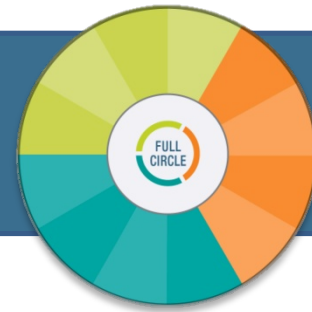
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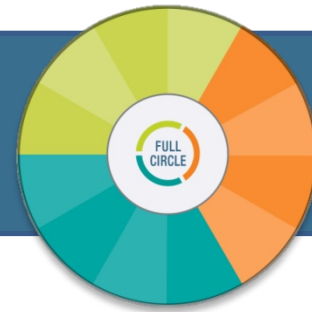
Kevin M. McCarthy

**Warner Norcross & Judd LLP
269.276.8109
401 E. Michigan Avenue, Suite 200
Kalamazoo, MI 49007**

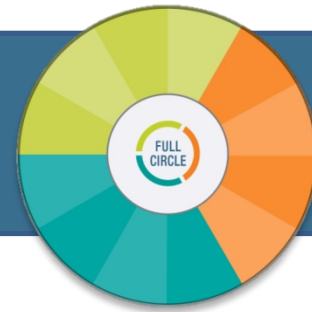
kmccarthy@wnj.com



- FLSA exemption changes
 - Increase in threshold amounts
 - Now: \$455/week (\$23,660/year)
 - Proposed: \$970/week (\$50,440/year)
- Primary duty tests
 - Adopt the California rule?
 - 50+% of time must be spent on exempt duties



- Return to long and short tests?
 - More difficult duties test with lower salaries
- Threshold change for highly compensated employee exemption
 - Current: \$100,000/year minimum salary
 - Proposed: \$122,140

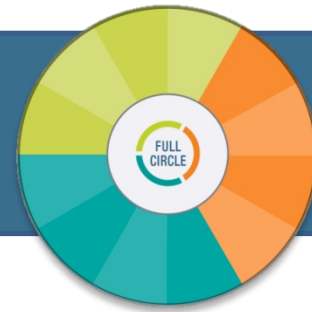


- Misclassification of workers as independent contractors
 - Six factor test for independent contractor vs. employee (Administrator’s Interpretation 2015-1)
 - Is the work integral to the entity’s business?
 - Opportunity for profit or loss



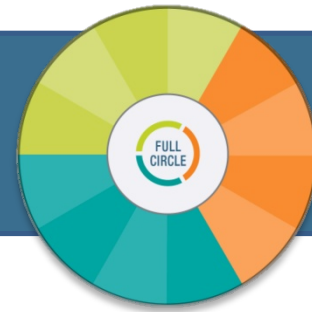
- **Six factor test**

- Extent of relative investments of the worker and the entity
- Whether special skills and initiative are required
- Permanency of the arrangement
- Degree of control over the worker exercised by the entity

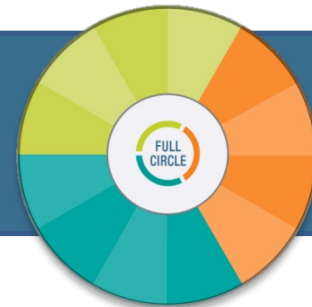


- Pay data collection proposed by EEOC
 - Would apply to employers with 100+ employees
 - These employers would have to report the pay of employees in 12 pay bands by race, gender and ethnicity on revised EEO-1 forms
 - Would be effective 9/30/2017

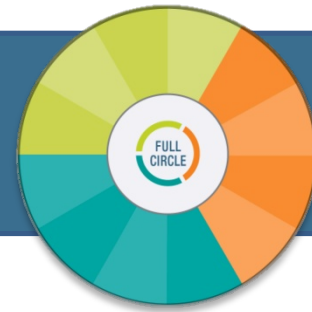
Legislative/Regulatory Issues - EEO



- For federal contractors & subcontractors
 - Pay Transparency rules (EO 13665)
 - Applies to federal contracts of \$10,000+ entered into on and after 1/11/2016
 - Bars employers from having rules or taking action against employees who ask about, discuss or disclose pay amounts
 - Specific non-discrimination clause required



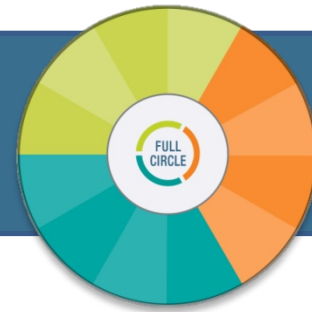
- Pay Transparency rules
 - Policy must be given to employees and applicants
 - New EEO poster is in the works
 - Effective for contracts entered into on and after 1/11/2016



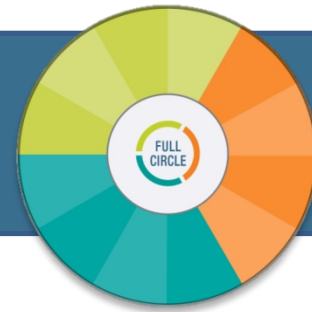
- **Federal contractors & Subcontractors**
 - Paid sick leave
 - Must provide up to 7 days/year of paid sick leave under contracts executed in 2017 and later, at the accrual rate of 1 hour of leave for each 30 hours worked



- New election rules
 - In effect now
 - Shortened election periods
 - Before: 38 days from petition to election (median)
 - Now: 27 days (median)
 - New Statement of Position requirement



- Increased information in Voter Lists
 - Available personal phone numbers and email addresses
 - Job title, shift and department
 - Significant penalty for violations
- Unions won 67% of 2014 elections

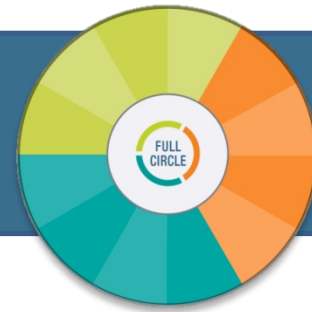


- NLRB General Counsel Summary of Employee Handbook Cases
 - Regarding confidentiality, employee conduct, interactions with third parties, tape recording, photos at work, conflicts of interest, etc.

Legislative/Regulatory - OSHA

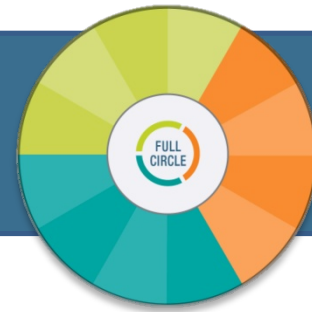


- Restroom access for transgender workers

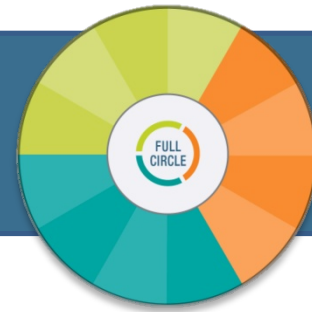


- Supreme Court's Gay Marriage Decision
 - Obergefell v Hodges
 - State laws barring or restricting same-sex marriage are unconstitutional and void
 - Same-sex spouses eligible for benefits
 - Negates need in handbooks for extension of benefits to same-sex couples

Cases of Interest



- Religious objections under the Religious Freedom Restoration Act available to closely held businesses with sincerely held religious beliefs against homosexuality



- **Pregnancy Discrimination Act**
 - Supreme Court in *Young v UPS*
 - Light duty work assignments to pregnant workers must be offered if a large percentage of non-pregnant disabled employees are offered light duty
 - Same concept applies to other forms of accommodation



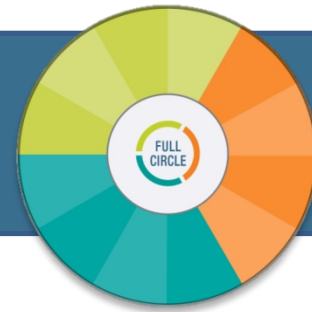
- Telecommuting not always a reasonable accommodation (EEOC v Ford Motor Co. (6th Circuit))
 - Employee’s job required regular interactions with co-workers – her absences resulted in many mistakes
 - Regular attendance at the workplace is normally an essential job function



- EEOC: Employers may have wellness programs that are “voluntary” and may conduct medical exams and require medical histories
 - Programs not “voluntary” – per the EEOC – if they require participation or penalizes employees who don’t participate
 - Incentives may be disguised penalties



- Resistance to sexual harassment and telling supervisor-harasser to stop are protected activities (EEOC v New Breed Logistics (6th Circuit))
 - Their discharges, with supervisor’s recommendation, were unlawful retaliation for engaging in protected activities

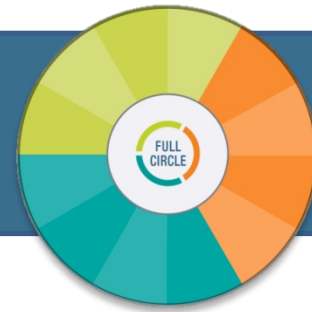


- White patient and family demanded African-American RN not care for patient
- Hospital agreed
- RN maintained all other duties and compensation and was not transferred
- Race discrimination case dismissed because RN suffered no adverse employment action (Foster v Mary Free Bed Hospital (WD Mich))



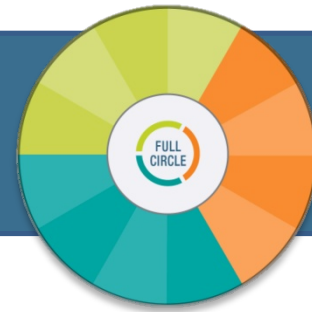
- \$938,000 award against EEOC for frivolous lawsuit (EEOC v Freeman (D Md))
- Claim: Employer failed to hire racial minorities and men because of criminal record checks
- Expert report “inexplicably shoddy”

Cases of Interest - FMLA



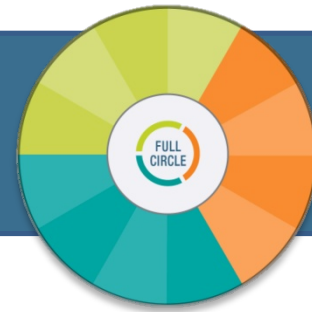
- Discharges for performance issues or misconduct not discovered until employee was on FMLA leave
- Most recent case – Gabriel v Colorado Mountain Medical (10th Circuit)
- OK to discharge for legitimate reasons during FMLA leave

Cases of Interest - FMLA



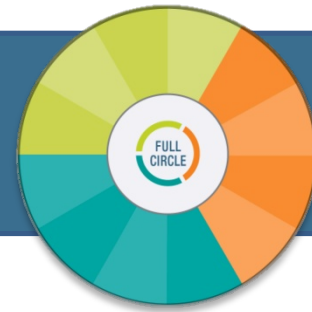
- Employee fired for taking FMLA leave
- DOL informed employer this was illegal
- Employer reinstated employee immediately, 5 days after discharge
- Lawsuit dismissed because employee wasn't harmed due to immediate remediation (Wilson v Gaston County (D NC))

Cases of Interest - NLRA



- Under new election rules, election win for employer reversed for failure to provide all personal email addresses and phone numbers on Voter List (Danbury Hospital (NLRB))

Cases of Interest - NLRA

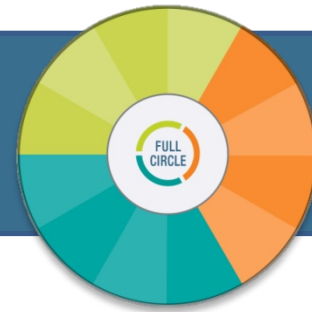


- Employee handbook conduct rules frequently invalidated by the NLRB for violating section 7 of the NLRA
- Old joint employer test revived (Browning-Ferris of California). Client of staffing firm a joint employer if it has authority to affect terms & conditions of employment, even if it never exercises them



- Joint employment

- Decision in Miller & Associates will decide joint employer rule in union elections
- Likely result: joint unit of shared employees and client company's regular employees will be permitted



- Social media cases
 - Section 7 rights of employees are being broadly protected
 - Three D, LLC (2nd Circuit)
 - Pier Sixty (NLRB)

Cases of Interest – FLSA Retaliation



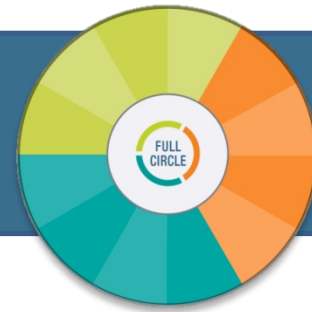
- HR Director 27 times tried to change OT policies to comply with FLSA
 - Discharged on 27th try and claimed retaliation
 - Issue: Did she complain, or was she just doing her job of proposing policy changes?
 - Court: This was protected activity (Rosenfield v GlobalTranz Enterprises (9th Circuit))

Cases of Interest - FLSA



- Employer claimed its FLSA violations were in good faith because it relied on free “e-law website” to conclude its actions were legal
- Defense rejected (Miles v HSC-Hopson Services Company (5th Circuit))

GINA Discrimination



- 2 employees ordered to undergo DNA testing (saliva) to determine if they had been defecating in the plant
 - This violates GINA, as employers can't require employees to produce genetic material (Lowe v Atlas Logistics Group retail Services (ND GA))



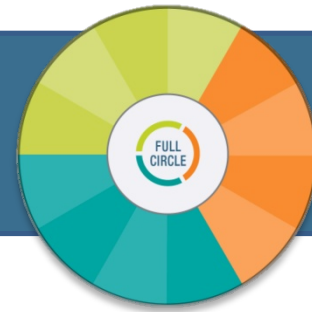
Questions



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Contact the Presenter



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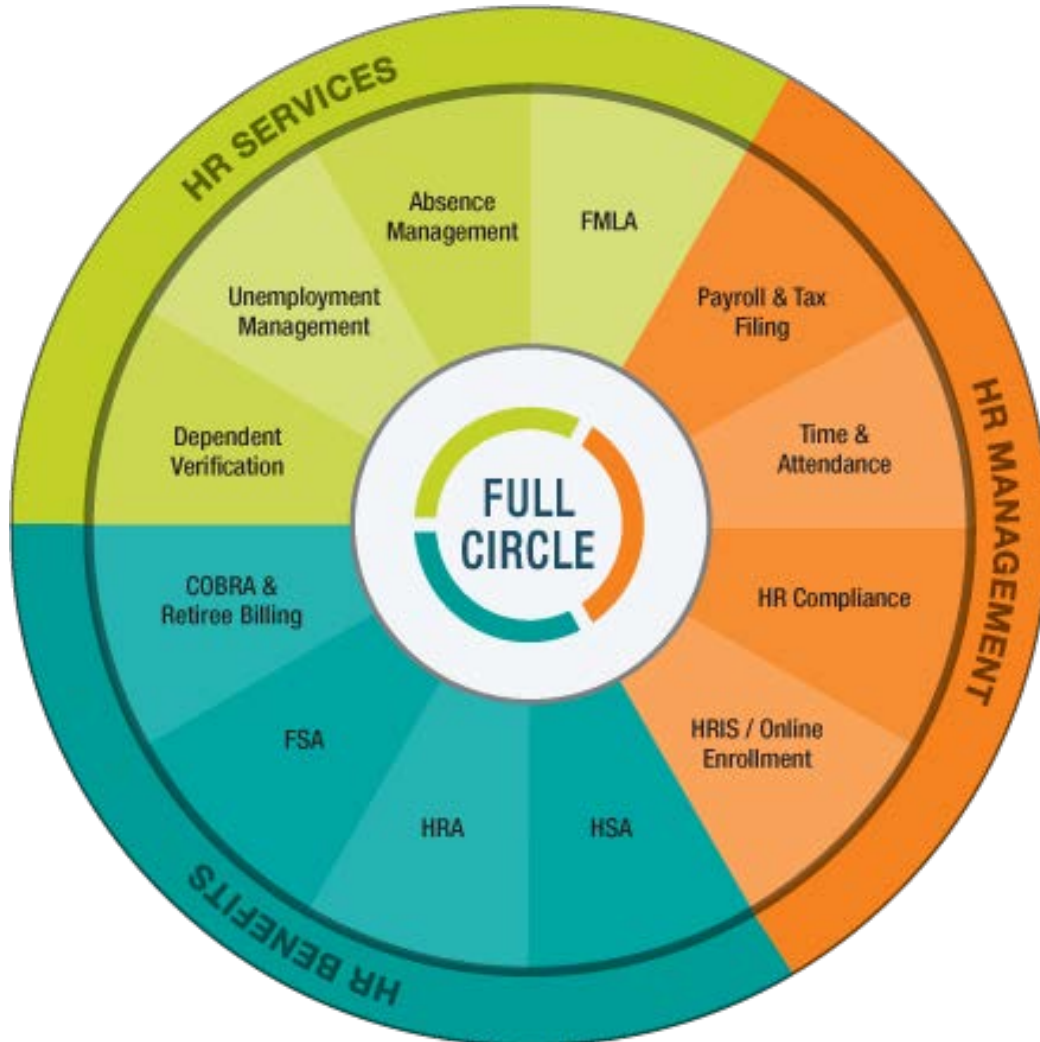
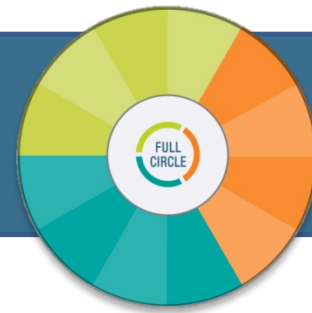
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401 E. Michigan Ave.

Kalamazoo, MI 49007

kmccarthy@wnj.com

Contact Us

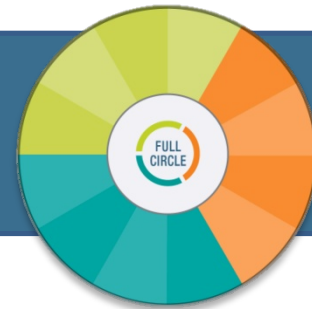


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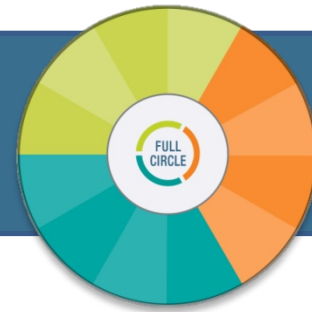
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