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TEXAS
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DISABILITIES

New type of ADA claim gets chilly welcome in Texas

by Michael P. Maslanka
FisherBroyles, LLP

In some parts of the country, a new type of Americans with Disabilities Act (ADA) claim is being filed. What is it? A claim based on temporary disabilities, not chronic ones. Read on for details.

Painful injury

An employee with a heavy backpack is on his way to work. While at a commuter train station, he stumbles on the platform. He sustains serious injuries as a result: a fracture of his left knee, a tear in his meniscus tendon, a fracture of his right ankle, and a rupture of the quadriceps-patellar tendon in his right leg.

The injury occurs in October, and the employee is terminated in December because he cannot return to work. He sues under the ADA. The trial court tosses out the lawsuit, reasoning that although the employee took a year to heal so he could walk again, his condition was not chronic. Yes, he had surgeries in order to get better, but he got better. An appeals court saw things differently and sent the case back for a jury trial. Here is what the appeals court said:

> Nothing about the [ADA Amendments Act (ADAAA)] or its regulations suggests a distinction between impairments caused by temporary injuries and impairments caused by permanent conditions. Because [the employee] alleges a severe injury that prevented him from walking for at least seven months, he has stated a claim that this impairment "substantially limited" his ability to walk.

Summers v. Altarum Institute, 740 F. 3d 325 (4th Cir., 2014).

Radio silence until . . .

Instead of a flood of lawsuits based on the theory, there was silence. Complete and total. As Shakespeare wrote, not so much as a mouse stirred at the news. But in April 2017, a federal court in Arizona picked up the 4th Circuit's idea.

In the case, the employee, a salesperson at a car dealership, did not have several months to heal. No, he had a little more than one month after he returned to work. On May 15, 2014, he visited his eye doctor because he was experiencing cloudy vision and headaches. He had never had any issues with his eyes before. After the doctor's visit, the employee underwent an unexpected "one-off" eye surgery. After the surgery, he was unable to drive, walk, or see. However, he returned to work

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on June 9 with no restrictions. He was fired for poor performance on July 17.

The trial court adopted the *Summers* approach in refusing to dismiss the case:

> The Court [adopts the *Summers* approach], which is more consistent with the ADA's purpose of affording broad and expansive coverage. As amended, the ADA does not impose a temporal or permanency requirement on substantially limiting physical impairments. Rather, "the duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity."

What about the employee's lack of production? In a bonus for plaintiffs, the court said that if his performance was poor, it was because he was out for a month and no adjustment was made to his quota for his disability. *Valenzuela v. Bill Alexander Ford Lincoln Mercury Inc.* (D. Ariz., 2017).

Welcome to Texas: Bunion surgery ain't no disability!

On May 9, 2017, a trial court in Houston tossed out an employee's ADA claim based on *Summers.* The employee had bunion surgery on March 5, 2015. She was unable to walk after the surgery. When she returned to work on June 9, she was told that her position was being eliminated and that her last day of work would be June 30. The employee sued. In a crisp tone, the trial court stated:

> [The employee's] three-month recovery . . . period is likely too short to be considered substantially limiting to establish a qualifying disability. A temporary, nonchronic impairment of short duration, with little or no longer-term or permanent impact, is usually not a disability [under the law.]

Harper v. Fort Bend Independent School District (S.D. Tex., 2017).

Bottom line

It is simple to determine disability status by the name or nature of the condition. Yes, bunion surgery as a disability seems like a joke, but a disability is determined by its effects, not by its origins. We will see how this issue evolves. The next time you have an employee who has an accident or a condition that is temporary, think about whether a protected disability is involved. If so, the employee is entitled to a reasonable accommodation dialogue and is protected from an adverse employment action.

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ARBITRATION

Forced to lie in the bed you made: Certain conduct may nullify arbitration agreements

by Jacob M. Monty
Monty & Ramirez, LLP

A U.S. district court judge in New York recently ruled that Equity Residential Properties Management Corporation (ERPMC) was barred from compelling a former employee to arbitrate her claims because it had previously refused to comply with the arbitration agreement. The court based its finding on contract law. Let's take a closer look at its reasoning.

Employer can't have it both ways

Following a disciplinary write-up, Janice Nadeau requested arbitration under an agreement she signed at the beginning of her employment at ERPMC. She filed her demand for arbitration with the American Arbitration Association (AAA). The AAA later informed her that ERPMC hadn't paid the arbitration fee, which it was required to do under the arbitration agreement.

Nadeau was subsequently fired—according to her, in retaliation for her demand for arbitration. ERPMC attempted to settle the claim after her termination, but it never paid the arbitration fee despite her continued insistence that she wanted the matter arbitrated. As a result, the AAA closed its case.

Trouble reared its head after Nadeau filed suit in federal court. In response to her lawsuit, ERPMC asked the court to compel arbitration under the arbitration agreement, but the judge wasn't having it. The court found that ERPMC had violated the agreement by not paying the arbitration fee. The court noted, "Under New York law, when a party to a contract materially breaches that contract, it cannot then enforce that contract against a non-breaching party." Ouch.

And another thing . . .

Nadeau's case should serve as a cautionary tale for employers. But breaching the arbitration agreement isn't the only conduct that may send an employer to court instead of arbitration. Inadvertently waiving your right to arbitration is also something to be wary of.

In a Texas case outside the employment context but directly addressing an arbitration agreement, the Dallas Court of Appeals recently held that a roofing company, Ideal Roofing, went so far into the litigation process that it waived its right to compel arbitration against a homeowner, Mike Armbruster, under an otherwise valid arbitration agreement.

The court began by underscoring the deference normally afforded to arbitration agreements, stating, "The law imposes a strong presumption against the waiver of contractual arbitration rights." The court then emphasized that when in doubt, the scales should tip in favor of arbitration. But in the case before it, the court found that Armbruster had met his "heavy burden of establishing [that Ideal] substantially invoked the judicial process."

The court looked to a number of factors to reach that conclusion—namely, the length of time that Ideal knew about the arbitration clause, the amount and type of discovery (pretrial exchange of evidence) already conducted, and how close to trial the company sought arbitration. The court ultimately found that the circumstances of the 19 months of litigation preceding the motion to compel arbitration weighed heavily in the homeowner's favor, and Ideal had therefore waived its right to arbitration.

JUST ASK JACOB

Be cautious about requiring direct deposit of wages

by Jacob M. Monty
Monty & Ramirez, LLP

Q *May we require our employees to use direct deposit? If so, what recourse do we have if an employee won't provide his account's routing number and other bank information?*

A In most states, employers cannot require employees to be paid through direct deposit. However, there are some exceptions. For instance, employers in Texas can require direct deposit of wages with some restrictions. But be aware that the Equal Employment Opportunity Commission (EEOC) might view any requirement that employees use direct deposit as having a disproportionate impact on minorities, who may not have ready access to bank accounts.

Q *We have an employee who will be leaving for active military duty for about one year. What are the requirements for continuing her benefits?*

A If an employee who has health insurance coverage provided by her employer deploys for active military duty, she can elect to continue the coverage much as she would under COBRA. In your situation, you can require the employee to pay the entire premium. However, if an employee serves fewer than 31 days of military duty, you cannot charge more than her ordinary contribution for the premium.

Q *One of our employees is out on unpaid Family and Medical Leave Act (FMLA) leave. What is the best way for him to pay his portion of benefit premiums since there is no paycheck from which we can deduct them? Should we require him to send us a personal check?*

A You can require the employee to pay his contribution amount by check, or you can cover his premiums until he returns from FMLA leave and then require him to reimburse you. Often, the latter option is more convenient for the employee. Upon his return to work, you can deduct the premium reimbursement over several paychecks.

Q *We have a policy that states we will pay out accrued vacation time only if an employee leaves voluntarily and provides two weeks' notice. Is this legal, or are we required to pay out accrued vacation even if an employee is fired or doesn't provide adequate notice?*

A It depends on the state where you're located. Some states require employers to pay out accrued vacation when employees separate from employment, while others don't. For instance, Texas requires employers to pay departing employees for their accrued vacation only if they have promised to do so in a written policy or agreement. You should contact your department of labor for more information on your state's requirements.

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Consider yourself warned

Both cases should give you pause if you're considering giving litigation a shot before agreeing to arbitrate an employee's claims under a preexisting agreement. You may be able to dip your toes in the litigation waters before making a decision, but if you don't tread carefully, you may get pushed all the way in.

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WAGE AND HOUR LAW

5th Circuit gums up administrative exemption for employers

by Michael P. Maslanka
FisherBroyles, LLP

If you classify some of your employees as exempt from overtime under the Fair Labor Standards Act's (FLSA) administrative exemption, you should read this article ASAP. A new decision from the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers) will cut back on employers' use of the exemption in some situations. That means you could be sitting on a truckload of liability for misclassification. Read on for the details.

First, the pertinent rules

Rule No. 1: The FLSA regulations provide that an employee can be classified as exempt under the administrative exemption if his work is "directly related to management or general business operations," including areas such as "human resources, marketing, quality control, and health and safety." The regulations' examples of exempt jobs include "insurance claims adjusters, financial services employees, and [HR] managers."

Rule No. 2: Production employees (whose job it is to generate the employer's product or service) do not qualify for the administrative exemption. Why? The exemption is meant only for employees who administer the business affairs of the company, and production employees duties don't fall into that category.

Rule No. 3: All FLSA exemptions are construed narrowly. In other words, the exemptions will be interpreted in favor of employees, not employers. That's because the FLSA is considered remedial legislation, meaning that when it was enacted back in the 1930s, it was intended to cure the social evil of requiring employees to work overtime without being paid fairly for it.

Now, the case

In the case before the 5th Circuit, the suing employees worked in the oil fields, monitoring the thickness of the oil in the wells. They would advise the client on whether the oil's thickness was acceptable and whether chemical additives should be pumped into the well to get the right consistency.

The court looked at the evidence and came to the following conclusions:

- **Strike 1:** The job in question requires the employees to provide advice, but the administrative exemption applies to employees who make policy determinations about how the business should be run or how it can run more effectively. In other words, rather than performing a service, an administrative employee helps decide whether the service should be offered in the first place.
- **Strike 2:** The employees' tasks sound more like production duties than administrative duties. Think of it this way: An administrative employee would be working in a nice air-conditioned office instead of toiling away in the heat of the oil patch.
- **Strike 3:** If it's a close call, the call goes to the employees. That's the way Congress set up the FLSA.

But what about the reference to "quality control" in the regulations? Wouldn't that mean the administrative exemption applies to the oil field employees? No dice. If you read the regs carefully, it becomes clear that "quality control" must be read in tandem with the other job duties and job titles.

So, three strikes, and the employer was out. Well, not quite yet. The appeals court set aside the trial court's decision in favor of the employer and sent the case back for a jury to determine if the administrative exemption applies to the employees. *Dewan et al. v. M-L, LLC* (5th Cir., 2017).

It's a gusher!

For employees who have been misclassified under the administrative exemption and their lawyers, the court's decision is virtually a gusher. As many of you know, liability for unpaid overtime to employees who are misclassified under the FLSA can quickly spiral out of control. If you are using the "quality control" language in the regs to classify your employees as exempt, you should call your employment lawyer. Trust me, attorneys who represent employees will get wind of this case and rev up the FLSA class action machine.

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IMMIGRATION INTEL

Double-edged sword: Supreme Court's *Morales-Santana* decision

by Jacob M. Monty
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Immigration law isn't just about filling out and retaining the required forms; it's a very complex body of laws and regulations from agencies like the U.S. Department of Labor (DOL), the U.S. State Department, and the U.S. Department of Homeland Security (DHS). As immigration continues to take center stage in our national politics, the U.S. Supreme Court recently addressed the issue of children born abroad when only one parent is a U.S. citizen. The Court's June 12 opinion in *Sessions v. Morales-Santana* at first reads like a sweeping victory for immigrants' rights—and women's rights, for that matter. But let's not get ahead of ourselves.

Both victory and defeat

The case before the Supreme Court involved a gender distinction in federal immigration law that the majority of the Court rejected because it didn't pass the heightened scrutiny analysis. The law that was challenged in the case addresses the citizenship status of children born outside the United States. Under the law, the child of a citizen and a noncitizen born abroad would be granted American citizenship only if his citizen parent "was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years."

But an exception applied to unwed mothers who are citizens: Their children were granted citizenship as long as the mothers were physically present in the United States for at least one year. It was this exception that the Court found unacceptable. Justice Ruth Bader Ginsburg, who drafted the opinion, called the exception "stunningly anachronistic."

Nonetheless, the Court's conclusion doesn't bode well for Luis Ramon Morales-Santana, who challenged the law in the face of a deportation proceeding. When Morales-Santana was born in the Dominican Republic, his father was a U.S. citizen, but he had been present in the United States for only four years, meaning Morales-Santana would need the exception applied to his father in order to be granted U.S. citizenship. So he argued that it was unconstitutional to make an exception for unwed mothers but not unwed fathers.

The Court agreed with Morales-Santana that the law was unconstitutional, but it also held that instead of being applied to both mothers and fathers, the exception should be thrown out altogether, meaning the five-year residency requirement will be imposed without regard to marital status or gender. That likely means deportation for Morales-Santana.

The greater impact

Ultimately, the Court's decision will ensure that fewer children born abroad will be granted citizenship status, but it may also have greater implications for immigration law. In the past, the Supreme Court has chiefly deferred to Congress in the area of immigration law. That deference, often referred to as the "plenary power doctrine," was barely noticeable in the *Morales-Santana* opinion, however.

Although Justice Ginsburg was hopeful that "going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender," the Court unapologetically employed a constitutional analysis in striking down the law, which flies in the face of the plenary power doctrine's hands-off approach. The Court has taken this tack in a few other recent cases. Only time will tell whether the *Morales-Santana* case serves as the end of the doctrine or just a temporary detour from it.

At the end of the day, the case is a reminder of how complicated it can be to balance a law or policy that creates a distinction based on sex with the requirement of equal protection or, in the employment setting, the prohibition of sex discrimination found in Title VII of the Civil Rights Act of 1964. The interplay can be complex and confusing.

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ENFORCEMENT

Americans first: Preference for foreign workers can run afoul of federal laws

by Jacob M. Monty
Monty & Ramirez, LLP

Making good on promises from earlier this year, the U.S. Department of Justice (DOJ) has begun cracking down on what it calls discrimination against U.S. workers who are being passed over in favor of temporary foreign workers. The DOJ recently announced a settlement with Carrillo Farm Labor, LLC, a New Mexico onion farm. Following an investigation into allegations by two U.S. citizens that they had been rejected in favor of workers from Mexico, Carrillo agreed to pay $5,000 in fines and comply with ongoing training and reporting requirements. In a separate but related agreement, Carrillo agreed to pay $44,000 in lost wages to five other U.S. workers.

Abuse of visa programs as discrimination

Carrillo brought the foreign workers into the country under the H-2A visa program, which is intended to help employers fill temporary agricultural jobs with foreign workers when there aren't enough U.S. workers available. But some employers abuse the visa process by using it to hire foreign workers despite the availability of U.S. laborers.

In a warning to employers issued earlier this year in the context of H-1B visa abuse, the DOJ said it "is wholeheartedly committed to investigating and vigorously prosecuting" claims of discrimination against U.S. workers. H-1Bs are nonimmigrant visas used to recruit highly skilled foreign workers for specialty occupations, and as with H-2As, abuse sometimes occurs.

Race and national origin discrimination

The DOJ is enforcing visa abuse under the antidiscrimination provision of the Immigration and Nationality Act (INA). But the Equal Employment Opportunity Commission (EEOC) has its own ax to grind with employers that show a preference for Mexican workers.

The EEOC has filed suit against Marquez Brothers International, Inc., claiming its actions favoring Hispanic applicants over all others constitute discrimination under Title VII. The EEOC alleges that the company discouraged non-Hispanics from applying for jobs and asked applicants whether they speak Spanish even though speaking Spanish isn't a job requirement.

What employers can do

You can protect your company against EEOC enforcement actions by implementing policies that ensure equal opportunities for all job applicants and employees. And because the DOJ has stated that it will focus on enforcement going forward, if you employ foreign workers on visas, it's important to be prepared for an agency investigation by reviewing the document retention requirements for each type of visa you use, informing your managers of the possibility of an outside audit, and undertaking the necessary internal audits to ensure that your hiring and compensation policies are consistently applied to all employees.

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JOINT EMPLOYMENT

'No worries. It's the staffing company's problem!' Texas employer can't pass the buck

by Michael P. Maslanka
FisherBroyles, LLP

Have you ever shrugged off a problem and assumed your staffing company would deal with it? Many employers use staffing companies, partly because they believe the workers are employees of the staffing agencies, not the businesses where they work. So employers believe they will not get sued for, say, discrimination. I am not a big Ernest Hemingway fan, but I've always liked this line from one of his novels: "Isn't it pretty to think so?" Read on to learn about a recent Texas case that dispelled the myth that lawsuits are the problem of staffing companies.

EEOC gets involved

S&B Industry Inc. operates a cell phone repair and testing company. Two deaf applicants sought employment at the company, and they were allegedly rejected. The Dallas office of the Equal Employment Opportunity Commission (EEOC) is very interested in the rights of deaf individuals under the Americans with Disabilities Act (ADA) and filed suit against S&B and Staff Force, a staffing company. The commission claimed that S&B and Staff Force were joint employers and that both companies were liable for alleged discrimination.

S&B: 'Whoa, we aren't the employer'

S&B argued that it was a party to a "Temporary Employment Services Agreement" with Staff Force. The agreement provided that (1) Staff Force did the hiring and firing, (2) all personnel provided by Staff Force were its employees, and (3) the "direction and control of the employee [was] the right and responsibility of Staff Force."

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AUSTIN LEGAL LIMITS

Texas legislative session: sanctuary cities, voter IDs, and bathroom bills

by Mark Flora
Constangy, Brooks, Smith & Prophete, LLP

Another legislative session has come and gone, and despite much emotional fanfare, relatively little has changed. Certainly, that is true concerning new labor and employment laws. For those of us who live here in Austin, the most noticeable changes are lighter traffic and more readily available tables at swanky restaurants.

Over the session's 140 days, a remarkable 6,600 bills were introduced, 1,000 of which were signed into law. Fifty bills were vetoed by Governor Greg Abbott, and 150 bills advanced without his signature. This column briefly addresses some of the more interesting and controversial measures that have at least a tenuous connection (applying the broadest possible construction) to labor and employment issues.

Sanctuary cities. Governor Abbott signed **Senate Bill (SB) 4,** which is scheduled to take effect on September 1, 2017. SB 4 effectively bans sanctuary cities in Texas and allows law enforcement to inquire about detainees' immigration status. The bill makes it a Class A misdemeanor for law enforcement and local leaders to refuse to cooperate with federal immigration authorities. Apparently, various organizations have already requested that the South by Southwest Conference and Festivals be moved from Austin because of the passage of SB 4. That is a nonstarter because the event brings about a bazillion dollars to Austin each year.

Voter ID. Governor Abbott signed **SB 5.** The bill modifies the controversial 2011 Texas Voter Identification Law, which has been before the U.S. Supreme Court, the 5th Circuit, and several district courts. The compromise measure was reached in an attempt to prevent Texas elections from possibly being placed under federal oversight once again.

Bathrooms. SB 6 would prevent transgender individuals from using publicly owned restrooms that match their gender identification. Lieutenant Governor Dan Patrick and Speaker of the House Joe Strauss, both Republicans, went toe to toe over the issue, with Strauss expressing concern about North Carolina's experience over a similar bill.

School choice. No session would be complete without a battle over school choice. The senate has proposed various bills over the years, and the house has repeatedly rejected them. It was no different this year. The house refused to consider **SB 3,** which would have subsidized the costs of private or home schooling for thousands of children in Texas.

Arrests and mental health. Governor Abbott signed **SB 1849,** also known as the Sandra Bland Act. The bill provides protection for individuals with mental health or substance abuse issues during arrest and incarceration. Sandra Bland, a young black woman, was arrested during a routine traffic stop and was subsequently found dead in a county jail. The Act requires county jails to direct individuals with recognized mental health or substance abuse issues to treatment, makes it easier for those individuals to be personally bonded out, and mandates independent investigations of jail deaths.

Medical marijuana. Although a medical marijuana bill was supported by over half of the Texas house and Willie Nelson, there's no magical mystery tour in Texas yet.

Ride-hailing. Governor Abbott signed **House Bill (HB) 100,** which gives the state the authority to override local regulation of ride-hailing services. Uber and Lyft are back in Austin, which is no surprise given the personal inconvenience experienced by legislators. Many were no doubt late for lunch or dinner reservations.

Texting. Again, it's no surprise that Governor Abbott signed **HB 62,** which bans texting while driving statewide. The law takes effect September 1. Texas was one of only four states without such a ban.

Straight-ticket voting. Although the proposal was of little interest to the media, Governor Abbott signed **HB 25,** which eliminates straight-ticket voting in all Texas elections beginning in September 2020. The bill may well prove to be significant in the future.

Stay tuned for the special session, with battles over bathroom choice, property tax and school finance reform, and school choice yet to be fought.

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8-8 Age-Based Discrimination Pitfalls to Avoid: How to Steer Clear of Costly Age-Related Lawsuits and Settlements

8-8 Creating All-Star Safety Processes: How to Develop Clear, Concise, and OSHA-Compliant Procedures and Instructions

8-15 Dealing with Difficult Employees: How to Successfully Handle Workplace Personalities and Defuse the Drama

8-16 Top 10 FMLA Policy Mistakes: How to Avoid the Most Hazardous Compliance Tripwires

8-17 Defensible Safety Documentation: Ensuring Your OSHA Records Won't Get You in Legal Hot Water

8-17 Job Grades and Pay Structure: The Secrets to Creating a Compensation System that Works for Your Organization ✤

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And, as 1:00 a.m. infomercials squawk, "Wait, there's more!" All applicants signed a document acknowledging that they were Staff Force employees, they were employed at will, and only Staff Force had the right to terminate them. Moreover, Staff Force set the rate of pay, maintained all personnel and payroll records, issued paychecks, and made appropriate federal withholdings and employer contributions. Finally, the agreement set out that it was Staff Force's sole responsibility to provide direction and control of its employees. S&B asked to be dismissed from the lawsuit, but the court said no.

So what's the issue?

The court said economic control was irrelevant in deciding the joint-employer issue. Rather, all that mattered was whether S&B had *some* control over how the workers performed their tasks. The court said there was evidence that S&B exercised control.

For example, S&B managers' job descriptions stated that they were responsible for giving directions to and reviewing "direct labor associated with operational production"—that is, workers sent by Staff Force. Moreover, there was testimony that S&B managers did in fact direct the work. The court said the evidence was sufficient to deny S&B's request for dismissal and have a jury decide whether S&B and Staff Force were joint employers. *EEOC v. S&B Industry, Inc., d/b/a Foxconn S&B* (N.D. Tex., 2016).

Bottom line

Using a staffing company is a way to manage your business and costs. But the EEOC and lawyers who represent employees won't just take your assertion that you are not the workers' employer at face value. Be sure to look at not only your agreement with your staffing company but also at how work is performed in real time.

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