Alphabet Soup—A Few Things You Need to Know

By Sheryl J. Willert

Developments in Federal Laws That May Have Applicability to Public Sector Employers

Regulatory schemes are often referred to by the initials of the regulatory agencies that enforce them or by the acronyms for the laws—a veritable alphabet soup. Regardless of the acronym or the letters that are used, many of the federal laws apply not just to private sector employers but also to public sector employers. Although this article cannot cover all of the federal laws that apply to public sector employers, listed below are a few key federal laws that do apply to them and about which public sector employers need to know.

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U.S. Department of Labor (DOL)

The U.S. Department of Labor (DOL) administers two laws that public sector employers particularly need to know about, although it administers others as well. These two are the Fair Labor Standards Act and the Family and Medical Leave Act.

Fair Labor Standards Act (FLSA)

There has been much recent discussion about internships under the Fair Labor Standards Act (FLSA) and whether such internships are legal. Although significant

rulings recently have imposed liability on private employers for unpaid internships, public sector employers continue to benefit from the ability to hire and to retain interns.

"Employment," as defined under the Fair Labor Standards Act, is very broad. In general, it means to "suffer" or to "permit" someone to work in your organization, and it should be read broadly in favor of maximizing the effectiveness of the law and who it covers. "Employment" brings with it the right to the protections of the minimum wage and overtime provisions of the FLSA. To comply with the FLSA standards, unpaid internships specifically should meet the following criteria:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Although not generally bound by these rules, public sector employers should strive to adhere to these standards, which have given rise to so much litigation in the private sector. In the guidance issued by the DOL in August 2010, the government made the following statement with respect to internships in the public sector:

> The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sectors.

As of the date of publication of this article, the DOL has issued no additional guidance and internships continue to be a potential grey area in the public sector.

To determine a supervisor's control over an employee for purposes of finding a violation, a court will analyze the "economic reality" of the employment situation, which may include factors such as the individual's power to hire and fire the employee, supervise and control employee work schedules or conditions of employment, determine the rate and method of payment, maintain employment records.

Family and Medical Leave Act (FMLA)

The most recent developments under the Family Medical Leave Act (FMLA) that affect the public sector come in the form of new case law. This case law is likely to result in some future determination by the U.S. Supreme Court regarding the potential liability of individual public sector supervisors for violations of employees' FMLA rights. In *Haybarger v. Lawrence County Probation and Parole*, 667 F.3d 408 (3rd Cir. 2012), the Third Circuit ruled that a supervisor in a public entity could be held personally liable for a FMLA violation. In arriving at this decision, the court used the definition of supervisor that is found in the Fair Labor Standards Act as the basis of its analysis. The court reasoned that the definition of employer in the two statutes is nearly identical.

In examining the definition of supervisor, the court focused on the FMLA statutory definition for "employer," which includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. §2611(4)(A)(ii)(1). Then the court turned back to the language of the FMLA that makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided under this subchapter." 29 U.S.C. §2615(a)(1). To determine a supervisor's control over an employee for purposes of finding a violation, a court will analyze the "economic reality" of the employment situation, which may include factors such as the individual's power to hire and fire the employee, supervise and control employee work schedules or conditions of employment, determine the rate and method of payment, maintain employment records. The *Haybarger* court found that it was not necessary that the supervisor exercise control over every aspect of employment to impose liability on the supervisor under the FMLA.

This is an FMLA decision that public sector employers should continue to watch.

The Americans with Disabilities Act (ADA) and Section 504 and Public Employers

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 both have the potential to affect public sector employers as they relate to employees and students with disabilities.

The ADA applies to virtually every entity except private clubs and churches. This

includes all public entities and requires access for persons with disabilities—including physical access—to all programs and services offered by the entity. *See* 25 C.F.R. pt. 25 and 28 C.F.R. pt. 36.

Section 504 applies to any entity that receives federal funds, and it places a variety of obligations on covered institutions, including requirements that necessary supports such as accommodations be provided to ensure access. *See* 34 C.F.R. pt. 104.

The purpose of these statutes is to prevent discrimination against individuals who are qualified for jobs, programs, or services that are offered by public sector employers. As a general rule, both of these statutes are intended to cover any individual who

1. Has a physical or mental impairment that substantially limits one or more major life activities,
2. Has a record of such impairments; or
3. Is regarded as having such an impairment.

Major life activities include walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself, and performing manual tasks.

Some public employers feel the effects of these statutes more than others. For example, most school districts see the interaction of these statutes through the students served by the districts and who receive Individualized Educational Programs (IEPs), governed by the Individuals with Disabilities Education Act (IDEA), which applies to individuals until they reach the age of majority and regulates auxiliary services in elementary and secondary schools. Students who attend public schools and who have disabilities must be assessed and permitted to participate in school programs without regard to their disabilities. Moreover, as a result of both the ADA and Section 504, schools are required to eliminate unnecessary eligibility requirements or requirements that would have a tendency to screen out students with disabilities.

Moreover, the combination of these statutes prevents a school from imposing special charges on students and requires schools to provide equivalent transportation services, remove architectural and communication barriers, and provide auxiliary services to facilitate student education, and all of this must be done unless schools can demonstrate undue hardships.

If a school district seeks to establish the existence of an undue hardship, the school district bears the burden of proof. The factors that will be considered include (1) the size of a school district; (2) the overall financial resources of the district; (3) the overall financial resources available to the program in question and the effect that an expenditure will have on the overall program; and (4) the nature and cost of accommodation.

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The U.S. Department of Education Office of Civil Rights (OCR), which has as one of its responsibilities the enforcement of Section 504 and the ADA in public schools has turned its attention to a number of initiatives with the intended purpose of protecting disabled students, including focusing on bullying, accommodations related to food allergies, use of inaccessible technology, and use of service animals, the definition of which was modified two years ago to include only dogs.

With increased focus on issues relating to employees and students with disabilities, it is important that school districts and other public employers continue to educate their supervisors and employees with respect to issues surrounding disabled individuals.

The U.S. Equal Employment Opportunity Commission (EEOC)

The U.S. Equal Employment Opportunity Commission (EEOC) has as its primary responsibility the enforcement of Title VII of the 1964 Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA), the Equal Pay Act, the Pregnancy Discrimination Act, and the Age Discrimination in Employment Act of 1967 (ADEA), Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), and Sections 501 and 503 of the Rehabilitation Act of 1973. In its enforcement capacity, the EEOC often issues regulations and guidance to provide employers with information about what its focus will be in a particular year. Within the last two years, the EEOC has issued very specific guidance on two areas of concern to all employers: credit history checks and criminal background checks.

The EEOC and Credit History Checks

The EEOC has become particularly active with respect to its enforcement of existing statutes, including those over which it does not have primary jurisdiction but which it believes should be enforced on a number of grounds to prevent discrimination in the workplace and to provide greater access to employment for minorities whom the EEOC believes have been prevented from entering the workforce through the use of traditional methods of investigation by employers that are legal under existing state and federal statutes. Such is the case with respect to its pronouncements and enforcement related to credit history checks.

Credit history background checks are traditionally governed by the provisions of the Fair Credit Reporting Act (FRCA), which is administered by Federal Trade Commission. The FCRA, Public Law No. 91-508, was enacted in 1970 to promote accuracy, fairness, and the privacy of personal information assembled by credit reporting agencies (CRAs). Information that is generally sought in credit history background checks includes driving records, vehicle registration information, credit records, social security information, education records, court records, bankruptcy information, workers' compensation injury information, character references, neighbor interviews, medical records, property ownership records, military records, state licensing records, results of drug testing, personal references, prior employment records, and records of crim-

inal activity, including arrests, convictions and sex offender designations. Although the areas that can be examined under the FRCA are broad, there are some limitations. The limitations include a prohibition against reporting bankruptcies that are more than 10 years old, civil lawsuits, judgment and arrest records that are more than seven years old, tax liens that have been paid and are more than seven years old, accounts placed for collections that are more than seven years old, and other negative information (except convictions) after seven years. Importantly, these restrictions do not apply to individuals who seek positions when the compensation is greater than $75,000. *See* FCRA §605(b).

The FRCA has very specific rules about how information obtained by employers for use in the application process can be obtained and the obligations that an employer has if adverse information obtained during a background check is used to make adverse employment determinations. Included among the safeguards established by the FRCA are requirements that applicants and employees be notified that checks are being done, that adverse information be reported to the applicants, and that the applicants receive an opportunity to rebut negative information.

Despite the fact that obtaining and using such information is perfectly legal in many jurisdictions, in 2010, the EEOC began pursuing employers obtaining and using credit history information. In *EEOC v. Kaplan Higher Education Inc.,* 2010 WL 5157837 (N.D. Ohio 2010), the EEOC initiated litigation against Kaplan Higher Education Inc. (Kaplan) claiming that its policy of conducting background checks had an adverse impact on minorities. In January 2013, the federal judge deciding the case dismissed the case on a summary judgment motion. Despite having lost this case, the EEOC has recently indicated that it intends to continue to pursue actions against employers that use credit histories in making employment decisions.

Some states have passed legislation that restricts an employer's right to obtain credit reports as part of a background check, and as such, the position taken by the EEOC will have less of an effect on employers in these states. Currently, 45 states have proposed or adopted legislation regarding the use of credit histories including the following: Washington, Wash. Rev. Code §19.182 *et. seq.*; Arizona, Ariz. Rev. Stat. §§44-1691–44-1693; California, Cal. Civ. Code §1786.16. A. B. 22, L 2011; Hawaii, Hawaii Rev. Stat. §§378-2, 378-2.7; Illinois, 820 Ill. Comp Stat. Ann. 70/1 to 70/30; Kansas, Kan. Stat. Ann. §50-703 *et. seq.*; and Louisiana, La. Rev. Stat. §9:3571.1.

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The EEOC and Criminal Background Checks

In April, 2012, the EEOC promulgated rules regarding the use of criminal history background checks in which it stated the following: "The Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity." *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.*

In an attempt to defend its position on criminal history background checks and the use of criminal histories to exclude individuals from employment, the Commission went through an extensive analysis of case law and data and concluded that using criminal convictions has a potentially disparate impact, primarily on African American, Hispanic, and male applicants, and as such, they should only be used using such data and information is either validated according to the extremely difficult validation standard established by the EEOC for consideration of job qualifications or there is an individualized assessment under the factors established in the *Green v. Missouri Railroad* decision. The *Green v. Missouri Pacific Railroad* decision held that it was discriminatory under Title VII for an employer to "follow[] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense." *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977). The Eighth Circuit identified three factors, referred to as the "*Green* factors," that were relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity:

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense or conduct or completion of the sentence or both; and
3. The nature of the job held or sought.

In addition to prohibiting using criminal history without an individualized analysis, the EEOC also declared that any state law that permits the use of criminal convictions as a basis for exclusion of someone from a position within a business entity does not take precedence over the EEOC regulation. This pronouncement is expressly contrary to many state laws, and in particular, the law in the state of Washington. *See Gugin v. Sonico, Inc.* 68 Wn. App. 826, 846 P.2d 571 (1993).

Despite having articulated the standards above, the EEOC has taken a very aggressive stance on criminal history background checks by instituting litigation against a number of employers that have used these programs. One such case, *EEOC v. Freeman, Inc.*, No. 09-CV-2573 (D. Md. August 9, 2013), was recently decided by a Maryland court that granted summary judgment in favor of Freeman, Inc. (Freeman). Freeman is a service provider for corporate events that uses multi-level investigations into criminal background history depending on the position for which an application is made within the company. Freeman had only one bright-line rule with respect to

the criminal background history and that bright line rule was being untruthful with respect to criminal background.

In ruling against the EEOC, Judge Titus wrote:

> By bringing actions of this nature, the EEOC has placed many employers in the "Hobson's choice" of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.

Despite this ruling by the court, the EEOC appears to be unbowed, intending to continue with litigation that it has started against several other employers including Dollar General and BMW.

The EEOC and "Who Is a Supervisor?"

In addition to the significant losses that were experienced by the EEOC respecting its determinations to focus on criminal history and credit history background checks, the EEOC also experienced setbacks with respect to its overly broad definition of who is a supervisor. Unless an entity has employees who are subject to collective bargaining, the definition of who is or is not a supervisor has been significantly narrowed by the United States Supreme Court.

In guidance issued in 1999, the EEOC opined that a person was a supervisor under one of two conditions:

1. The individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*
2. The individual has authority to direct the employee's daily work activities.

In explaining which individuals it considered to have authority to direct an employee's daily activities, the EEOC opined that an individual was a supervisor if that individual is authorized to direct another employee's day-to-day work activities, even if that directing individual does not have the authority to undertake or to recommend tangible job decisions.

In a decision that was not expected by the EEOC, in June 2013, the United States Supreme substantially narrowed the definition of a supervisor. In *Vance v. Ball State University*, No. 11-556 (June 24, 2013), the Supreme Court ruled that a supervisor must have the authority to make "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." With this pronouncement, all employers, including public sector employers, had significantly greater guidance with respect to enforcement of harassment and other employment antidiscrimination laws. This decision has the potential to narrow the potential for vicarious liability of all employers.

> Included among the safeguards established by the FRCA are requirements that applicants and employees be notified that a checks are being done, that adverse information be reported to the applicants, and that the applicants receive an opportunity to rebut negative information.

The EEOC and Its Future Focus

In June 2013, the EEOC provided employers with a map of where it would likely head with enforcement efforts. The EEOC listed five general areas in which the agency would begin more aggressive enforcement actions. Although not all of these areas will affect public sector employers, it is important to note that the EEOC several areas may clearly bring public sector employers into the spotlight.

1. The EEOC has planned to litigate class actions based on recruitment and hiring practices with a special emphasis on pre-employment issues and activities that affect minority groups that have statutory protections.
2. The EEOC has planned to focus on workers such as migrant workers and other vulnerable workers who often are reluctant to exercise their statutory rights.
3. The EEOC has planned to focus on what it has classified as "emerging issues" such as issues arising under the ADA. The ADA issues include concerns about reasonable accommodations and undue hardship. The agency also has intended to focus on pregnancy discrimination and lesbian, gay, and transgender individuals under the sex discrimination provisions of Title VII of the Civil Rights Act of 1964.
4. The EEOC has indicated that it plans to focus on enforcement of the equal pay laws, including compensation systems and practices that discriminate on the basis of gender.
5. The EEOC will also focus on retaliation against complaining employees; overly broad waiver provisions in either arbitration, employment, or settlement agreements; restrictions on filing charges with the EEOC or assisting in the investigation of claims; and the failure to retain records required by the regulations when such activities discourage employees from attempting to vindicate their rights.

The Office of Federal Contract Compliance (OFCCP)

The mission statement for the Office of Federal Contract Compliance (OFCCP) of the DOL identifies the responsibilities of the office as follows:

> OFCCP administers and enforces three legal authorities that require equal employment opportunity: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the Vietnam Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. §4212. Taken together, these laws ban discrimination and require Federal contractors and subcontractors to take affirmative action

to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a protected veteran.

If a public employer receives money from the federal government and is a supply or service contractor to the government, it may be subject to regulation by the OFCCP. For example, employers that contract with the government to provide services under federally funded programs are subject to regulation by the OFCCP. Consequently, it is important to note that in 2013, the OFCCP issued several new directives that may materially affect the manner in which these employers proceed.

The two most important directives that have been issued by the OFCCP address federal contractors, Vietnam Era veterans, and individuals with disabilities. The first of the new directives has established new hiring benchmarks for protected veterans using one of two alternative methods to reach the benchmarks. The first alternative is to use a benchmark that is equal to the national percentage of veterans in the civilian workforce. This number is published and updated annually by the OFCCP. Contractors can also use a benchmark that they develop based on information from a not yet developed data base that the OFCCP will establish that will take information from the Bureau of Labor Statistics (BLS) and the Veterans Employment and Training Service/Employment and Training Administration (VETS/ETA). In addition to setting benchmarks for contractors, the new directive also requires maintenance of certain records regarding the number of veterans who apply and are hired for positions.

In the second directive, the OFCCP has issued guidance relating to disabled individuals working within the federal contracting workforce. The second directive imposes a hiring goal of seven percent utilization of individuals with disabilities for federal contract work. Along with the seven percent goal, the OFCCP has directed that each government contractor must conduct an analysis of utilization on an annual basis; assess areas in which each has problems hiring and retaining disabled workers; establish specific programs to reduce the problems related to hiring and retention of disabled individuals; and maintain data tracking disabled applicants and hires.

The final rule implementing these new directives was posted in the Federal Register on September 24, 2013, and took effect 180 days after that date.

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Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 was passed to protect the privacy of patients while at the same time providing an opportunity for the release of information when it becomes necessary and appropriate. Although this law is specifically aimed at hospitals and medical institutions, this law can also have application to public employers since those entities often have medical information in their possession.

Public employers that have these records in their possession will want to understand how the act defines "business associate." Business associate is defined by the statute as follows:

(1) Except as provided in paragraph (4) of this definition, business associate means, with respect to a covered entity, a person who:
  (i) On behalf of such covered entity or of an organized health care arrangement (as defined in this section) in which the covered entity participates, but other than in the capacity of a member of the workforce of such covered entity or arrangement, creates, receives, maintains, or transmits protected health information for a function or activity regulated by this subchapter, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities listed at 42 CFR 3.20, billing, benefit management, practice management, and repricing; or
  (ii) Provides, other than in the capacity of a member of the workforce of such covered entity, legal, actuarial, accounting, consulting, data aggregation (as defined in §164.501 of this subchapter), management, administrative, accreditation, or financial services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of protected health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person.

(2) A covered entity may be a business associate of another covered entity.

(3) Business associate includes:
  (i) A Health Information Organization, E-prescribing Gateway, or other person that provides data transmission services with respect to protected health information to a covered entity and that requires access on a routine basis to such protected health information.
  (ii) A person that offers a personal health record to one or more individuals on behalf of a covered entity.
  (iii) A subcontractor that creates, receives, maintains, or transmits protected health information on behalf of the business associate.

(4) Business associate does not include:
  (i) A health care provider, with respect to disclosures by a covered entity to the health care provider concerning the treatment of the individual.
  (ii) A plan sponsor, with respect to disclosures by a group health plan (or by a health insurance issuer or HMO

with respect to a group health plan) to the plan sponsor, to the extent that the requirements of §164.504(f) of this subchapter apply and are met.

(iii) A government agency, with respect to determining eligibility for, or enrollment in, a government health plan that provides public benefits and is administered by another government agency, or collecting protected health information for such purposes, to the extent such activities are authorized by law.

(iv) A covered entity participating in an organized health care arrangement that performs a function or activity as described by paragraph (1)(i) of this definition for or on behalf of such organized health care arrangement, or that provides a service as described in paragraph (1)(ii) of this definition to or for such organized health care arrangement by virtue of such activities or services.

The government changed HIPAA regulations as they relate to business associates. For one, more stringent rules for breaches related to the release of protected health information (PHI) now exist.

The public employers that these requirements most likely will affect include school districts and universities and detention facilities operated by various state and local organizations or otherwise acting as agents of such entities. For school districts, the likely most important change in the HIPAA regulations is one related to school districts and the release of information regarding student immunizations. The regulation establishing rules for student disclosures specifically does the following:

- The final rule amends 164.512(b)(1) by adding a new paragraph that permits a covered entity to disclose proof of immunization to a school when a state or other law requires the school to have such information prior to admitting the student. Written authorization is no longer required to permit this disclosure.
- Covered entities will still be required to obtain agreement, which may be oral, from a parent, guardian, or other person in *loco parentis* for the individual or from the individual himself or herself if the individual is an adult or an emancipated minor.
- Covered entities must document the agreement obtained.
- The agreement obtained is effective until revoked.

There are also new rules for a breach of security related to HIPAA. These new rules modify the standards that will be applied. The new breach-related rules include a presumption that any release of information is a breach unless a covered entity that experienced the breach can demonstrate that there is a low probability that the PHI has been compromised. *And the new rules eliminate the exemption for data that does not contain dates of birth or zip codes.* To determine whether PHI has been compromised, a "risk assessment" (RA) must be performed. The RA should consider the following factors:

- The nature and the extent of the PHI involved, including the types of identifiers and the likelihood of re-identification;
- The unauthorized person who used the PHI or to whom the PHI was disclosed;
- Whether the PHI was actually acquired or viewed; and
- The extent to which the risk to the PHI has been mitigated.

Of course, a covered entity and a business associate can also decide to provide notice of any breach without conducting the assessment.

> The NLRB has undertaken vigorous inspection of employer handbooks and policies relating to speech and social media postings and has limited the ability of private sector employers to regulate such speech.

Public Employees and Social Networking

There has been a flurry of activity on the part of the National Labor Relations Board (NLRB) in its enforcement of Section 7 of the National Labor Relations Act (NLRA) to regulate the ability of employers in the private sector to control speech by employees on social media sites. The NLRB has undertaken vigorous inspection of employer handbooks and policies relating to speech and social media postings and has limited the ability of private sector employers to regulate such speech. The NLRB continues to use as its standard whether the speech in question is concerted activity that is intended for the mutual aid and protection of the individual or other employees or both. *See, Hispanics United of Buffalo, Inc.*, 359 N.L.R.B No. 37, 2012-13 NLRB Dec. (CCH) ¶ 15656 (Dec. 14, 2012). The NLRB has examined factors such as whether the speech that is posted online is part of a complaint raised by employees regarding workplace conditions, whether the complaints are related to conduct of supervisors or management, and whether the complaints articulated what the employees believed to be their rights in determining whether the speech in question is protected under the NLRA. *See Bettie Page Clothing*, 359 N.L.R.B No. 96, 195 L.R.R.M. 1309 (BNA) (April 19, 2013). With decisions such as these, the traditional ability of private sector employers to defend themselves or to articulate policies that would salvage their brand and restrain employees from otherwise "bad mouthing" a company is rapidly becoming a thing of the past.

Although not covered by a specific alphabet such as would be the case in private sector, the regulation of speech through social networking mediums has become a topic of interest to many public sector employees and employers. It has also become the subject of discussion in the federal courts. However, unlike the approach that the National Labor Relations Board has taken in regulating employers in the private sector, the regulation of speech by public employees continues to be subject to a balancing act under the U.S. Constitution.

In looking at social media postings for public sector employees, the courts continue to look primarily at three factors. Those factors are rooted in the same type of

analysis that has been applied to the speech of public employees regardless of where it appears. The questions that are asked are

1. Whether the speech is related to the official duties of the employee
2. Whether the speech is a matter of public concern; and
3. Whether the speech strikes the proper balance of interests of the employee as compared to the interests of the employer.

It has long been clear that governments have the right to impose restrictions on the speech of governmental employees if there is appropriate justification for those restrictions. *City of San Diego v. Roe*, 543 U.S. 77 (2004). The question becomes what are the appropriate justifications and how do the courts determine whether the justifications meet constitutional muster.

Efforts to determine whether, and to what extent, postings and speech are permissible for public sector employees have been defined in large part by the decision of the United States Supreme Court in *Garcetti v. Ceballos*, 547 U. S. 410 (2006). In the *Garcetti* decision, the Court determined that postings and statements that are made in the course of a government employee's official duties do not carry with them the protections of the First Amendment. Instead, postings and speech made in the course of a government employee's official duties are made in the course of employment. Unfortunately, the court did not define what constituted official duties, and in fact, the Court left the analysis to the courts on a case-by-case basis. However, many courts that have reviewed this subject since *Garcetti* have consistently taken the position that any speech that is related to performance of a government employee's job duties is consistent with performing official duties and lacks protection under the constitution. *See Phillips v. City of Dawsonville*, 499 F.3d 1239 (11th Cir. 2007); *Weintraub v. Bd. of Education of the City of New York*, 593 F. 3d 196 (2nd Cir. 2010); and *Rohrbough v. University of Colorado Hosp. Authority*, 596 F. 3d 741 (10th Cir. 2010).

With more and more of the work related to the administration of the government and justice being done online, there is some likelihood that the courts will be required to address this issue again in the near future. This is particularly true since neither legislation nor the courts seem to have the ability to move as rapidly as social media does. Regardless of the current state of the definitions, *Garcetti* is the starting point of the initial inquiry about whether postings of any nature by a public employee are protected.

Once the *Garcetti* analysis has been conducted, it is imperative to determine whether the speech or posting touches on a matter of public concern. The test for public concern far predates the *Garcetti* decision and can be found in the four corners of the *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U. S. 138 (1983). As demonstrated in the *Connick* decision, the methodology applied to determine whether speech is a matter of public concern requires examining the content, the context, and the form of speech. Although one specific factor does not control the inquiry outcome, the content of the speech or posting is the most important aspect. If a posting generally addresses personal concerns such as performance evaluations, disagreements with supervisors, or other personal complaints, it is far less likely to result in a determination that it is a matter of public concern, much less postings that are related to parties and social activities of public employees. *See Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008) (Faculty members posting referring to herself in a drunken state not a matter of public concern) and *Duke v. Hamil*, No 1:13-cv-01663-RWS, 2014 U.S. Dist. LEXIS 13388 (N. D. Ga. Feb. 4, 2014) (police officer posting confederate flag after election of President Obama suggesting a second revolution of the confederacy) and *Shepherd v. McGee*, No. 03:12-02218-HZ, 2013 U. S. Dist. LEXIS 159432 (D. Ore. Nov. 7, 2013) (social working posting rules for social community fort recipients of public assistance). On the other hand, if the speech or posting addresses political issues, public policy, or something that has garnered the attention of the media, it is far more likely to fit the bill of having First Amendment protection. *See, Mattingly v. Milligan*, No. 4 11CV00214, 2011 WL (E.D. Ark. Nov. 1, 2011), and *Butler v. Edwards-Brown*, Nov. 13-13738, 2014 U. S. Dist. LEXIS 62032 (E. D. Mich., May 5, 2014) (employee commented on the ineffectiveness of the court clerk's office on line).

> However, unlike the approach that the National Labor Relations Board has taken in regulating employers in the private sector, the regulation of speech by public employees continues to be subject to a balancing act under the U.S. Constitution

After analyzing whether a posting deals with a public or a private concern, a court will then examine the posting to determine whether the government has a true interest in prohibiting the speech to protect its ability to fulfill its governmental roles and to protect the interests of citizens that outweigh the right of an individual public employee to speak out (even negatively) on issues related to the government. Factors that courts will consider when weighing the government's genuine interests against a public employee's right include whether the blog, posting, or speech negatively affects workplace harmony, impairs the potential for discipline, or otherwise has a detrimental effect on good working relationships. *See Connick v. Myers*, 461 U.S. 138, 150 (1983), and *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

Regardless of whether speech is a matter of public concern or not, there is likely to be more litigation involving the subject of free speech and public employees with an effort to move more toward the standards of the NLRA than the standards currently in place for public sector employees.

Conclusion

While these are not all of the alphabets, these alphabets are important, and you should know their implications so that you can stay out of the soup.