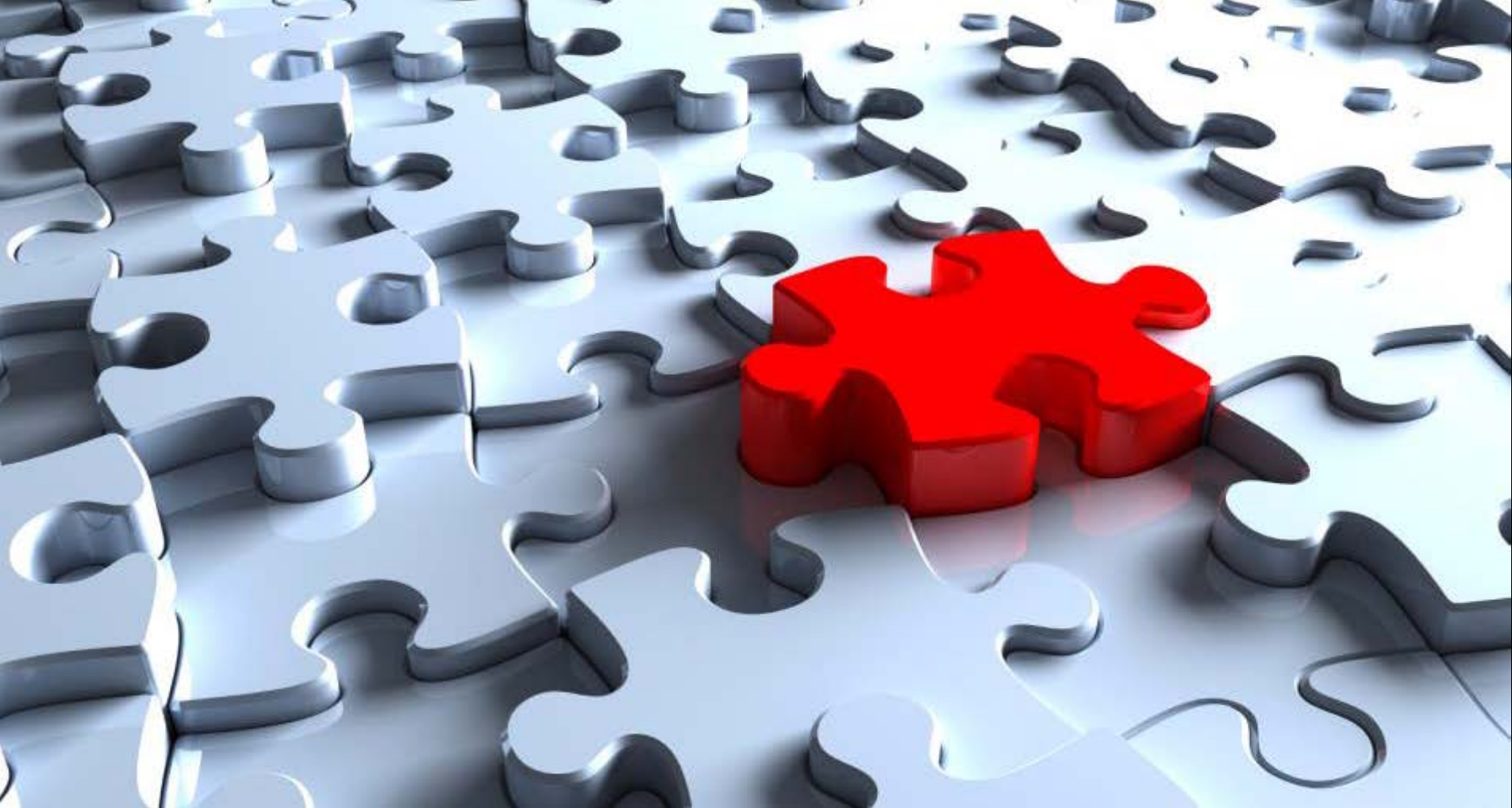




# Hagan Davis Mangum Barrett & Langley PLLC

Top HR Legal Traps  
September 23, 2014

Lawyers for Leaders



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## Today's Agenda

- EEOC Update
- Overview of NLRB Activities
- U.S. DoL Emphasis on Employee Misclassification

# What's Happening with the EEOC?

## Criminal Background Checks – “Ban the Box”

- *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, April 25, 2012.*

[www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

# What's Happening with the EEOC?

## **Criminal Background Checks – “Ban the Box”**

- Disparate Treatment
  - EEOC theory: There is an adverse impact on African American and Hispanic males when employers screen out applicants due to arrests and convictions.



# What's Happening with the EEOC?

## Criminal Background Checks – “Ban the Box”

How do employers comply?

- Remove arrest/conviction inquiries from applications and pre-offer hiring process.
- Conduct criminal background checks after conditional offer of employment.
- Criminal background screening needs to be job-related for the position and consistent with business necessity.



# What's Happening with the EEOC?

## **Criminal Background Checks – “Ban the Box”**

How do employers comply?

- Include the job-related reasons in job descriptions.
- No conviction/no job is no longer acceptable.
- Comply with Fair Credit Reporting Act consent forms and notices.

# What's Happening with the EEOC?

## Pregnancy Discrimination – New EEOC Guidance

- ***EEOC Guidance on Pregnancy Discrimination and Related Issues. July 14, 2014.***

**[www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)**

- Pregnancy Discrimination Act (1978) prohibits discrimination based on pregnancy, childbirth or related medical conditions.
- Amended ADA (ADAAA, 2008) expanded definition of “Disability” so that women with pregnancy-related impairments have protection under ADA, including right to reasonable accommodation.



# What's Happening with the EEOC?

## Pregnancy Discrimination – New EEOC Guidance

- EEOC's New Guidance on Pregnancy Discrimination Focuses on:
  - Adverse treatment based on stereotypes about pregnancy and women (e.g., “absences” or “being committed”).
  - Provides new discrimination protections including infertility, “intent to become pregnant,” and use of contraception.
  - Focuses on employer's application of leave policies and light duty.



# Pregnancy Discrimination – New EEOC Guidance

How do employers comply:

- Treat all similarly-situated employees the same.
- Don't hold pregnant women or women who have been pregnant to higher standards, or make life choices for them.

# What's Happening with the EEOC?

## **Pregnancy Discrimination – New EEOC Guidance**

- Beware of EEOC's heightened awareness of “caregiver” responsibilities.
- Focus only on the job requirements, and whether the employee is objectively performing the requirements.
- Document fully before taking adverse action.
- Make reasonable accommodations when appropriate.



# What's Happening with the EEOC?

## **Religious Discrimination – Watch out for more charges and lawsuits.**

**[www.eeoc.gov/policy/docs/religion.html](http://www.eeoc.gov/policy/docs/religion.html)**

- Increased focus on religious discrimination and duty to make religious accommodations in the workplace.
- Complex area of Title VII. Very much a case-by-case analysis.



# What's Happening with the EEOC?

## **Religious Discrimination – Watch out for more charges and lawsuits.**

How do employers comply?

- Review requests for work schedule modifications for religious reasons to determine if they can be accommodated.
- Review dress code policies. Make accommodations on case-by-case basis.



# What's Happening with the EEOC?

## **Religious Discrimination – Watch out for more charges and lawsuits.**

How do employers comply?

- Review job requirements to determine if an accommodation is reasonable vs. undue burden.
- Contact legal counsel.



## NLRB Activity

### **If you have employees, pay attention! National Labor Relations Board [www.nlr.gov](http://www.nlr.gov)**

- NLRB was established as federal agency to enforce National Labor Relations Act (“NLRA”).
- Traditionally governed Employer/Union issues.



## NLRB Activity

- For last few years, NLRB has used Section 7 of NLRA to focus on non-union employers.
- Section 7 protects employees who engage in “concerted protected activity.”





# NLRB Activity

## Section 7 of NLRA

“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.”



## NLRB Activity

### **Protected Concerted Activity – when two or more employees:**

- Discuss wages.
- Talk about safety concerns.
- Discuss any terms or conditions of employment.



# NLRB Activity

## What are the land mines?

- Employee Handbook provisions may violate Section 7

Examples:

- Prohibition on discussing compensation.
- Broad confidentiality provisions.
- Arbitration/grievance policies.
- Social media policies:
  - Tweets/likes/posts may be concerted protected activity even if they are offensive.



# U.S. Department of Labor

## Employee vs. Independent Contractor

- Are your workers properly classified?
- DOL misclassification Initiative.  
[www.dol.gov/whd/workers/misclassification](http://www.dol.gov/whd/workers/misclassification)
- Memorandum of understanding with IRS.

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# Questions?