

**32ND ANNUAL NORTH CAROLINA/SOUTH CAROLINA LABOR & EMPLOYMENT
LAW PROGRAM
October 28-29, 2016 | The Omni Grove Park Inn | Asheville, NC**

Table of Contents

I. 2016 SUPREME COURT COMMENTARY: EMPLOYMENT LAW

Jonathan R. Harkavy – Greensboro

INTRODUCTION	I-1
DECISIONS OF THE OCTOBER 2015 TERM	I-2
Employer Discrimination and Retaliation	I-2
Employee Compensation and Benefits	I-11
Labor Relations	I-27
Arbitration and Dispute Resolution	I-28
Adjective and Sundry Other Cases	I-33
GRANTS OF CERTIORARI FOR THE 2016 TERM.....	I-45
OVERVIEW OF THE 2015 CIVIL DOCKET	I-47
CONCLUDING OBSERVATIONS.....	I-48

II. THE FOURTH CIRCUIT YEAR IN REVIEW

Brian S. Clarke – Cullowhee

COVER PAGE.....	II-1
TABLE OF CONTENTS.....	II-2
INTRODUCTION	II-5
AMERICANS WITH DISABILITIES ACT (“ADA”) AND REHABILITATION ACT	II-9
EMPLOYEE RETIREMENT INCOME SECURITY ACT (“ERISA”).....	II-19
FAIR LABOR STANDARDS ACT (“FLSA”).....	II-21
FAMILY AND MEDICAL LEAVE ACT (“FMLA”).....	II-42
FIRST AMENDMENT/POLITICAL ACTIVITY	II-45
LABOR MANAGEMENT RELATIONS ACT (“LMRA”)	II-48
SARBANES-OXLEY ACT (“SOX”).....	II-50
TITLE VII & SECTION 1981	II-52
TITLE IX AND THE MEANING OF SEX	II-78

III-A. CRIMINAL IMPLICATIONS OF TRADE SECRETS

Patrick S. Berckmiller – Cary
M. Todd Sullivan – Raleigh

SCOPE NOTE	III-A-1
------------------	---------

TRADE SECRET LAW, PRIOR TO 2016, WAS THE ONLY BODY OF INTELLECTUAL PROPERTY LAW THAT WAS PRIMARILY STATE LAW BASED	III-A-1
The Uniform Trade Secret Act	III-A-1
Procedural and Remedial Hurdles	III-A-1
Rapidly Evolving Capacity of Technology.....	III-A-1
State Criminal Law Proved Ineffective.....	III-A-1
THE ECONOMIC ESPIONAGE ACT OF 1996	III-A-1
EEA Criminalized.....	III-A-1
Prior to its Amendment.....	III-A-1
The Pre-DTSA EEA	III-A-2
Limited Number of Prosecutions under EEA	III-A-2
THE CRIMINAL AND CIVIL TRADE SECRET TRAVAILS OF SERGEY ALEYNIKOV	III-A-2
Aleynikov.....	III-A-2
March 2009	III-A-2
Aleynikov Arrested in Newark.....	III-A-2
Aleynikov Tried and Convicted of Criminal Violations.....	III-A-3
Second Circuit.....	III-A-3
July 31, 2012.....	III-A-3
February 12, 2015	III-A-3
April 6, 2015	III-A-4
July 27, 2015.....	III-A-4
TRADE SECRETS CLARIFICATION ACT OF 2012	III-A-5
The TSCA of 2012.....	III-A-5
Why?.....	III-A-5
FOREIGN AND ECONOMIC ESPIONAGE PENALTY ENHANCEMENT ACT OF 2012	III-A-5
The FEEPA of 2012.....	III-A-5
Why?.....	III-A-5
Notably, the FEEPA of 2012	III-A-5
DEFEND TRADE SECRETS ACT OF 2016-THE FEDERALIZATION OF FORMERLY EXCLUSIVE STATE-BY-STATE LAW	III-A-5
An Owner of a Trade Secret	III-A-5
Definition of Trade Secret	III-A-6
The DTSA.....	III-A-6
Noteworthy Features of DTSA.....	III-A-6
TRADE SECRET MISAPPROPRIATION PRACTICE POINTERS POST-ALEYNIKOV AND POST-DTSA.....	III-A-7
CONCLUSION.....	III-A-8
EXHIBIT A.....	III-A-9
EXHIBIT B.....	III-A-36
EXHIBIT C.....	III-A-38
EXHIBIT D.....	III-A-41

III-B. UNDERSTANDING LGBTQ EMPLOYMENT RIGHTS BEFORE,
DURING AND AFTER THE HB2 ERA

Charles E. Johnson and Susan M. Huber – Charlotte

INTRODUCTION	III-B-1
DEFINITIONS.....	III-B-2
STATE LAW PROHIBITIONS AGAINST LGBTQ DISCRIMINATION	III-B-3
TITLE VII’s “SEX” DISCRIMINATION.....	III-B-7
Sexual Orientation Discrimination Under Title VII	III-B-7
Title VII and Gender Identity Discrimination	III-B-12
Sexual Orientation and Gender Identity Discrimination Claims Under State Law	III-B-14
HB2	III-B-15
Legislative History.....	III-B-15
Legal Challenge to HB2.....	III-B-16
Impact on Employment Laws	III-B-17

IV. A PRIMER ON THE FALSE CLAIMS ACT

Gary L. Azorsky and Jeanne A. Markey – Philadelphia, PA

FEDERAL FALSE CLAIMS ACT	IV-1
WHAT DOES “QUI TAM” MEAN?.....	IV-2
CIRCUMSTANCES	IV-3
DAMAGES & PENALTIES	IV-5
FALSE CLAIMS	IV-6
FCA	IV-8
THE QUI TAM COMPLAINT & SEAL PERIOD	IV-10
GOVERNMENT INTERVENTION RATE.....	IV-11
REALTORS	IV-12
NORTH CAROLINA FALSE CLAIMS ACT.....	IV-18
WHISTLEBLOWER PROGRAM	IV-19
EMERGING ISSUES	IV-22

V. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL
PROCEDURE

William J. McMahon, IV – Winston-Salem
Joshua R. “Josh” Van Kampen – Charlotte

RULE 1. SCOPE AND PURPOSE	V-1
RULE 4. SUMMONS.....	V-3
RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT.....	V-5
RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY.....	V-10

RULE 30. DEPOSITIONS BY ORAL EXAMINATION	V-27
RULE 31. DEPOSITIONS BY WRITTEN QUESTIONS.....	V-29
RULE 33. INTERROGATORIES TO PARTIES	V-30
RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION AND TANGIBLE THINGS	V-31
RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS.....	V-35
RULE 5. DEFAULT; DEFAULT JUDGMENT	V-48
RULE 84. FORMS.....	V-49
APPENDIX OF FORMS	V-50

VI. TAKING ACTION: RECOGNIZING AND RESPONDING TO
DEPRESSION, SUICIDE AND SUBSTANCE ABUSE IN THE LEGAL
PROFESSION

C. Stuart Mauney – Greenville, SC

COVER PAGE.....	VI-1
INTRODUCTION	VI-2
DEFINING THE PROBLEM.....	VI-2
Lawyers.....	VI-2
Law Students.....	VI-4
THE PRACTICE OF LAW	VI-4
Perfectionism: The Perfect is the Enemy of the Good.....	VI-4
Pessimism	VI-6
Unrealistic Expectations	VI-6
DEPRESSION	VI-7
What is Depression?	VI-7
What are the Symptoms?	VI-7
What are the Types of Depression?	VI-8
What Causes Depression?.....	VI-9
Who Gets Depression?.....	VI-9
What is the Treatment of Depression?.....	VI-10
How to Help.....	VI-12
SUICIDE.....	VI-13
What are the Warning Signs of Suicide?	VI-14
What to do When you Fear Someone May Take his or her Life	VI-14
SUBSTANCE ABUSE	VI-16
Lawyers and Addiction	VI-16
How Do You Know?	VI-17
Signs of Substance Abuse.....	VI-18
How to Help.....	VI-18
HOW LAWYERS CAN AVOID THE VULNERABILITY TO DEPRESSION, SUICIDE AND SUBSTANCE ABUSE	VI-20
Face the Facts.....	VI-20
Establish Clear Priorities.....	VI-20
Develop and Practice Good Time Management	VI-21
Live Beneath Your Means	VI-21

Don't Let Technology Control Your Life.....	VI-21
Care about Character – And Conduct Yourself Accordingly	VI-22
“Just Say No” to Some Clients	VI-22
Stay Emotionally Healthy	VI-22
Embrace Law as a “High Calling”	VI-22
Be Generous With Your Time and Money	VI-23
Pace Yourself for a Marathon.....	VI-23

VII. WAGE AND HOUR UPDATE AND HOT TOPICS

Gilda A. “Jill” Hernandez – Cary

Richard A. Rainey – Charlotte

SCOPE NOTE	VII-1
RISE IN CASE FILINGS CONTINUES	VII-2
FLSA COVERAGE	VII-2
Employee or Independent Contractor	VII-3
THE NEW DOL REGULATIONS	VII-4
FLSA Exemptions.....	VII-4
The “White Collar” Exemption	VII-5
Backlash to New DOL Regulations.....	VII-8
COLLECTIVE ACTIONS UNDER THE FLSA	VII-9
First Stage – Conditional Class Certification.....	VII-10
Second Stage – Decertification.....	VII-10
New Development: Electronic Notice	VII-12
WAGE AND HOUR CLASS ACTIONS UNDER STATE LAW	VII-13
State Actions	VII-13
“Hybrid” Actions	VII-14
EMERGING ISSUE: CLASS ACTION WAIVERS, ARBITRATION	VII-15
NLRA Claims	VII-15
Who Determines Whether Class Arbitration is Authorized	VII-17
EMERGING ISSUE: PRIVATE SETTLEMENT OF FLSA ACTIONS	VII-18
Background.....	VII-18
New Developments.....	VII-18
RECENT DEVELOPMENT: JOINT EMPLOYMENT	VII-21
Traditional Approach.....	VII-21
Recent DOL AI.....	VII-22
EMERGING ISSUE: TIP POOLING.....	VII-24
Background.....	VII-24
Recent Developments	VII-25
State Law	VII-26
UPDATE: DONNING v. DOFFING.....	VII-27
UPDATE: PRELIMINARY AND POSTLIMINARY ACTIVITIES	VII-28

VIII-A. 2016 NLRB/TRADITIONAL LABOR UPDATE

John T. Merrell – Greenville, SC

DEPARTMENT OF LABOR’S NEW “PERSUADER” REGULATIONS,
WITH GREATLY EXPANDED REPORTING OBLIGATIONS FOR
EMPLOYERS AND LAWYERS, ARE IMPLEMENTED, THEN
ENJOINED VIII-A-1
THE NLRB ANNOUNCES IT WILL ACCEPT E-SIGNATURES ON
AUTHORIZATION CARDS VIII-A-2
WHOLE FOODS MARKET GRANTS EMPLOYEES THE RIGHT TO
ENGAGE IN PHOTOGRAPHY AND RECORDING IN THE
WORKPLACE..... VIII-A-3
NLRB UPENDS TRADITIONAL BACKPAY FORMULA,
PROVIDING POTENTIAL WINDFALL TO EMPLOYEES..... VIII-A-5
NLRB HOLDS THAT GRADUATE AND UNDERGRAD
TEACHING ASSISTANTS AT COLUMBIA UNIVERSITY ARE
“EMPLOYEES” VIII-A-6
NLRB ANNOUNCES IN *MILLER & ANDERSON* THAT JOINTLY
EMPLOYED EMPLOYEES CAN BE INCLUDED IN BARGAINING
UNIT WITH SOLELY-EMPLOYED EMPLOYEES WITHOUT
EMPLOYERS’ CONSENT VIII-A-8
IN *WILLIAM BEAUMONT* AND *VALLEY HEALTH SYSTEM*, THE
NLRB STRIKES DOWN HANDBOOK RULES AT HEALTHCARE
FACILITIES VIII-A-10
SEVENTH CIRCUIT STRIKES DOWN CLASS WAIVER IN
ARBITRATION AGREEMENT, CREATING CIRCUIT SPLIT VIII-A-11
NLRB FURTHER NARROWS DEFINITION OF “SUPERVISOR”
UNDER SECTION 2(11) VIII-A-12
NLRB WILL ANALYZE EMPLOYER’S MOTIVE FOR HIRING
REPLACEMENT WORKERS..... VIII-A-13

VIII-B. STRATEGIES FOR A SUCCESSFUL EMPLOYMENT LAW
MEDIATION....STEPS TO CONSIDER ALONG THE WAY

Patricia L. Holland – Raleigh

INTRODUCTION VIII-B-1
What are the Parties to the Dispute Thinking About as the Date
of Mediation Approaches? VIII-B-1
What Traits Should you Look for in a Mediator that will Increase
the Likelihood of Success? VIII-B-2
Could a Co-Mediation be Useful? VIII-B-4
STRATEGIES FOR EACH STAGE OF THE MEDIATION OF AN
EMPLOYMENT LAW DISPUTE VIII-B-4
What Should the Advocate do Prior to the Date of the Actual
Mediation? VIII-B-4
How Should the Opening Joint Session be Handled?..... VIII-B-8

How Should the Private Caucuses be Handled?	VIII-B-9
What Sort of Creative Solutions Could be Considered by the Parties?	VIII-B-11
What Can an Advocate Do if it Appears that the Mediation is Close to Reaching an Impasse?.....	VIII-B-15
What Considerations Should be Given to Preparing a Medicated Settlement Agreement or a “Terms List?”	VIII-B-16
CONCLUSION.....	VIII-B-18

IX. OUTLINE OF EMPLOYMENT LAW DEVELOPMENTS IN 2015-2016

Judge Max O. Cogburn, Jr. – Asheville

UNITED STATES DEPARTMENT OF LABOR: <i>OVERTIME RULES</i>	IX-1
The Changes.....	IX-1
The Likely Impact in Federal Court.....	IX-1
EEOC/TITLE VII: <i>PREGNANT WORKERS FAIRNESS ACT (HOUSE BILL NO. 2654)</i>	IX-1
The Potential Change.....	IX-1
The Likely Impact in Federal Court.....	IX-2
FEDERAL EMPLOYMENT: <i>FEDERAL FAIR CHANCE ACT (SENATE BILL 2021)</i>	IX-2
The Potential Change.....	IX-2
The Impact Potential on the Courts	IX-2
SIGNIFICANT 4 TH CIRCUIT CASE LAW: <i>SIGNIFICANT EMPLOYMENT LAW DECISIONS</i>	IX-3
“But For” Cause in ADA Cases	IX-3
Even Isolated Racial Slurs Can Lead to Liability.....	IX-4
Gender Based Differences in Physical Requirements OK.....	IX-4

X. EEOC UPDATE

Victoria A. Lipnic – Washington, DC

EEOC STRATEGIC ENFORCEMENT PLAN 2017-2021	X-1
WORKPLACE HARASSMENT.....	X-1
LGBT ISSUES.....	X-1
EQUAL PAY	X-4
RELEASES AND WAIVERS	X-4
RETALIATION ISSUES.....	X-5
ADA ISSUES.....	X-5
EMPLOYER WELLNESS PROGRAMS	X-6
“FAIR PAY AND SAFE WORKPLACES”	X-6
TITLE VII-RACE LITIGATION	X-6
STRATEGIC ENFORCEMENT PLAN – FISCAL YEARS 2017-2021	X-7
SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE.....	X-31

XI. NATIONAL LABOR RELATIONS ACT (NLRA) ISSUES FOR THE
NON-UNION LAWYER

Lisa R. Shearin – Winston-Salem
Paul E. Smith – Chapel Hill
H. Ellis Fisher – Greenville, SC

SCOPE NOTE	XI-1
BRIEF OVERVIEW OF THE AGENCY	XI-1
Independent Federal Agency Created in 1935.....	XI-1
Two Primary Functions of the NLRB.....	XI-1
Agency Structure	XI-1
Process/Remedy	XI-2
RECENT PROTECTED CONCERTED ACTIVITY CASES.....	XI-3
Concerted Activity General Concept	XI-3
Definition of Concerted Activity	XI-4
What is Protected Activity?	XI-5
Causation.....	XI-7
DISCIPLINE AND FIRINGS IN THE AGE OF SOCIAL MEDIA SUCH AS FACEBOOK.....	XI-8
Differences Between Facebook Posting Critical of Work vs. Face-to Face Confrontation with a Supervisor about a Work Issue	XI-8
What is Concerted in Online Activity Such as a Facebook Account?...	XI-8
Is a Social Media Post Protected?.....	XI-9
Examples.....	XI-9
EMPLOYER HANDBOOK RULES: TRAPS FOR THE UNWARY	XI-12
GC Memorandum 15-04.....	XI-12
Greater Focus on Handbook Rules	XI-12
ADDITIONAL RESOURCES.....	XI-16

XII-A. NORTH CAROLINA UPDATE

Laura J. Wetsch – Raleigh

TABLE OF CONTENTS.....	XII-A-1
REGULATORY CHANGES.....	XII-A-3
Wage and Hour – Overtime	XII-A-3
Unemployment.....	XII-A-5
STATUTORY CHANGES	XII-A-5
Unemployment.....	XII-A-5
The “Ag-Gag” Law.....	XII-A-6
<i>Morris v. Scenera Research</i> – N.C. Gen. Stat. § 66057.2	XII-A-6
HB2.....	XII-A-7
CASE LAW	XII-A-25
Affirmative Defenses	XII-A-25
Arbitration.....	XII-A-27
At-Will Employment	XII-A-29

Civil Rights	XII-A-30
Contract Breach	XII-A-32
Discovery	XII-A-34
Immunity.....	XII-A-34
Licensing.....	XII-A-37
Noncompetes.....	XII-A-38
Public Employees.....	XII-A-42
REDA.....	XII-A-56
Settlements.....	XII-A-56
Teachers	XII-A-59
Statute of Limitations.....	XII-A-60
Torts	XII-A-60
Trade Secrets.....	XII-A-69
Unemployment.....	XII-A-71
Wage and Hour	XII-A-72
Whistleblower.....	XII-A-74
Workers Comp.....	XII-A-76
Wrongful Discharge.....	XII-A-77

XII-B. SOUTH CAROLINA LEGAL UPDATE

C. Frederick “Fred” Manning, II – Columbia, SC

EVIDENTIARY MATTERS.....	XII-B-1
Sumter v. Jenny Craig, Inc.....	XII-B-1
DEFAMATION	XII-B-3
Harris v. Tietax International Ltd.	XII-B-3
WRONGFUL TERMINATION	XII-B-6
Bouknight v. KW Associates, LLC, et al.....	XII-B-6
Desmarais v. Scientific Research Corp.....	XII-B-7
RULES OF CIVIL PROCEDURE	XII-B-8
Hueble v. South Carolina Dept. of Natural Resources and Eric Vaughn.....	XII-B-8
CIVIL CONSPIRACY/BREACH OF CONTRACT.....	XII-B-11
Allegro, Inc., v. Synergetic, Inc., Corbin, and Yarborough.....	XII-B-11
NON-COMPETITION AGREEMENTS	XII-B-13
Palmetto Mortuary Transport, Inc. v. Knight Systems, Inc., et al.....	XII-B-13
UNPAID WAGES	XII-B-15
Grimesly v. SLED.....	XII-B-15