



HR CORNER

FEES & BURGESS, P.C.



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U.S. Senate Introduces Employment Non-Discrimination Act of 2009

Fees & Burgess, P.C., Emphasizes:

Several senators introduced the Employment Non-Discrimination Act of 2009 (ENDA) on August 5, 2009, in the U.S. Senate. If it becomes law, the bill would prohibit discrimination based on sexual orientation and gender identity. ENDA's provisions are similar to the prohibitions against discrimination based on race, sex, national origin, and religion as stated in Title VII of the Civil Rights Act of 1964 (Title VII). ENDA includes the same definition of "employer" as is contained in Title VII, meaning that ENDA would apply to employers with at least 15 employees.

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Specifically, the bill protects sexual orientation, which is defined as homosexuality, heterosexuality, and bisexuality. Unlike previous versions of ENDA introduced into the U.S. House of Representatives, this bill includes additional protection against discrimination based on gender identity, which is defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." Furthermore, ENDA prohibits discrimination as to an employee's actual *or perceived* sexual orientation and/or gender identity. ENDA also includes language prohibiting discrimination for an employee's mere association with another employee that is protected under ENDA. Finally, as with all Title VII protections, ENDA prohibits retaliation against employees who exercise their rights under it.

Employers should monitor ENDA's progress through Congress and consider drafting new policies and procedures in preparation for ENDA. While there is no guarantee that this will become law, it is likely that some form of bill protecting sexual orientation will become law in the near future.





Alabama Court Upholds Employer's Justifications for Employee Termination

On July 31, 2009, the Alabama Court of Civil Appeals overturned a judgment in favor of a discharged employee, stating that the employer offered a legitimate reason for the employee's discharge. In Black Creek, Inc., v. Wood, the employer terminated Wood after he uttered foul language towards a manager. However, the situation was complicated because Wood had previously taken several weeks of leave due to a workers' compensation injury.

In February of 2000, Wood tore a muscle in his left arm, and had surgery to correct the issue in May of 2000. Wood's doctor did not release him to return to work until June of 2000. Wood had continuing physical therapy appointments related to his arm injury, which required him to miss work. Due to a policy requiring medical appointments at the beginning or end of an employee's scheduled work shifts, Wood was disciplined for attending appointments in the middle of the day. Wood continued to struggle with arm pain, but he was unable to discuss the situation with his manager. As a result, he made inappropriate statements towards this manager, including the use of foul language. The manager fired Wood, in accordance with the company's policy prohibiting foul language. Wood filed a retaliatory discharge claim against the company, alleging that he was fired because of his workers' compensation claim.

In analyzing retaliatory discharge claims, if the employer establishes a legitimate reason for the employee's termination, the legal burden shifts to the employee to prove that the employer's justification is pretextual, meaning that the employer's stated justification merely hides the true, discriminatory reason for the termination. In Black Creek, the evidence was undisputed that Wood used foul language towards a supervisor. Because the company handbook expressly permitted termination as discipline for such an offense, the court determined that the employer presented a legitimate justification for his termination. In response, the employee did not present any evidence proving that this stated justification was pretextual, or that the true reason for his termination related to his workers' compensation claims. As such, the Court of Civil Appeals overturned the trial's court's judgment in favor of the employee.

This case presents a good example of well-maintained policies and procedures. Because the employer maintained and properly enforced its written policy, it successfully proved that it did not discriminate against its employee in deciding to terminate him. Despite the close proximity in time to the employee's workers' compensation leave, the employer was able to show that its true and valid reason for termination related to policy violations. Without such a written policy, a jury could have implied that Wood's termination was related to his workers' compensation absences since there would be no written policy stating otherwise.

The case is Black Creek, Inc. v. Wood, 2009 WL 2343162 (Ala. Civ. App. 2009).



Fees & Burgess, P.C.—Calendar of Events

Fees & Burgess, P.C., is proud to present, or participate in the presentation of, the following upcoming seminars/webinars:

August 24, 2009 — Huntsville, Alabama

Small Business Employers Legal Update Workshop, co-presented with Jamie Jones, CEO of Jamie Jones Consulting. We will discuss:

- SCA revisited - Obama Executive Orders for government contractors and small business
- Genetic Information Non-Discrimination Act
- Lilly Ledbetter Fair Pay Act of 2009
- Pending and Anticipated Legislation
- Forewarn Act, Employment Non-Discrimination Act, Healthy Families, Employee Free Choice Act, and proposed "compromise"
- Summary of Federal Employment Laws and Number of Employee Thresholds
- E-Verify
- How does a small business survive and afford compliance? Operational How-To's

This workshop is a must for small businesses seeking to understand the myriad of employment laws, both existing and anticipated, and how the regulations impact the operations of the business. HRCI credit pending. To register, click [here](#).

September 9, 2009 — Birmingham, Alabama

Wage & Hour Master Class, presented for, and sponsored by, M. Lee Smith Publishing, Inc. Master payroll and overtime compliance in just one day and learn how to avoid a DOL audit by attending this all-new program created just for Alabama employers and HR management. We will discuss:

- Who is, and isn't, covered by the 5 main exemptions to the Fair Labor Standards Act
- Which workplace activities are and are not compensable, in light of recent court decisions
- Techniques that work for avoiding overtime – and those that backfire
- How to handle bonuses, commissions, and tips
- Why FLSA retaliation lawsuits are exploding, and what you can do to steer clear

And *much more...*

Our clients receive a 20% discount on the class registration fee; contact Sylvia Taylor at staylor@feesburgess.com for more information.



Fees & Burgess, P.C.—Calendar of Events

September 16, 2009 — Webinar; 12:00 - 1:30 P.M., CST

[Delivery Terms and Allocation of Risk in Commercial Contracts under Incoterms and the Uniform Commercial Code](#)

This webinar will give participants an understanding of the meaning of various delivery terms under both Incoterms 2000 and the Uniform Commercial Code (UCC), including changes to the UCC, eliminating previously used delivery terms, and the trend toward using delivery terms under Incoterms 2000 under domestic agreements. This webinar is pending approval for 1.5 ISM and NCMA credit hours. To register, click [here](#).

September 24-25, 2009 — Chicago, Illinois

[IPC EMS Program Manager Training and Certification II](#)

Presenting Contract Management and Business Arrangements: Risk Allocation in Critical Areas of the Contract, as part of EMS Training II: Part C.

October 7, 2009 — Webinar; 12:00 - 1:00 P.M., CST

[Contracting on Your Own Terms / Reducing Risk in Purchasing Terms and Conditions](#)

This one-hour webinar will cover Do's and Don'ts of:

- Systemic Purchase Terms Coverage and Communication
- "Battle of the forms" issues
- Important coverage areas
- Getting your terms in a real-time contracting environment
- "Flow through" of purchasing terms from vendors through resellers to customers
- Issues with purchasing through distribution
- Material liability, warranty, and indemnity issues
- International Procurement
- Key terms and conditions
- International contracting tips

This webinar is pending approval for 1.0 ISM and NCMA credit hours. To register, click [here](#).

October 21-22, 2009 — Scottsdale, Arizona

[IPC Electronics Industry Executive Summit](#)

This presentation will address contracts from an EMS-supplier standpoint. A few key topics included: contracts with distribution and with direct purchases including fabricated items (metal, plastics, pcbs), as well as off-shore (Asian) procurement contracts.

If you would like more information on these seminars, please go to www.feesburgess.com



SPEAKERS

Fees & Burgess, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, contact Sylvia Taylor at staylor@feesburgess.com.

NEWSLETTERS

Fees & Burgess, P.C., also publishes *F&B Quarterly Bytes*, focusing on multiple practice areas; and *F&B SCM Memo*, focusing on the supply chain management industry. To receive any of these e-newsletters, please e-mail Sylvia Taylor at staylor@feesburgess.com with your contact information.

To remove your name from our mailing list, please e-mail staylor@feesburgess.com.

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“No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”