2013
Labor and Employment Law Seminar

May 2, 2013

Seaport Boston Hotel
Boston, MA

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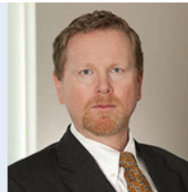
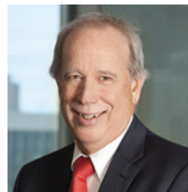
PROGRAM AGENDA

Labor and Employment Law Seminar

Boston Seaport Hotel - May 2, 2013

Time	Session		Speaker
8:30 a.m.	Welcome and Introduction		**James W. Bucking** 617 832 1182 jbucking@foleyhoag.com
8:40 a.m.	Latest Developments in Labor and Employment Law		**Jonathan A. Keselenko** 617 832 1208 jkeselenko@foleyhoag.com
9:15 a.m.	Immediate Requirements for Employers Under the New Federal Healthcare Law		**Robert A. Fisher** 617 832 1235 rfisher@foleyhoag.com
9:40 a.m.	NLRB Update - Continued Activist Agenda		**Scott C. Merrill** 617 832 1174 smerrill@foleyhoag.com
10:05 a.m.	*Break*		
10:25 a.m.	New Developments with Respect to the Family and Medical Leave Act (FMLA)		**Lyndsey M. Kruzer** 617 832 1248 lkruzer@foleyhoag.com
10:45 a.m.	Immigration Update		**Kevin J. Fitzgerald** 617 832 1122 kfitzgerald@foleyhoag.com
11:10 a.m.	Dodd-Frank for Employers		**Michael L. Rosen** 617 832 1231 mrosen@foleyhoag.com
11:30 a.m.	Conclusion		

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Latest Developments in Labor and Employment Law
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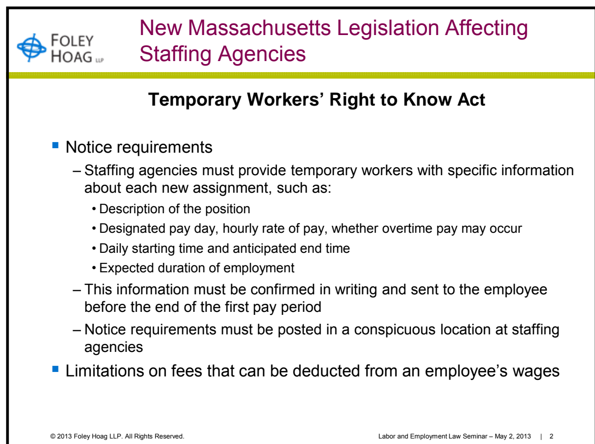
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New Massachusetts Legislation Affecting Staffing Agencies
Temporary Workers' Right to Know Act
Notice requirements
– Staffing agencies must provide temporary workers with specific information about each new assignment, such as:
• Description of the position
• Designated pay day, hourly rate of pay, whether overtime pay may occur
• Daily starting time and anticipated end time
• Expected duration of employment
– This information must be confirmed in writing and sent to the employee before the end of the first pay period
– Notice requirements must be posted in a conspicuous location at staffing agencies
Limitations on fees that can be deducted from an employee's wages
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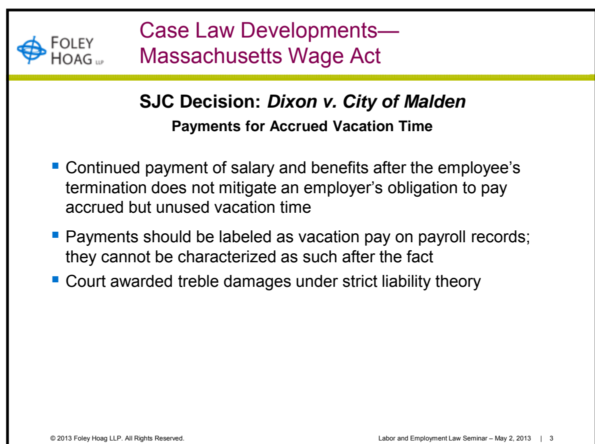
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Case Law Developments—Massachusetts Wage Act
SJC Decision: Dixon v. City of Malden
Payments for Accrued Vacation Time
Continued payment of salary and benefits after the employee's termination does not mitigate an employer's obligation to pay accrued but unused vacation time
Payments should be labeled as vacation pay on payroll records; they cannot be characterized as such after the fact
Court awarded treble damages under strict liability theory
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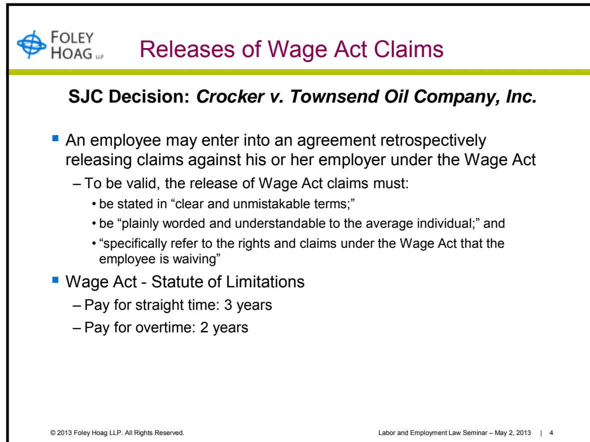
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Releases of Wage Act Claims
SJC Decision: Crocker v. Townsend Oil Company, Inc.
An employee may enter into an agreement retrospectively releasing claims against his or her employer under the Wage Act
– To be valid, the release of Wage Act claims must:
• be stated in "clear and unmistakable terms;"
• be "plainly worded and understandable to the average individual;" and
• "specifically refer to the rights and claims under the Wage Act that the employee is waiving"
Wage Act - Statute of Limitations
– Pay for straight time: 3 years
– Pay for overtime: 2 years
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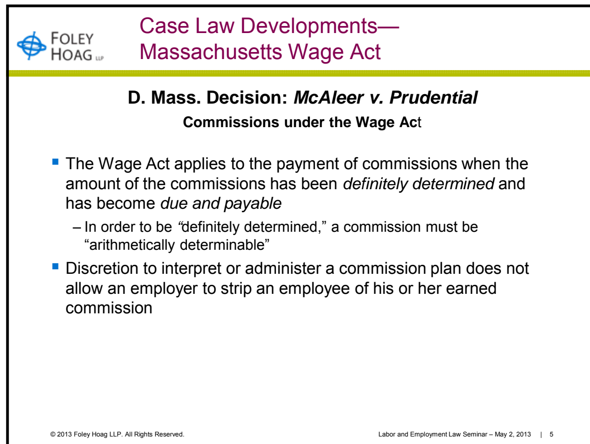
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Case Law Developments—
Massachusetts Wage Act
D. Mass. Decision: McAleer v. Prudential
Commissions under the Wage Act
The Wage Act applies to the payment of commissions when the amount of the commissions has been definitely determined and has become due and payable
– In order to be "definitely determined," a commission must be "arithmetically determinable"
Discretion to interpret or administer a commission plan does not allow an employer to strip an employee of his or her earned commission
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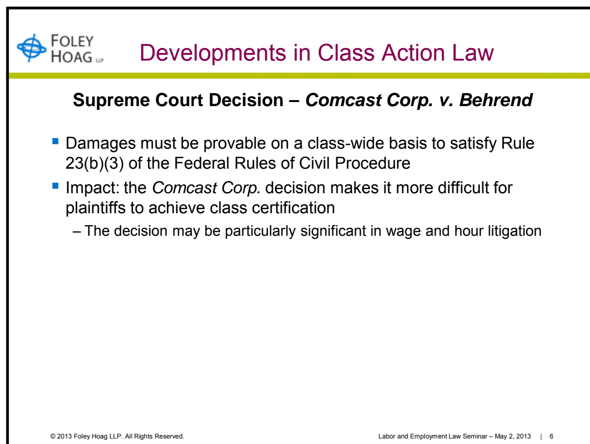
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Developments in Class Action Law
Supreme Court Decision – Comcast Corp. v. Behrend
Damages must be provable on a class-wide basis to satisfy Rule 23(b)(3) of the Federal Rules of Civil Procedure
Impact: the Comcast Corp. decision makes it more difficult for plaintiffs to achieve class certification
– The decision may be particularly significant in wage and hour litigation
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Pending Supreme Court Decision: *Vance v. Ball State University*

Title VII of the 1964 Civil Rights Act:

Supervisor Vicarious Liability Rule

- Gray area: is the alleged harasser the plaintiff's supervisor or co-worker?
- *Vance* decision will resolve circuit split over the definition of "supervisor:"

Authority to direct and oversee the plaintiff's daily work VS. Authority to hire, fire, demote, promote, transfer, or discipline the plaintiff

- Impact of the ruling
  - Employers' exposure to Title VII claims
  - How companies organize their workforces
  - How companies conduct anti-harassment training

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Pending Supreme Court Decision: *University of Texas v. Nassar*

Title VII of the 1964 Civil Rights Act

Proving Retaliation:

"Mixed Motive" Test vs. "But-for" Causation

- Interpretation of Section 2(m) of the Civil Rights Act of 1991:
  "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a <u>motivating factor</u> for any employment practice, even though other factors also motivated the practice." (*Emphasis Added)*
- Does the 1991 Amendment's "motivating factor" test apply only to substantive discrimination claims and not to retaliation claims?
  - If the answer is "yes," the plaintiff needs to prove that retaliation was a "motivating factor" in the employment decision
  - If the answer is "no," the plaintiff needs to prove that retaliation was the "but-for" cause of the adverse employment decision

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Obama Administration Initiatives

Obama's 2014 Budget Proposal

- Proposal calls for increased budgets for the EEOC, DOL, and OSHA
- Signals continued aggressive enforcement concerning violations involving biased employment practices, employee misclassification, and whistleblower retaliation

Impact of Sequestration

- Government budget cuts under sequestration could result in employee furloughs for these government agencies

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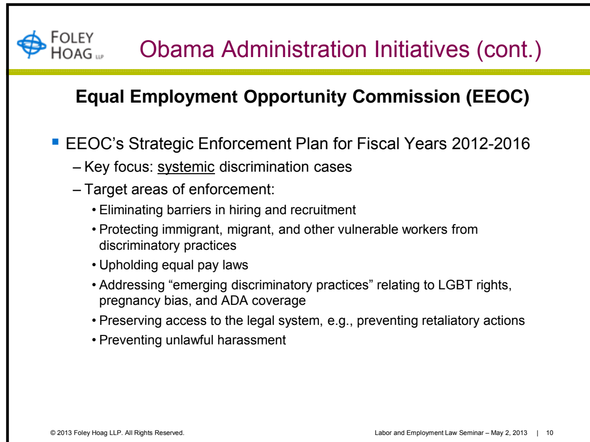
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Obama Administration Initiatives (cont.)
Equal Employment Opportunity Commission (EEOC)
EEOC's Strategic Enforcement Plan for Fiscal Years 2012-2016
– Key focus: systemic discrimination cases
– Target areas of enforcement:
• Eliminating barriers in hiring and recruitment
• Protecting immigrant, migrant, and other vulnerable workers from discriminatory practices
• Upholding equal pay laws
• Addressing "emerging discriminatory practices" relating to LGBT rights, pregnancy bias, and ADA coverage
• Preserving access to the legal system, e.g., preventing retaliatory actions
• Preventing unlawful harassment
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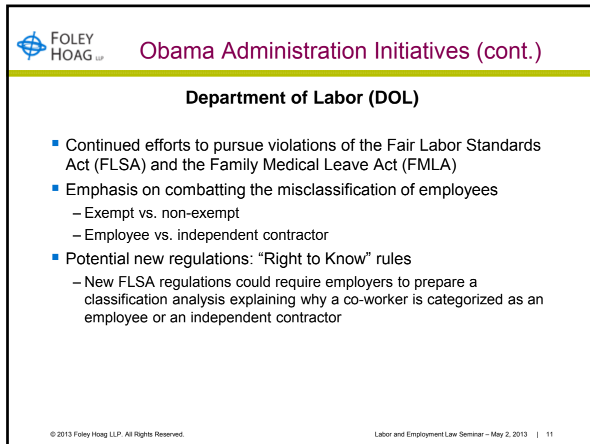
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Obama Administration Initiatives (cont.)
Department of Labor (DOL)
Continued efforts to pursue violations of the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA)
Emphasis on combatting the misclassification of employees
– Exempt vs. non-exempt
– Employee vs. independent contractor
Potential new regulations: "Right to Know" rules
– New FLSA regulations could require employers to prepare a classification analysis explaining why a co-worker is categorized as an employee or an independent contractor
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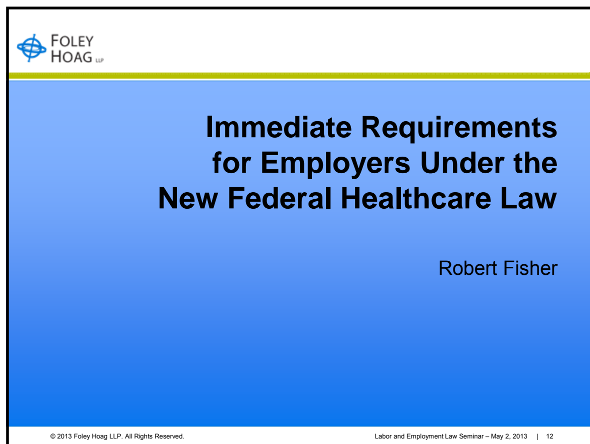
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Immediate Requirements for Employers Under the New Federal Healthcare Law
Robert Fisher
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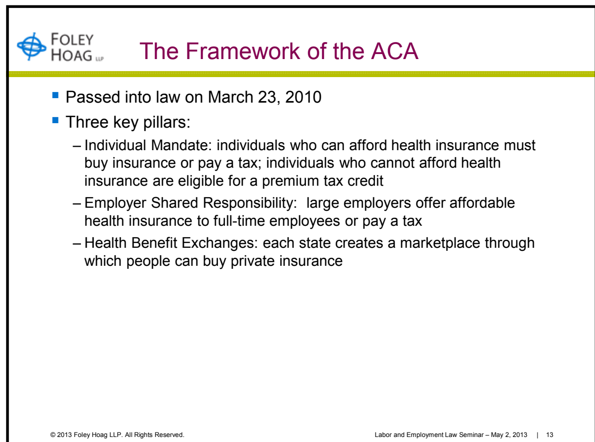
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The Framework of the ACA
Passed into law on March 23, 2010
Three key pillars:
– Individual Mandate: individuals who can afford health insurance must buy insurance or pay a tax; individuals who cannot afford health insurance are eligible for a premium tax credit
– Employer Shared Responsibility: large employers offer affordable health insurance to full-time employees or pay a tax
– Health Benefit Exchanges: each state creates a marketplace through which people can buy private insurance
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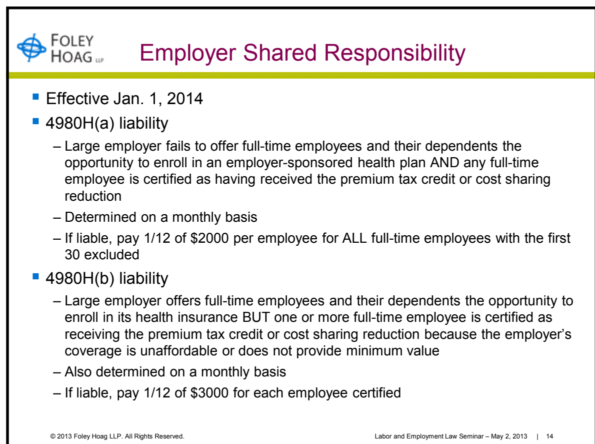
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Employer Shared Responsibility
Effective Jan. 1, 2014
4980H(a) liability
– Large employer fails to offer full-time employees and their dependents the opportunity to enroll in an employer-sponsored health plan AND any full-time employee is certified as having received the premium tax credit or cost sharing reduction
– Determined on a monthly basis
– If liable, pay 1/12 of $2000 per employee for ALL full-time employees with the first 30 excluded
4980H(b) liability
– Large employer offers full-time employees and their dependents the opportunity to enroll in its health insurance BUT one or more full-time employee is certified as receiving the premium tax credit or cost sharing reduction because the employer's coverage is unaffordable or does not provide minimum value
– Also determined on a monthly basis
– If liable, pay 1/12 of $3000 for each employee certified
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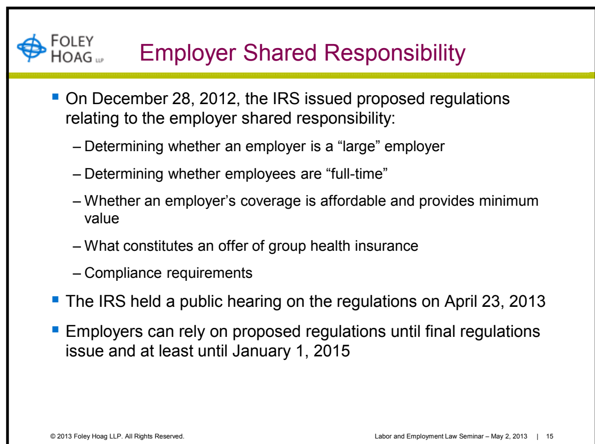
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Employer Shared Responsibility
On December 28, 2012, the IRS issued proposed regulations relating to the employer shared responsibility:
– Determining whether an employer is a "large" employer
– Determining whether employees are "full-time"
– Whether an employer's coverage is affordable and provides minimum value
– What constitutes an offer of group health insurance
– Compliance requirements
The IRS held a public hearing on the regulations on April 23, 2013
Employers can rely on proposed regulations until final regulations issue and at least until January 1, 2015
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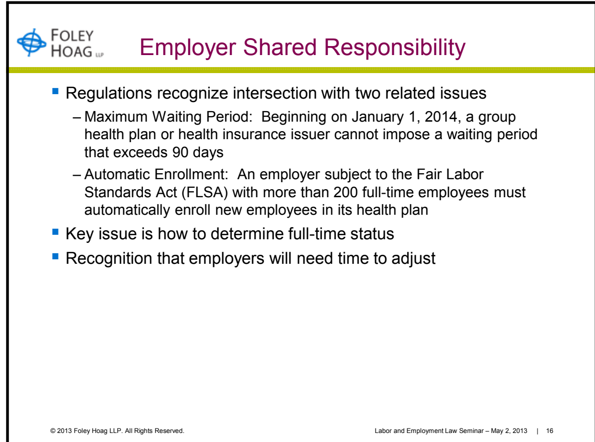
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Employer Shared Responsibility
Regulations recognize intersection with two related issues
– Maximum Waiting Period: Beginning on January 1, 2014, a group health plan or health insurance issuer cannot impose a waiting period that exceeds 90 days
– Automatic Enrollment: An employer subject to the Fair Labor Standards Act (FLSA) with more than 200 full-time employees must automatically enroll new employees in its health plan
Key issue is how to determine full-time status
Recognition that employers will need time to adjust
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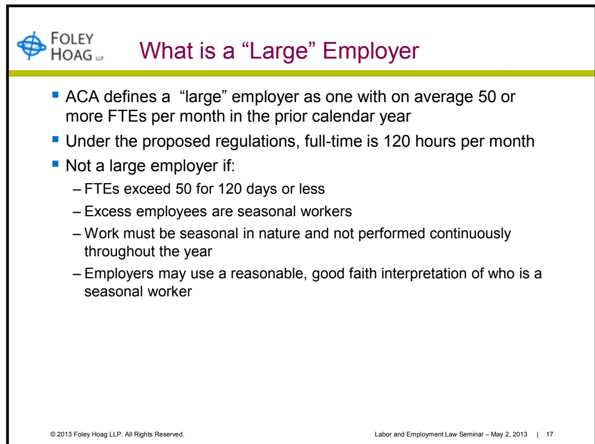
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What is a “Large” Employer
ACA defines a “large” employer as one with on average 50 or more FTEs per month in the prior calendar year
Under the proposed regulations, full-time is 120 hours per month
Not a large employer if:
– FTEs exceed 50 for 120 days or less
– Excess employees are seasonal workers
– Work must be seasonal in nature and not performed continuously throughout the year
– Employers may use a reasonable, good faith interpretation of who is a seasonal worker
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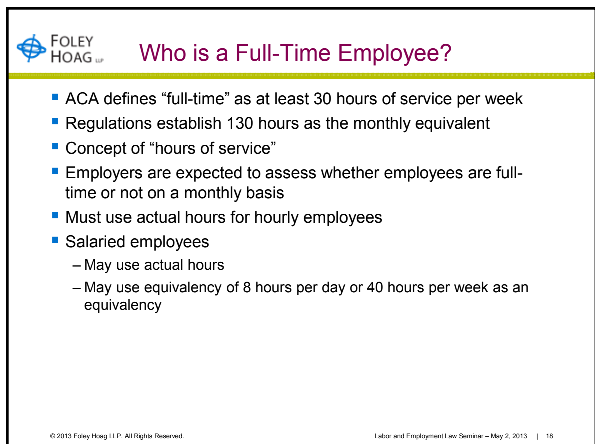
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Who is a Full-Time Employee?
ACA defines “full-time” as at least 30 hours of service per week
Regulations establish 130 hours as the monthly equivalent
Concept of “hours of service”
Employers are expected to assess whether employees are full-time or not on a monthly basis
Must use actual hours for hourly employees
Salaried employees
– May use actual hours
– May use equivalency of 8 hours per day or 40 hours per week as an equivalency
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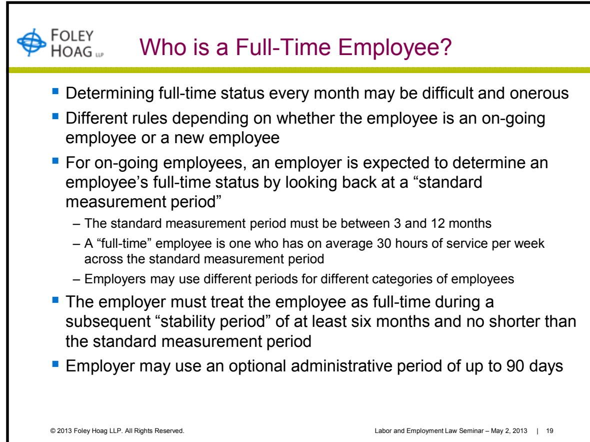
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Who is a Full-Time Employee?
Determining full-time status every month may be difficult and onerous
Different rules depending on whether the employee is an on-going employee or a new employee
For on-going employees, an employer is expected to determine an employee's full-time status by looking back at a "standard measurement period"
– The standard measurement period must be between 3 and 12 months
– A "full-time" employee is one who has on average 30 hours of service per week across the standard measurement period
– Employers may use different periods for different categories of employees
The employer must treat the employee as full-time during a subsequent "stability period" of at least six months and no shorter than the standard measurement period
Employer may use an optional administrative period of up to 90 days
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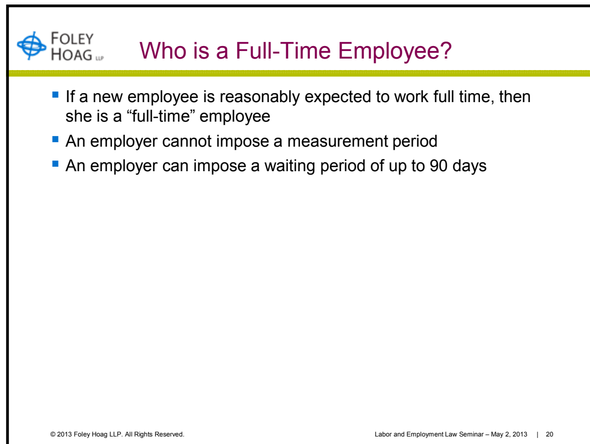
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Who is a Full-Time Employee?
If a new employee is reasonably expected to work full time, then she is a "full-time" employee
An employer cannot impose a measurement period
An employer can impose a waiting period of up to 90 days
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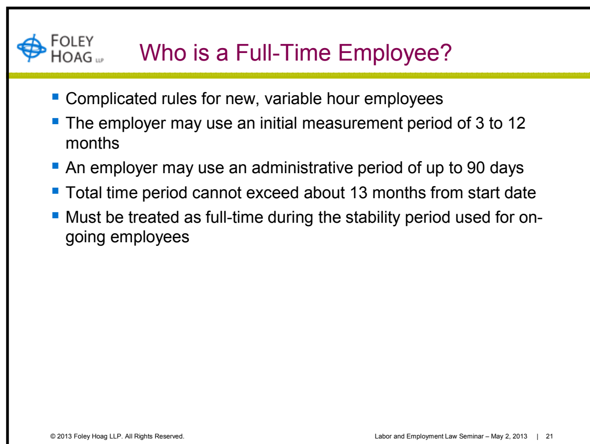
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Who is a Full-Time Employee?
Complicated rules for new, variable hour employees
The employer may use an initial measurement period of 3 to 12 months
An employer may use an administrative period of up to 90 days
Total time period cannot exceed about 13 months from start date
Must be treated as full-time during the stability period used for on-going employees
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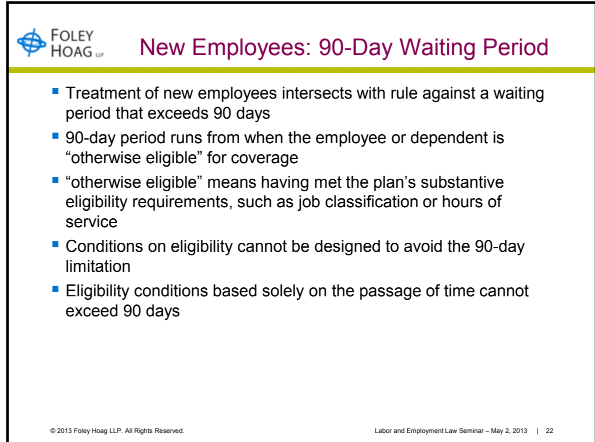
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New Employees: 90-Day Waiting Period
Treatment of new employees intersects with rule against a waiting period that exceeds 90 days
90-day period runs from when the employee or dependent is "otherwise eligible" for coverage
"otherwise eligible" means having met the plan's substantive eligibility requirements, such as job classification or hours of service
Conditions on eligibility cannot be designed to avoid the 90-day limitation
Eligibility conditions based solely on the passage of time cannot exceed 90 days
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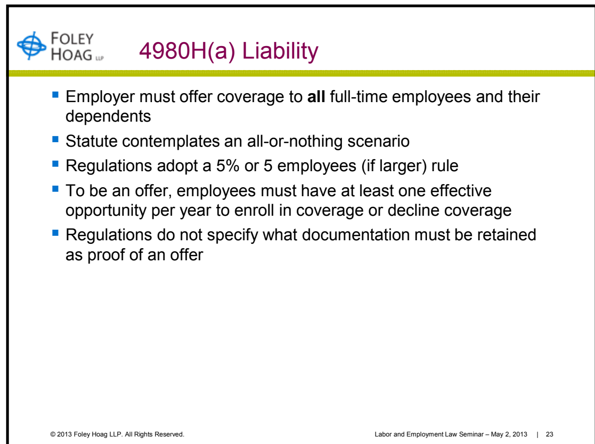
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4980H(a) Liability
Employer must offer coverage to all full-time employees and their dependents
Statute contemplates an all-or-nothing scenario
Regulations adopt a 5% or 5 employees (if larger) rule
To be an offer, employees must have at least one effective opportunity per year to enroll in coverage or decline coverage
Regulations do not specify what documentation must be retained as proof of an offer
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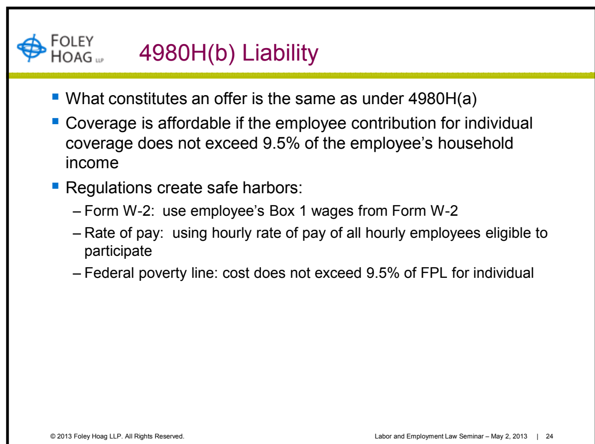
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4980H(b) Liability
What constitutes an offer is the same as under 4980H(a)
Coverage is affordable if the employee contribution for individual coverage does not exceed 9.5% of the employee's household income
Regulations create safe harbors:
– Form W-2: use employee's Box 1 wages from Form W-2
– Rate of pay: using hourly rate of pay of all hourly employees eligible to participate
– Federal poverty line: cost does not exceed 9.5% of FPL for individual
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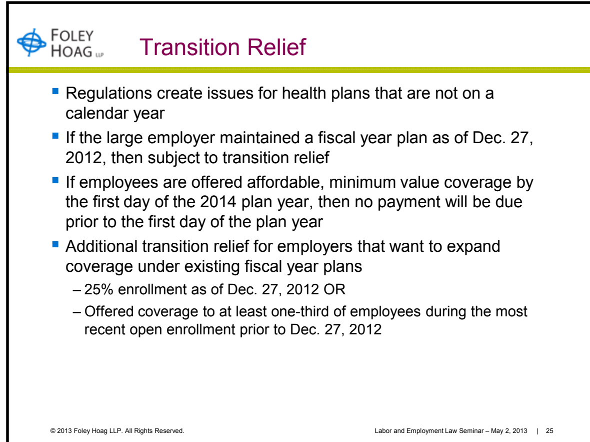
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Transition Relief
Regulations create issues for health plans that are not on a calendar year
If the large employer maintained a fiscal year plan as of Dec. 27, 2012, then subject to transition relief
If employees are offered affordable, minimum value coverage by the first day of the 2014 plan year, then no payment will be due prior to the first day of the plan year
Additional transition relief for employers that want to expand coverage under existing fiscal year plans
– 25% enrollment as of Dec. 27, 2012 OR
– Offered coverage to at least one-third of employees during the most recent open enrollment prior to Dec. 27, 2012
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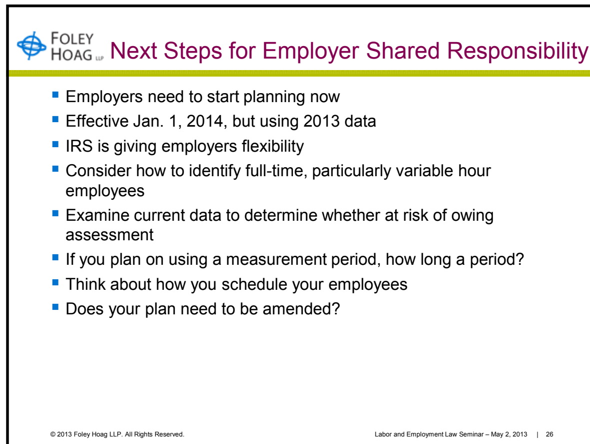
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Next Steps for Employer Shared Responsibility
Employers need to start planning now
Effective Jan. 1, 2014, but using 2013 data
IRS is giving employers flexibility
Consider how to identify full-time, particularly variable hour employees
Examine current data to determine whether at risk of owing assessment
If you plan on using a measurement period, how long a period?
Think about how you schedule your employees
Does your plan need to be amended?
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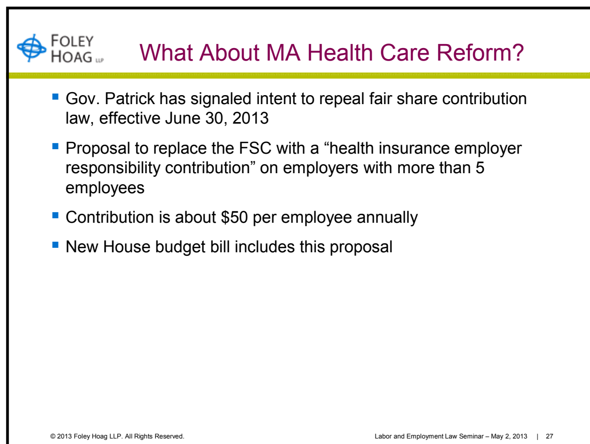
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What About MA Health Care Reform?
Gov. Patrick has signaled intent to repeal fair share contribution law, effective June 30, 2013
Proposal to replace the FSC with a “health insurance employer responsibility contribution” on employers with more than 5 employees
Contribution is about $50 per employee annually
New House budget bill includes this proposal
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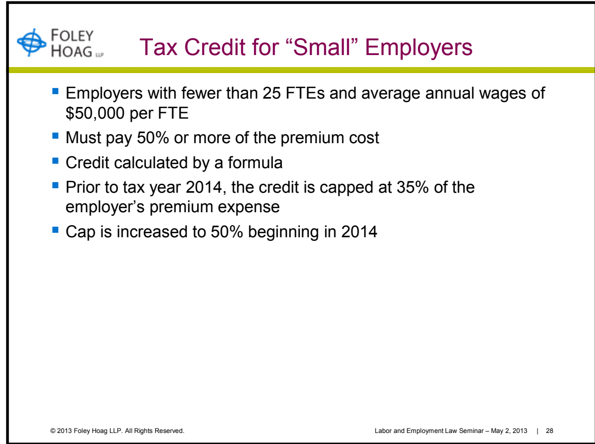
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Tax Credit for "Small" Employers
Employers with fewer than 25 FTEs and average annual wages of $50,000 per FTE
Must pay 50% or more of the premium cost
Credit calculated by a formula
Prior to tax year 2014, the credit is capped at 35% of the employer's premium expense
Cap is increased to 50% beginning in 2014
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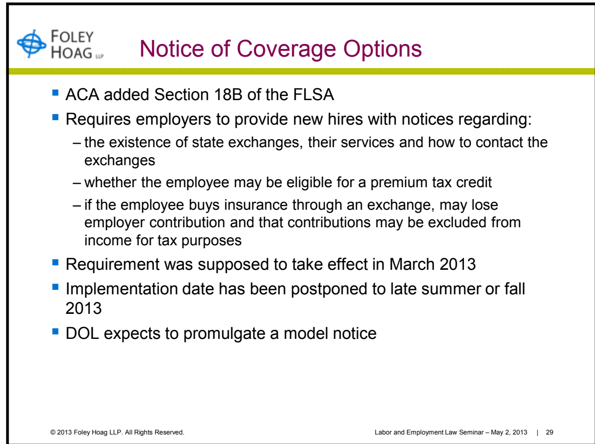
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Notice of Coverage Options
ACA added Section 18B of the FLSA
Requires employers to provide new hires with notices regarding:
– the existence of state exchanges, their services and how to contact the exchanges
– whether the employee may be eligible for a premium tax credit
– if the employee buys insurance through an exchange, may lose employer contribution and that contributions may be excluded from income for tax purposes
Requirement was supposed to take effect in March 2013
Implementation date has been postponed to late summer or fall 2013
DOL expects to promulgate a model notice
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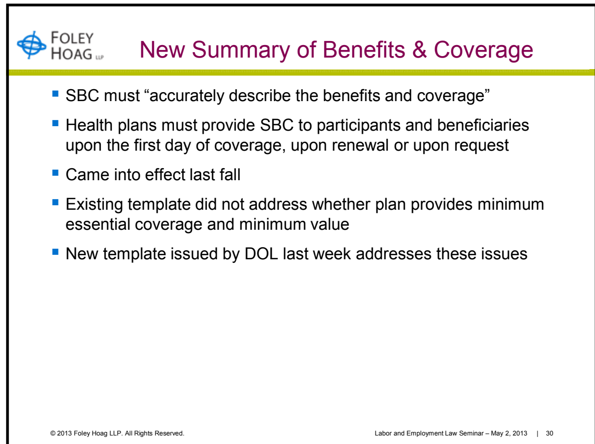
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New Summary of Benefits & Coverage
SBC must "accurately describe the benefits and coverage"
Health plans must provide SBC to participants and beneficiaries upon the first day of coverage, upon renewal or upon request
Came into effect last fall
Existing template did not address whether plan provides minimum essential coverage and minimum value
New template issued by DOL last week addresses these issues
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NLRB Update— Continued Activist Agenda

Scott C. Merrill

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Introduction

- The National Labor Relations Board (NLRB) is a federal government agency which, among other powers, enforces the provisions of the National Labor Relations Act (NLRA) by conducting union elections and investigating unfair labor practice charges
- The NLRB is comprised of five members and one general counsel, all of whom are appointed by the President of the United States
- The NLRA applies to both union and non-union workplaces
- Although most of the NLRA deals with union-related issues, it covers collective employee action whether a union is involved or not

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National Labor Relations Act

- Section 7 of the NLRA states:

  "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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment…"
- NLRB activist agenda continues
  - Non-union employers: social media, confidentiality provisions
  - Union employers: bargaining over discipline, expanded duty to provide information and the continuation of union dues after a CBA expires

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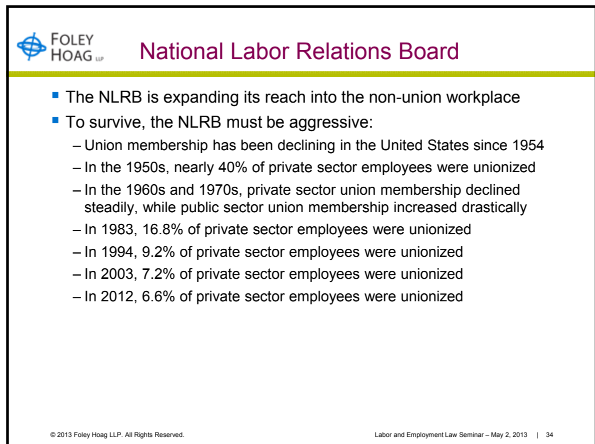
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National Labor Relations Board
The NLRB is expanding its reach into the non-union workplace
To survive, the NLRB must be aggressive:
– Union membership has been declining in the United States since 1954
– In the 1950s, nearly 40% of private sector employees were unionized
– In the 1960s and 1970s, private sector union membership declined steadily, while public sector union membership increased drastically
– In 1983, 16.8% of private sector employees were unionized
– In 1994, 9.2% of private sector employees were unionized
– In 2003, 7.2% of private sector employees were unionized
– In 2012, 6.6% of private sector employees were unionized
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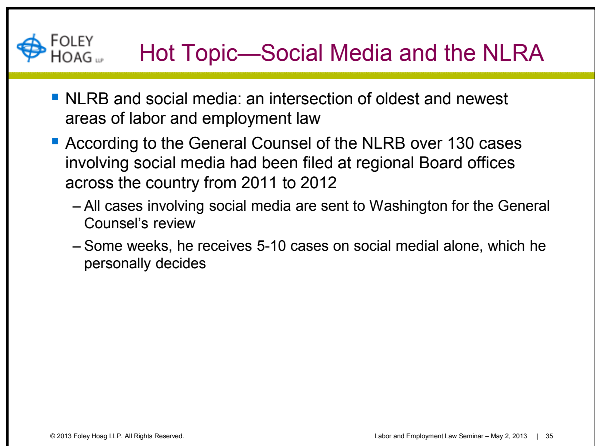
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Hot Topic—Social Media and the NLRA
NLRB and social media: an intersection of oldest and newest areas of labor and employment law
According to the General Counsel of the NLRB over 130 cases involving social media had been filed at regional Board offices across the country from 2011 to 2012
– All cases involving social media are sent to Washington for the General Counsel's review
– Some weeks, he receives 5-10 cases on social medial alone, which he personally decides
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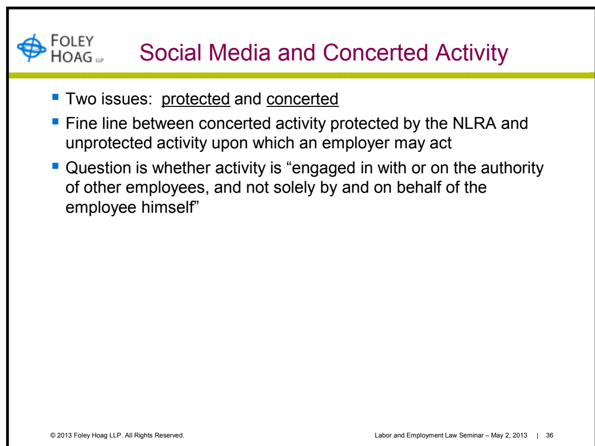
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Social Media and Concerted Activity
Two issues: protected and concerted
Fine line between concerted activity protected by the NLRA and unprotected activity upon which an employer may act
Question is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself"
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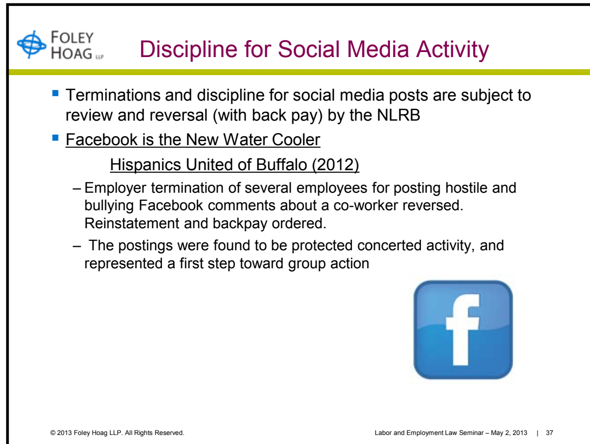

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Discipline for Social Media Activity

Concerns

1) Possibility that online posts may address terms and conditions of employment is sufficient
2) "Mutual aid and protection" will be liberally construed. The Board assumed the activity was intended for a collective purpose.

How far can it go?

- Is "Liking" a post that complains about work concerted activity?
- Snapchatting…does fleeting activity count?
- Is following someone's complaints about work on Twitter concerted activity?

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Social Media Policies

NLRB Active in Scrutinizing Social Media Policies

Overbroad policies will be considered unlawful

1. Context and content is key
2. Savings clause may help, but is not a panacea

Costco Wholesale Corp. and UFCW, Local 371 (2012)

- Policy that prohibited employees from electronically posting statements that "damage the company, defame any individual or damage any person's reputation" was overbroad. The policy chilled employee rights to engage in protected concerted activity.

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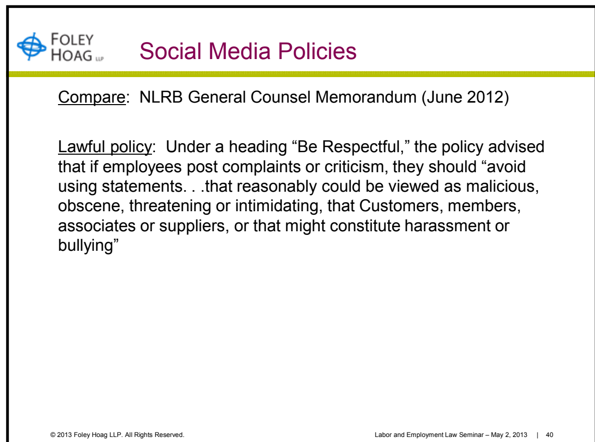
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Social Media Policies
Compare: NLRB General Counsel Memorandum (June 2012)
Lawful policy: Under a heading "Be Respectful," the policy advised that if employees post complaints or criticism, they should "avoid using statements. . .that reasonably could be viewed as malicious, obscene, threatening or intimidating, that Customers, members, associates or suppliers, or that might constitute harassment or bullying"
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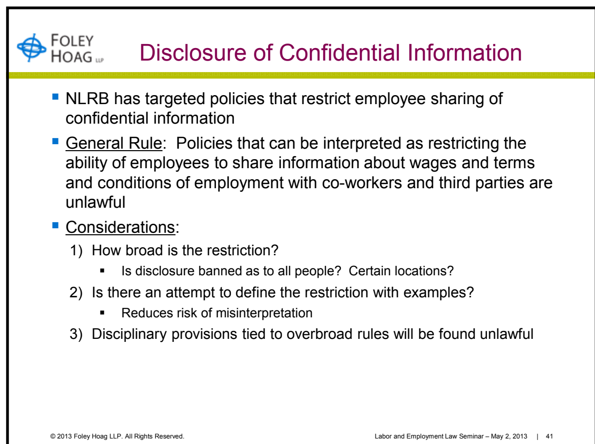
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Disclosure of Confidential Information
NLRB has targeted policies that restrict employee sharing of confidential information
General Rule: Policies that can be interpreted as restricting the ability of employees to share information about wages and terms and conditions of employment with co-workers and third parties are unlawful
Considerations:
1) How broad is the restriction?
Is disclosure banned as to all people? Certain locations?
2) Is there an attempt to define the restriction with examples?
Reduces risk of misinterpretation
3) Disciplinary provisions tied to overbroad rules will be found unlawful
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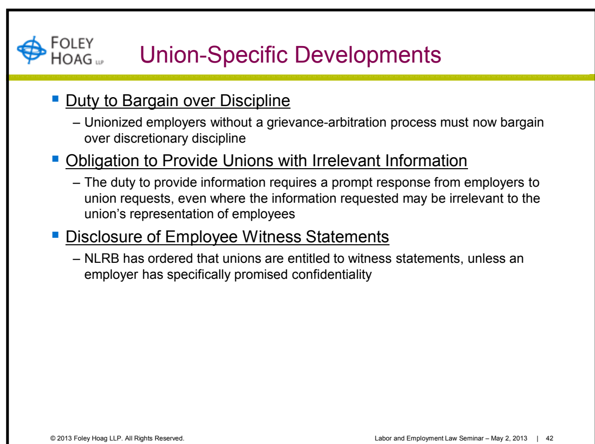
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Union-Specific Developments
Duty to Bargain over Discipline
– Unionized employers without a grievance-arbitration process must now bargain over discretionary discipline
Obligation to Provide Unions with Irrelevant Information
– The duty to provide information requires a prompt response from employers to union requests, even where the information requested may be irrelevant to the union's representation of employees
Disclosure of Employee Witness Statements
– NLRB has ordered that unions are entitled to witness statements, unless an employer has specifically promised confidentiality
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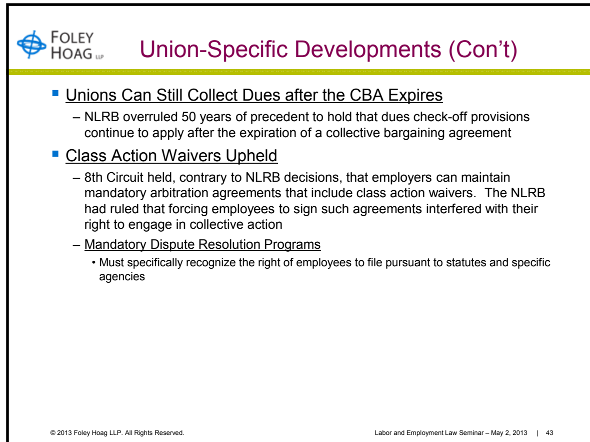
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Union-Specific Developments (Con't)
Unions Can Still Collect Dues after the CBA Expires
– NLRB overruled 50 years of precedent to hold that dues check-off provisions continue to apply after the expiration of a collective bargaining agreement
Class Action Waivers Upheld
– 8th Circuit held, contrary to NLRB decisions, that employers can maintain mandatory arbitration agreements that include class action waivers. The NLRB had ruled that forcing employees to sign such agreements interfered with their right to engage in collective action
– Mandatory Dispute Resolution Programs
• Must specifically recognize the right of employees to file pursuant to statutes and specific agencies
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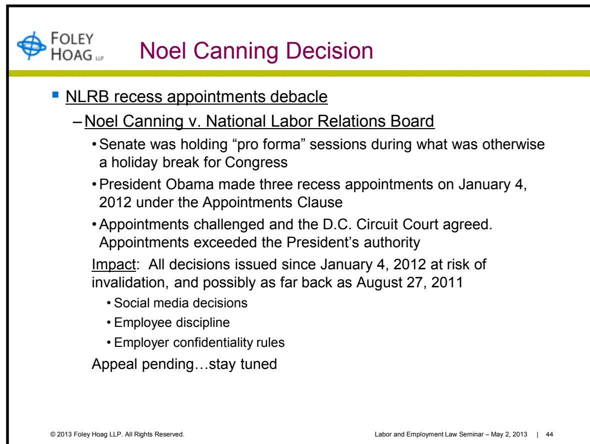
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Noel Canning Decision
NLRB recess appointments debacle
– Noel Canning v. National Labor Relations Board
• Senate was holding "pro forma" sessions during what was otherwise a holiday break for Congress
• President Obama made three recess appointments on January 4, 2012 under the Appointments Clause
• Appointments challenged and the D.C. Circuit Court agreed. Appointments exceeded the President's authority
Impact: All decisions issued since January 4, 2012 at risk of invalidation, and possibly as far back as August 27, 2011
• Social media decisions
• Employee discipline
• Employer confidentiality rules
Appeal pending…stay tuned
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New Developments with Respect to The Family and Medical Leave Act
Lyndsey M. Kruzer
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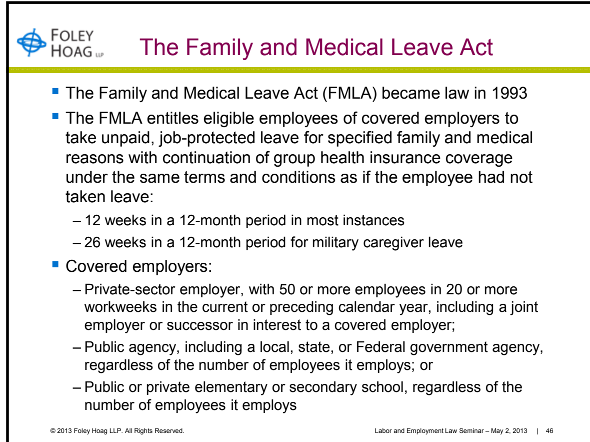
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The Family and Medical Leave Act
The Family and Medical Leave Act (FMLA) became law in 1993
The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave:
– 12 weeks in a 12-month period in most instances
– 26 weeks in a 12-month period for military caregiver leave
Covered employers:
– Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer;
– Public agency, including a local, state, or Federal government agency, regardless of the number of employees it employs; or
– Public or private elementary or secondary school, regardless of the number of employees it employs
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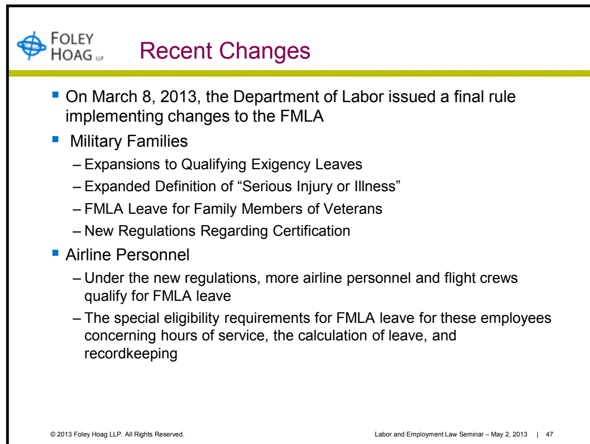
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Recent Changes
On March 8, 2013, the Department of Labor issued a final rule implementing changes to the FMLA
Military Families
– Expansions to Qualifying Exigency Leaves
– Expanded Definition of “Serious Injury or Illness”
– FMLA Leave for Family Members of Veterans
– New Regulations Regarding Certification
Airline Personnel
– Under the new regulations, more airline personnel and flight crews qualify for FMLA leave
– The special eligibility requirements for FMLA leave for these employees concerning hours of service, the calculation of leave, and recordkeeping
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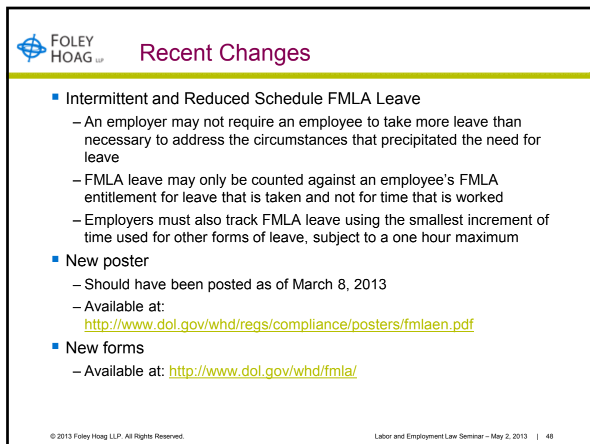
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Recent Changes
Intermittent and Reduced Schedule FMLA Leave
– An employer may not require an employee to take more leave than necessary to address the circumstances that precipitated the need for leave
– FMLA leave may only be counted against an employee’s FMLA entitlement for leave that is taken and not for time that is worked
– Employers must also track FMLA leave using the smallest increment of time used for other forms of leave, subject to a one hour maximum
New poster
– Should have been posted as of March 8, 2013
– Available at: http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf
New forms
– Available at: http://www.dol.gov/whd/fmla/
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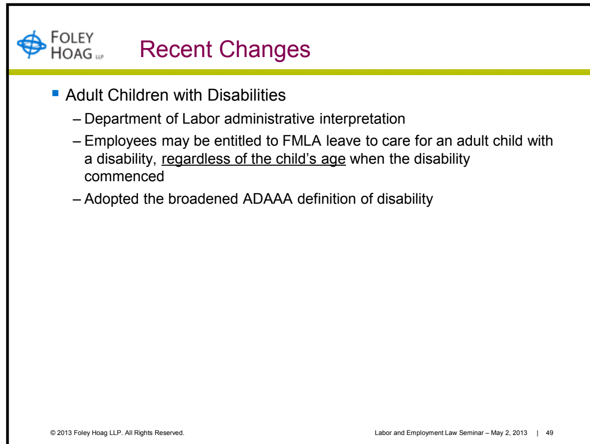
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Recent Changes
Adult Children with Disabilities
– Department of Labor administrative interpretation
– Employees may be entitled to FMLA leave to care for an adult child with a disability, regardless of the child's age when the disability commenced
– Adopted the broadened ADAAA definition of disability
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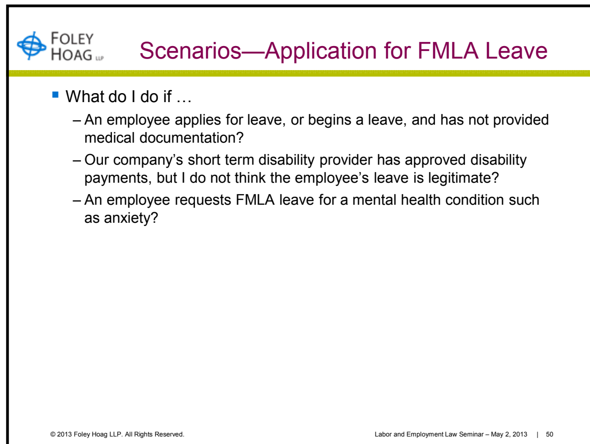
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Scenarios—Application for FMLA Leave
What do I do if …
– An employee applies for leave, or begins a leave, and has not provided medical documentation?
– Our company's short term disability provider has approved disability payments, but I do not think the employee's leave is legitimate?
– An employee requests FMLA leave for a mental health condition such as anxiety?
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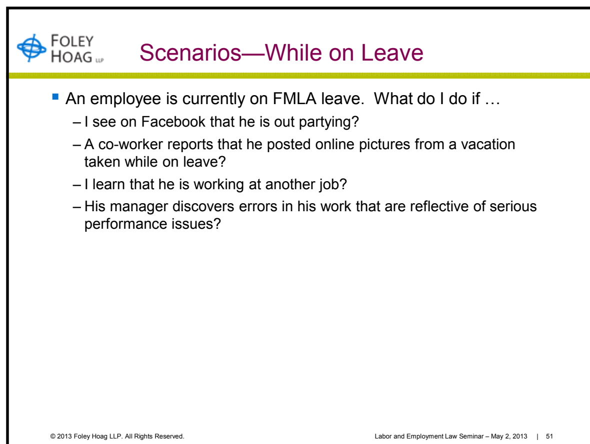
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Scenarios—While on Leave
An employee is currently on FMLA leave. What do I do if …
– I see on Facebook that he is out partying?
– A co-worker reports that he posted online pictures from a vacation taken while on leave?
– I learn that he is working at another job?
– His manager discovers errors in his work that are reflective of serious performance issues?
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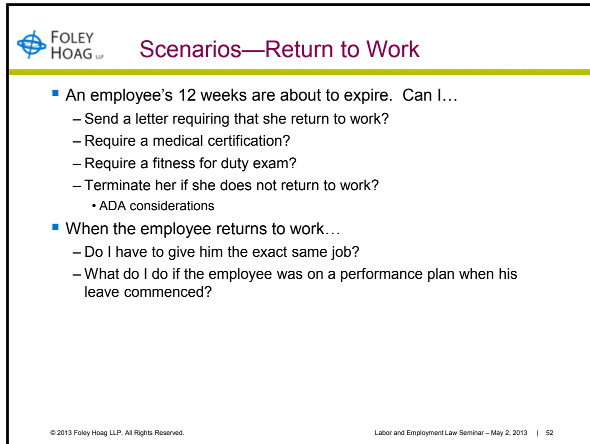
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Scenarios—Return to Work
An employee's 12 weeks are about to expire. Can I…
– Send a letter requiring that she return to work?
– Require a medical certification?
– Require a fitness for duty exam?
– Terminate her if she does not return to work?
• ADA considerations
When the employee returns to work…
– Do I have to give him the exact same job?
– What do I do if the employee was on a performance plan when his leave commenced?
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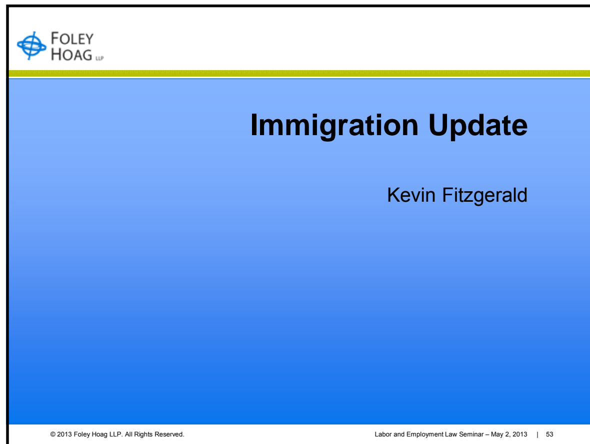
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Immigration Update
Kevin Fitzgerald
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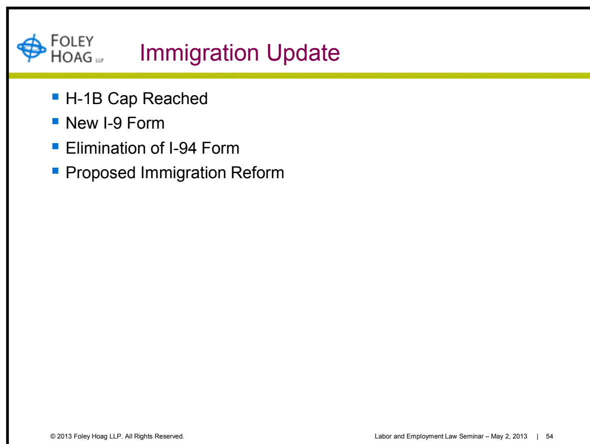
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Immigration Update
H-1B Cap Reached
New I-9 Form
Elimination of I-94 Form
Proposed Immigration Reform
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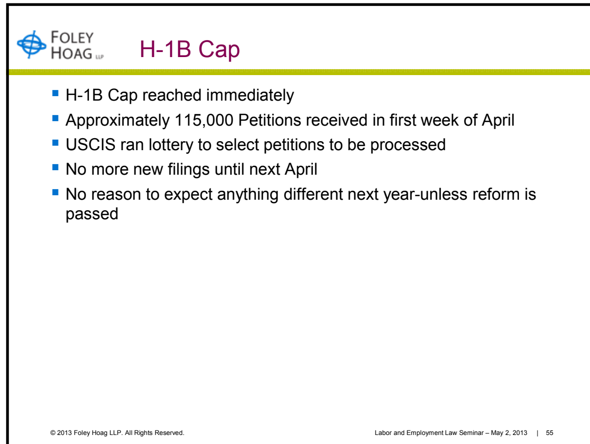
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H-1B Cap
H-1B Cap reached immediately
Approximately 115,000 Petitions received in first week of April
USCIS ran lottery to select petitions to be processed
No more new filings until next April
No reason to expect anything different next year-unless reform is passed
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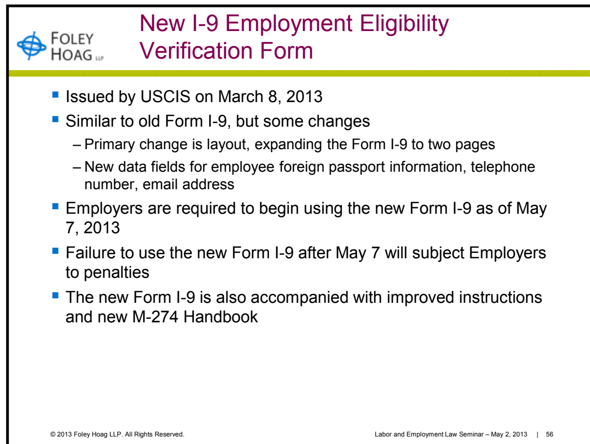
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New I-9 Employment Eligibility Verification Form
Issued by USCIS on March 8, 2013
Similar to old Form I-9, but some changes
– Primary change is layout, expanding the Form I-9 to two pages
– New data fields for employee foreign passport information, telephone number, email address
Employers are required to begin using the new Form I-9 as of May 7, 2013
Failure to use the new Form I-9 after May 7 will subject Employers to penalties
The new Form I-9 is also accompanied with improved instructions and new M-274 Handbook
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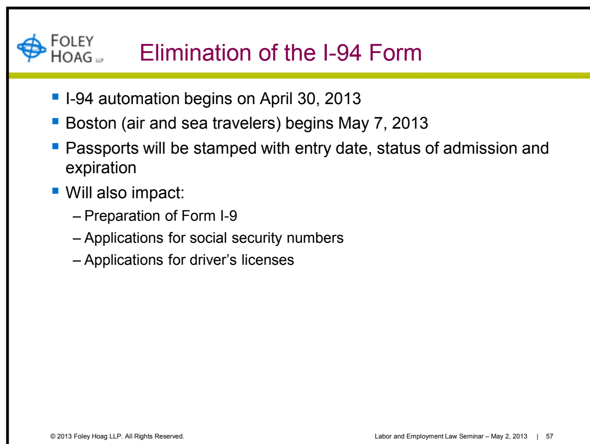
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Elimination of the I-94 Form
I-94 automation begins on April 30, 2013
Boston (air and sea travelers) begins May 7, 2013
Passports will be stamped with entry date, status of admission and expiration
Will also impact:
– Preparation of Form I-9
– Applications for social security numbers
– Applications for driver's licenses
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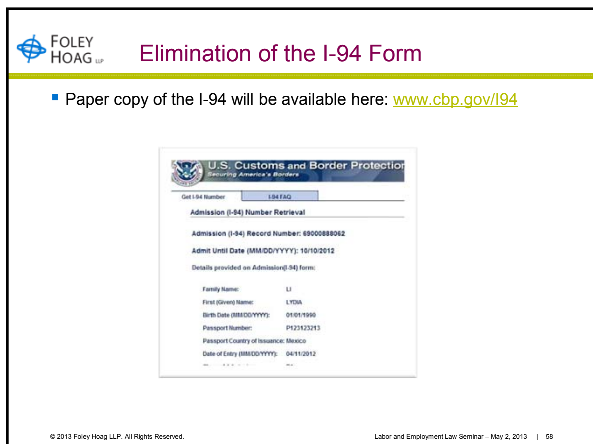

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Proposed Immigration Reform

- Border Security
- Path to Citizenship
- Expansion of H-1B program
- Changes to Permanent Residence Process
- Creation of the W (low-skilled) Visa Category
- E-Verify made mandatory

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Expansion of H-1B Program

- Base H-1B Cap raised from 65,000 to 110,000
- Advanced Degree Cap amended
  - Raised from 20,000 to 25,000
  - Limited to STEM fields
- High Skilled Jobs Demand Index formula for further cap increases
  - Up to 10,000 additional slots can be added each year
  - Maximum is set 180,000
- Change to prevailing wage requirement
- Imposition of advertising requirement through a new DOL website
- Increased scrutiny of “H-1B dependent” employers

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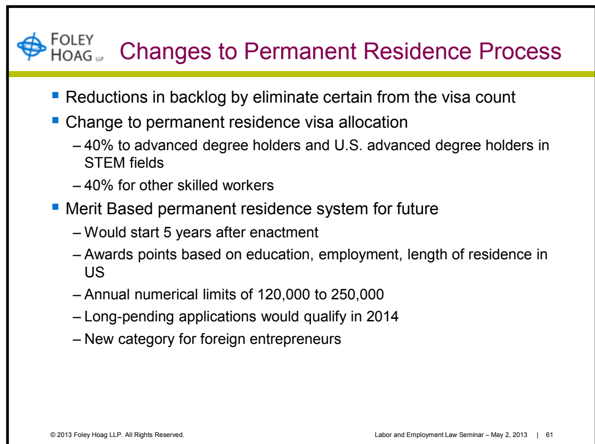
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Changes to Permanent Residence Process
Reductions in backlog by eliminate certain from the visa count
Change to permanent residence visa allocation
– 40% to advanced degree holders and U.S. advanced degree holders in STEM fields
– 40% for other skilled workers
Merit Based permanent residence system for future
– Would start 5 years after enactment
– Awards points based on education, employment, length of residence in US
– Annual numerical limits of 120,000 to 250,000
– Long-pending applications would qualify in 2014
– New category for foreign entrepreneurs
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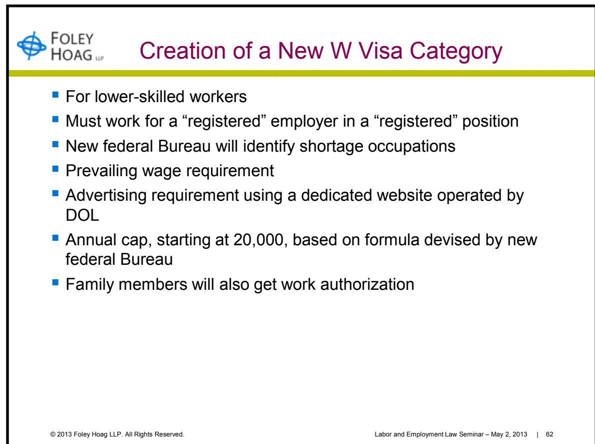
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Creation of a New W Visa Category
For lower-skilled workers
Must work for a “registered” employer in a “registered” position
New federal Bureau will identify shortage occupations
Prevailing wage requirement
Advertising requirement using a dedicated website operated by DOL
Annual cap, starting at 20,000, based on formula devised by new federal Bureau
Family members will also get work authorization
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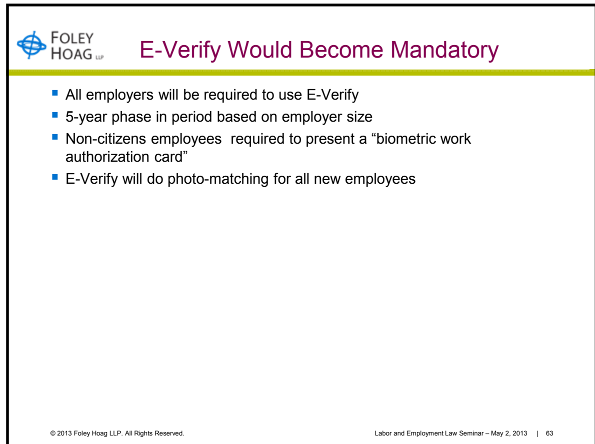
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E-Verify Would Become Mandatory
All employers will be required to use E-Verify
5-year phase in period based on employer size
Non-citizens employees required to present a “biometric work authorization card”
E-Verify will do photo-matching for all new employees
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Dodd-Frank for Employers

Michael L. Rosen

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Overview

- The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was Signed into law in July of 2010
- Includes sweeping reforms to financial regulations
  - In many ways a response to late-2000's financial crisis and recession
- Stated goal:
  - "To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes"
- Adds to growing landscape of anti-retaliation/whistleblowing laws

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Dodd-Frank's Predecessor: "SOX"

- The Sarbanes-Oxley Act ("SOX") of 2002 precedes and is modified by Dodd-Frank
- Established civil and criminal liability for retaliatory action against whistleblowers
- Requires publicly traded companies to establish internal whistleblowing procedures
- Employees need only "reasonably believe" a violation has occurred to be protected by SOX
- SOX required that claims be brought first to DOL within 90 days

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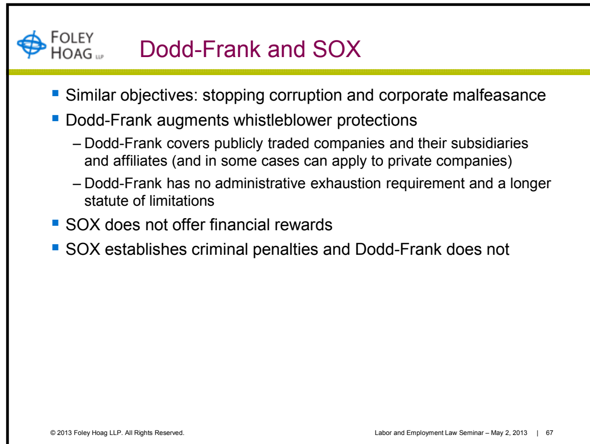
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Dodd-Frank and SOX
Similar objectives: stopping corruption and corporate malfeasance
Dodd-Frank augments whistleblower protections
– Dodd-Frank covers publicly traded companies and their subsidiaries and affiliates (and in some cases can apply to private companies)
– Dodd-Frank has no administrative exhaustion requirement and a longer statute of limitations
SOX does not offer financial rewards
SOX establishes criminal penalties and Dodd-Frank does not
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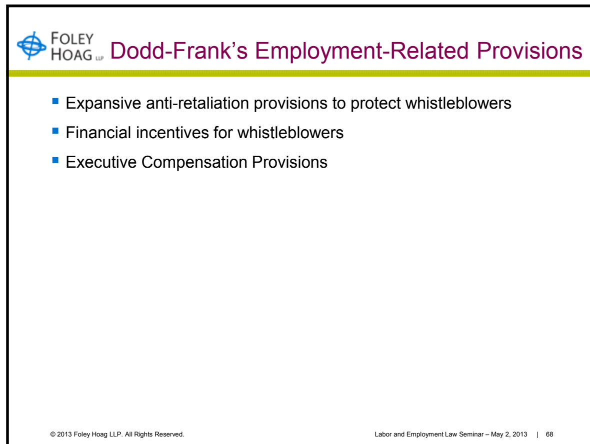
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Dodd-Frank's Employment-Related Provisions
Expansive anti-retaliation provisions to protect whistleblowers
Financial incentives for whistleblowers
Executive Compensation Provisions
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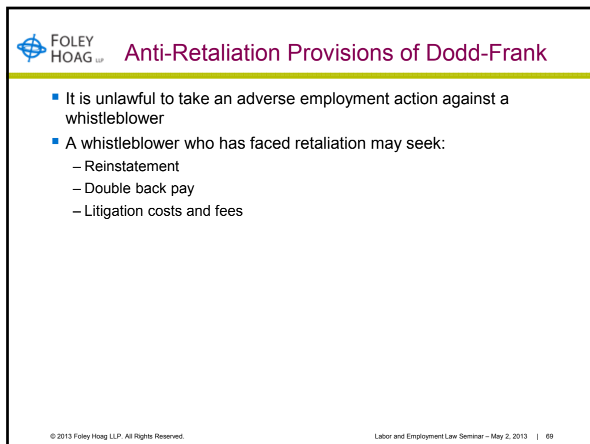
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Anti-Retaliation Provisions of Dodd-Frank
It is unlawful to take an adverse employment action against a whistleblower
A whistleblower who has faced retaliation may seek:
– Reinstatement
– Double back pay
– Litigation costs and fees
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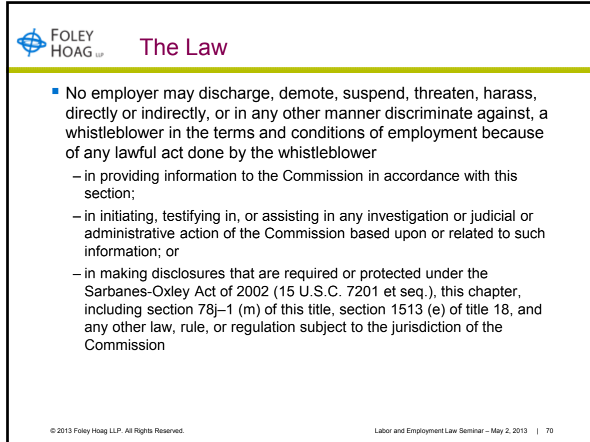
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The Law
No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower
– in providing information to the Commission in accordance with this section;
– in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
– in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j–1 (m) of this title, section 1513 (e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission
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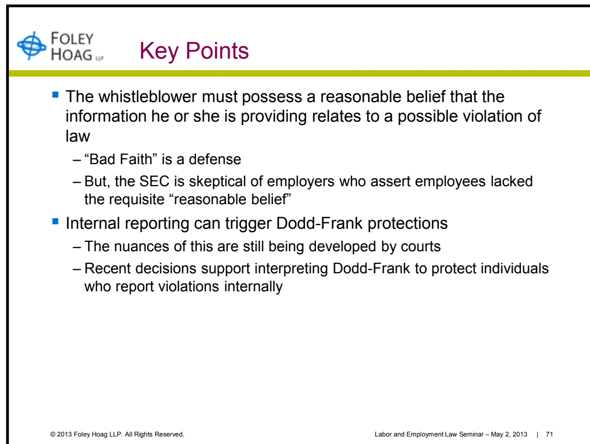
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Key Points
The whistleblower must possess a reasonable belief that the information he or she is providing relates to a possible violation of law
– “Bad Faith” is a defense
– But, the SEC is skeptical of employers who assert employees lacked the requisite “reasonable belief”
Internal reporting can trigger Dodd-Frank protections
– The nuances of this are still being developed by courts
– Recent decisions support interpreting Dodd-Frank to protect individuals who report violations internally
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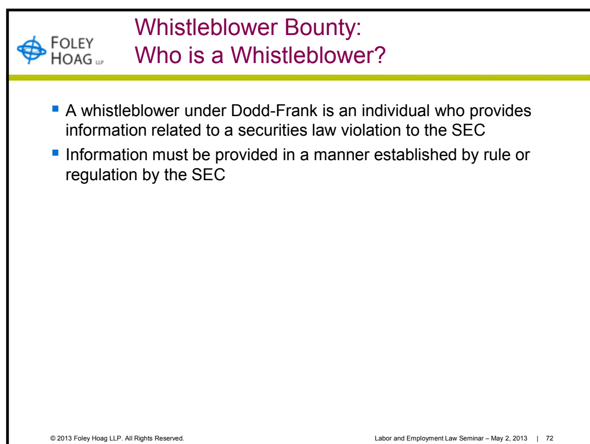
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Whistleblower Bounty:
Who is a Whistleblower?
A whistleblower under Dodd-Frank is an individual who provides information related to a securities law violation to the SEC
Information must be provided in a manner established by rule or regulation by the SEC
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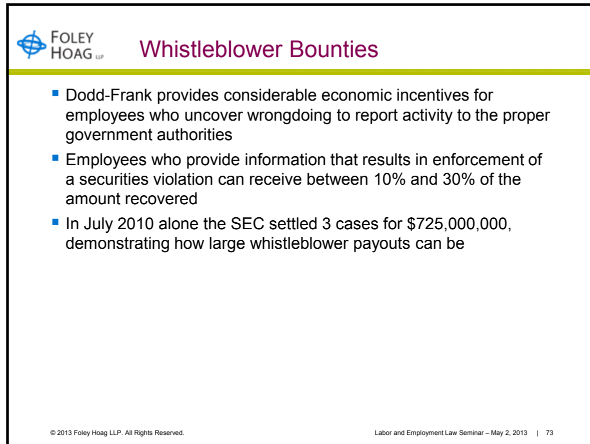
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Whistleblower Bounties
Dodd-Frank provides considerable economic incentives for employees who uncover wrongdoing to report activity to the proper government authorities
Employees who provide information that results in enforcement of a securities violation can receive between 10% and 30% of the amount recovered
In July 2010 alone the SEC settled 3 cases for $725,000,000, demonstrating how large whistleblower payouts can be
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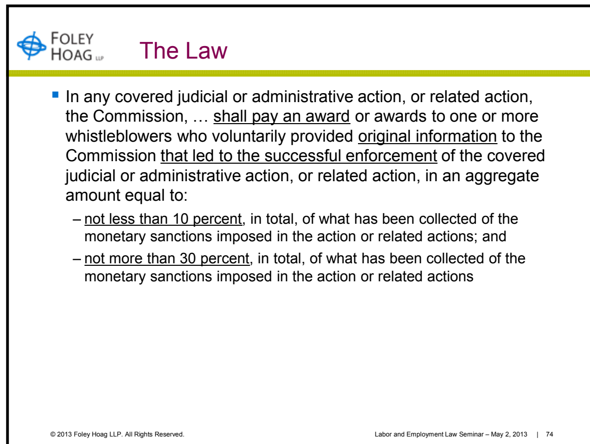
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The Law
In any covered judicial or administrative action, or related action, the Commission, … shall pay an award or awards to one or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to:
– not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
– not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions
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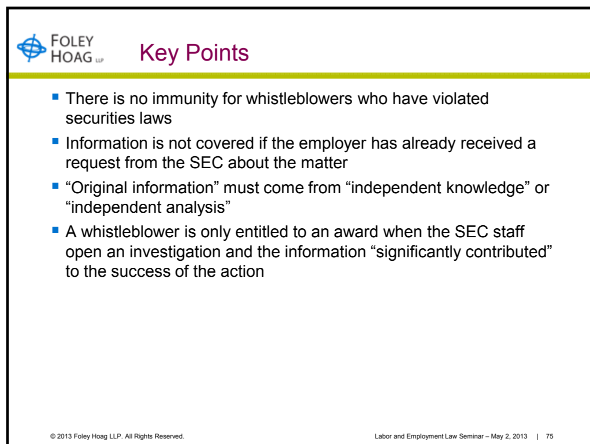
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Key Points
There is no immunity for whistleblowers who have violated securities laws
Information is not covered if the employer has already received a request from the SEC about the matter
"Original information" must come from "independent knowledge" or "independent analysis"
A whistleblower is only entitled to an award when the SEC staff open an investigation and the information "significantly contributed" to the success of the action
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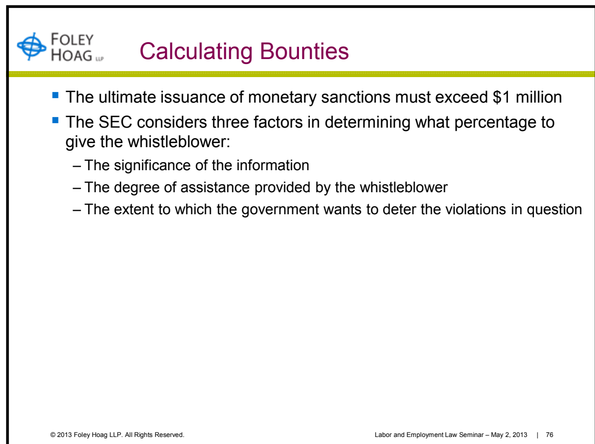
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Calculating Bounties
The ultimate issuance of monetary sanctions must exceed $1 million
The SEC considers three factors in determining what percentage to give the whistleblower:
– The significance of the information
– The degree of assistance provided by the whistleblower
– The extent to which the government wants to deter the violations in question
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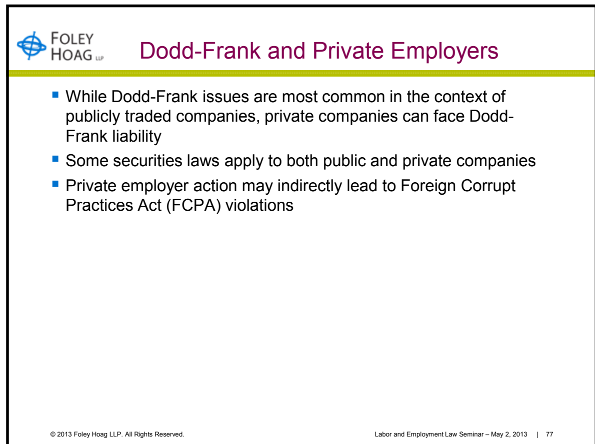
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Dodd-Frank and Private Employers
While Dodd-Frank issues are most common in the context of publicly traded companies, private companies can face Dodd-Frank liability
Some securities laws apply to both public and private companies
Private employer action may indirectly lead to Foreign Corrupt Practices Act (FCPA) violations
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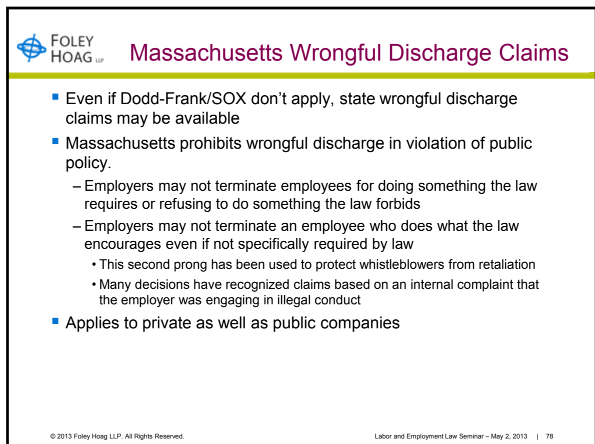
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Massachusetts Wrongful Discharge Claims
Even if Dodd-Frank/SOX don't apply, state wrongful discharge claims may be available
Massachusetts prohibits wrongful discharge in violation of public policy.
– Employers may not terminate employees for doing something the law requires or refusing to do something the law forbids
– Employers may not terminate an employee who does what the law encourages even if not specifically required by law
• This second prong has been used to protect whistleblowers from retaliation
• Many decisions have recognized claims based on an internal complaint that the employer was engaging in illegal conduct
Applies to private as well as public companies
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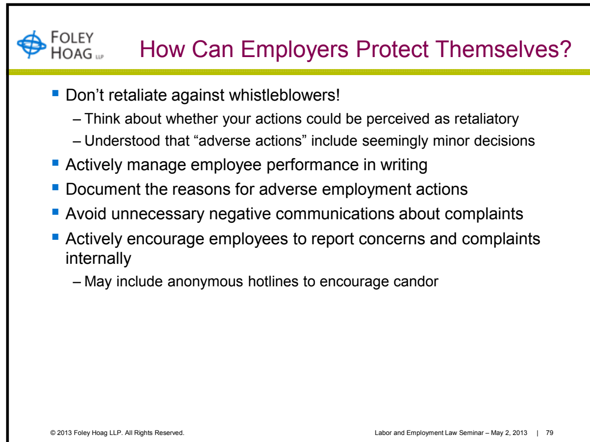
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How Can Employers Protect Themselves?
Don't retaliate against whistleblowers!
– Think about whether your actions could be perceived as retaliatory
– Understood that "adverse actions" include seemingly minor decisions
Actively manage employee performance in writing
Document the reasons for adverse employment actions
Avoid unnecessary negative communications about complaints
Actively encourage employees to report concerns and complaints internally
– May include anonymous hotlines to encourage candor
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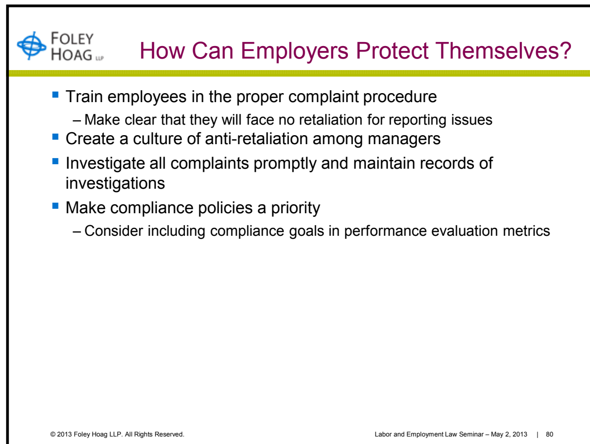
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How Can Employers Protect Themselves?
Train employees in the proper complaint procedure
– Make clear that they will face no retaliation for reporting issues
Create a culture of anti-retaliation among managers
Investigate all complaints promptly and maintain records of investigations
Make compliance policies a priority
– Consider including compliance goals in performance evaluation metrics
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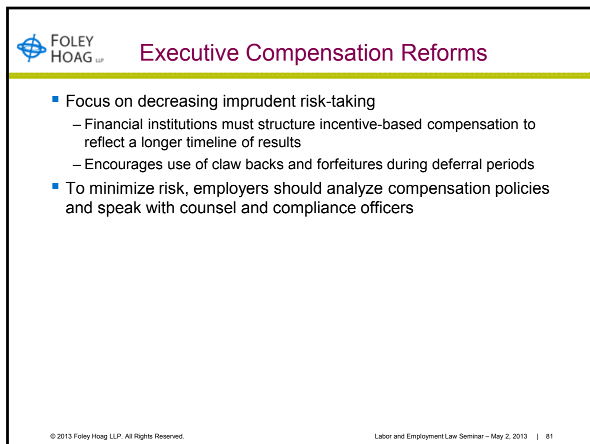
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Executive Compensation Reforms
Focus on decreasing imprudent risk-taking
– Financial institutions must structure incentive-based compensation to reflect a longer timeline of results
– Encourages use of claw backs and forfeitures during deferral periods
To minimize risk, employers should analyze compensation policies and speak with counsel and compliance officers
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Thank You for Attending

- **Latest Developments in Labor and Employment Law**
- **Immediate Requirements for Employers Under the New Federal Healthcare Law**
- **NLRB Update – Continued Activist Agenda**
- **New Developments with Respect to The Family and Medical Leave Act Immigration Update**
- **Dodd-Frank for Employers**

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