SPILMAN THOMAS & BATTLE, PLLC
ATTORNEYS AT LAW
1.800.967.8251

SuperVision TODAY™

LABOR & EMPLOYMENT NEWS

Contact the Spilman Labor & Employment Practice Group 1-800-967-8251 www.spilmanlaw.com

The Fourth Circuit Asks ***What For***, Answers with ***But For***: The Determination that a Landmark United States Supreme Court Decision Does Not Change Employment Discrimination Law in the Circuit

By Carrie M. Harris

In 2013, the Supreme Court of the United States held that plaintiffs claiming retaliation under Title VII must prove that "but for" the retaliation they would not have been discharged. Many had wondered if that decision would change what a disgruntled employee must prove in order to recover on a federal discrimination claim. On May 21, 2015, the Fourth Circuit Court of Appeals decided that, at least for the states it oversees (Maryland, North Carolina, South Carolina, Virginia and West Virginia) it does

Notes from the Chair and Executive Editor

Welcome to the second quarter edition of *SuperVision Today,* the quarterly e-newsletter published by Spilman's Labor & Employment Group.

We currently are making the final preparations for the Charleston SuperVision Symposium, set for June 26th at the Embassy Suites in Charleston, West Virginia during the final weekend of Charleston's FestivALL celebration. The day after our symposium is the region's largest summer event, the Wine & All That Jazz Festival at the University of Charleston.

The focus of this year's SuperVision series is maximizing the value of your human capital. During this year's event, Spilman attorneys and local business leaders will discuss a variety of human resources topics, including how to evaluate talent, conduct workplace investigations, mitigate risk in employee separations, navigate the NLRB's "quickie" election rules and untangle the legal morass of state and federally mandated leave. In addition, lunch will center around Lunch & Learn tables where attendees and Spilman attorneys will discuss cutting-edge employment topics. We always have a full house for SuperVision, so click here to reserve your place today or contact Pamela Kesling at (304) 720-4065 or pkesling@spilmanlaw.com for additional information. We look forward to seeing you there.

For our readers in West Virginia, do not forget a number of significant

not. The Court determined that the *McDonnell Douglas* framework it has used for years has always required a plaintiff to prove that an employer's discriminatory animus was the "but for" cause of retaliation.

Click here to get the full story.

Employers and The Fair Credit Reporting Act: Has ***Sweet v. LinkedIn*** Signaled the Next Wave of Social Media Change?

By Kate Sturdivant Gibson

Most employers are at least generally familiar with the The Fair Credit Reporting Act ("FCRA"). FCRA protects consumers whose information is disclosed by consumer reporting agencies. In the employment context, FCRA regulates how employers may use "consumer reports" in the hiring process (or during an investigation) and what rights applicants and employees have regarding their use.

Employers need to be aware of FCRA because many employers use consumer reports, such as credit history reports and background checks, to make important employment decisions. Employees (or potential employees) have several rights as it pertains to consumer reports related to them.

Click here to get the full story.

The Supreme Court Holds the EEOC's Feet to the Fire, but Not That Closely: The Court in ***Mach Mining*** Affirms the EEOC's Obligation to Conciliate Charges

By Gordon L. Mowen, II

Title VII of the Civil Rights Act of 1964, requires that the EEOC engage in informal conciliation

legislative changes go into effect in less than a month, including changes to the Wage Payment Act and damages available in employment lawsuits. For more comprehensive analysis on these legislative issues, please review the webinar we produced back in March on these changes by clicking here. (Note: All bills discussed were eventually signed into law by the Governor). Our next webinar, on the topic of restrictive covenants, will be in June. You can learn more by clicking here.

In this edition of *SuperVision Today*, Anna Sweigart and Erin Jones Adams explain the EEOC's recently issued regulations regarding wellness programs (for our webinar on wellness programs click here). Carrie Harris guides you through the perils of unpaid internships and the Fourth Circuit's determination that a landmark case does not employment discrimination law. Kate Sturdivant Gibson explains issues in credit reporting, and Gordon Mowen updates us on a recent Supreme Court of the United States decision involving the EEOC's obligation to conciliate.

We strive to bring you valuable content in each addition of *SuperVision Today*. As always, if you have any questions or ideas for future articles, please do not hesitate to reach out to us.

Eric Iskra, Chair of the Group
Eric Kinder, Editor of *SuperVision Today*

EEOC Issues Notice of Proposed Rulemaking on Interplay Between ADA and Employee Wellness Programs

By Anna L. Sweigart and Erin Jones Adams

Despite existing guidance available to employers under the Affordable Care Act ("ACA") and Health Insurance Portability and Accountability Act ("HIPAA"), employers have long faced uncertainty about the legality of their wellness programs under the Americans with Disabilities Act ("ADA"). While employers hoped that the Equal Employment Opportunity Commission ("EEOC") would align any wellness rules it issued under the ADA with the ACA and HIPAA, that notion was attacked in mid-2014 when the EEOC began suing multiple large employers for wellness programs that allegedly violated the ADA.

Last month, after a lengthy and much anticipated wait, the EEOC finally issued proposed rules clarifying how Title I of the ADA applies to employee wellness programs that inquire about employees' health or medical examinations. Although the proposed rules provide important guidance for employer-designed programs, the rules (which are not final) may ultimately reignite controversy over the legal and appropriate use of wellness incentives and the requisite "voluntary" nature of wellness programs.

Click here to read the entire story.

The Return of the Unpaid Labor

efforts after it finds reasonable cause to support a charge of discrimination, but before it files suit. The EEOC can only bring suit against an employer after the Commission has attempted, in good-faith, to secure from the employer a conciliation agreement acceptable to the Commission.This "good-faith" requirement is critical to the conciliation process because it is the statutory precondition the Commission must follow before it may initiate a lawsuit against an employer.

Over the past several years, however, it has become unclear exactly when the Commission has made this "good-faith" attempt. This point of contention has been litigated among the federal circuits with very mixed results, including whether the judiciary even had the authority to "measure" the Commission's conciliation attempts.

Three weeks ago, the United States Supreme Court clarified this area of law by holding that the courts have the authority to review and enforce the EEOC's conciliation obligation, by that courts should not delve deeply into the process.

Click here to read the entire article.

Force:

A Refresher on Unpaid Summer Interns

By Carrie M. Harris

This time every year, employers across the country welcome student interns into their workforce in droves. Internships are mutually beneficial relationships: the intern receives real-world, practical experience and the employer receives free labor and an extra set of hands.

In many cases, employers welcome an unpaid intern into their workforce without a second thought. Employers rarely consider whether or not that intern is actually an employee. For profit companies do so at their peril.

The *default rule* according to the Department of Labor Wage & Hour Division is that an intern should be treated as an employee who is to be paid minimum wage and be eligible for overtime. To avoid the obligation to pay your summer intern, an internship program must meet the following six requirements.

What are those requirements? Click here to read the entire article.