Employment Law Update for City and County Governments

David J. Canupp, Shareholder
Lanier Ford Shaver & Payne, P.C.
2101 West Clinton Ave., Suite 102
Huntsville, Alabama 35805
256-535-1100
DJC@LanierFord.com

www.LanierFord.com

Agenda

- Broad overview of employment law trends.
- PowerPoint Presentation differs slightly from handout.
- Additional materials on state and local developments are in the handout.

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Wage & Hour Update

Changes in the FLSA's "Salary Basis"

- In mid-2016, Obama Department of Labor enacted a new rule number of people eligible for overtime pay by raising the salary basis threshold for overtime eligibility.
- Current regulations require that workers who are classified as "exempt" from overtime must be paid on a "salary basis," and must receive at least $455 a week ($23,660 a year) regardless of the quality or quantity of the work.
- Proposed regulations would increase minimum salary threshold to $910 a week ($47,476 a year). Anyone earning less than that must be overtime-eligible for hours worked over 40.
- Final rule was set to go into effect December 1, 2016
- 21 states sued. On November 21, 2016, U.S. District Court in Texas issued **nationwide injunction**, finding rule was arbitrary and questioning whether reliance upon a salary basis as a proxy for exempt status is even permitted under the FLSA.

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Pending Appeal of Salary Threshold Ruling

- Obama administration appealed to Fifth Circuit in December 2016, and asked for expedited briefing.
- Trump administration has thrice asked for delay in briefing—now scheduled to start on June 30 in order to give new Labor Secretary Alexander Acosta time to determine a course of action.
- District Judge has refused to stay proceedings below, where summary judgment motions are pending. Appeal could be rendered moot by summary judgment order.
- Not clear that Trump administration would appeal if DOL loses in district court. Alexander Acosta has indicated some lukewarm support for tinkering with the rules, but also suggested Obama administration went too far.

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Impact on Governmental Employers

- Even if the new rules go into effect (and it is looking like they won't), the FLSA contains unique provisions for governmental employers that limit the impact of the new rules.
- Elected officials, their policymaking appointees, and their personal staff and legal advisors who are not subject to civil service laws are exempt from overtime under the FLSA.
- Fire protection or law enforcement employees in public agencies with fewer than 5 fire protection or law enforcement employees respectively will continue to be exempt from overtime.
- The new threshold will have no impact on the pay of workers paid hourly and no impact on the minimum wage (currently $7.25 per hour).
- **AND**: Governmental agencies may continue to use comp time.

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Yes, Comp Time is Still a Thing

- By agreement, public sector employers can satisfy their overtime obligation by providing comp time rather than paying a cash overtime premium. Most state and local government employees may accrue up to 240 hours of comp time. Law enforcement, fire protection, and emergency response personnel may accrue up to 480 hours of comp time.
- State and local government employers may continue to use comp time to satisfy their overtime obligations to employees who have not accrued the maximum number of comp time hours.
- House of Representatives just passed bill authorizing private sector to implement comp time. Bill was sponsored by Rep. Martha Roby (R-AL).

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Minimum Wage Update

- Multiple states and localities increased minimum wage over past 4 years. Despite local changes, the federal minimum wage has remained constant at $7.25/hr.
- Alabama has no state minimum wage except for certain classes of minors.
- In 2016, Birmingham passed an ordinance raising the minimum wage within city limits to $10.10/hr.
- Also in 2016, Alabama Legislature passed a bill removing authority of municipalities to legislate minimum wages.
- A group of Birmingham fast food workers and the NAACP sued alleging the Legislature was motivated by racial animus. Judge Proctor dismissed the lawsuit in February 2017.
- On March 2, 2017, the plaintiffs appealed to Eleventh Circuit.

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Immigration Update

Changes in Enforcement Priorities

- Employer “raids” by ICE and USCIS all but abandoned under Obama administration. Trump administration has restarted raids.
- Trump administration has increased I-9 inspections and audits.
- Trump administration has proposed E-Verify for all.
- Mandatory E-Verify for all is already the law in Alabama, despite some aspects of Alabama immigration law (H.B. 56) being ruled unconstitutional.

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Applies to ALL employers.

I-9 Forms

- I-9 Form is employment verification tool required by Immigration and Control Act (IRCA of 1986).
- Used to determine whether job applicants are eligible to work in the United States.
- I-9 must be completed for each new employee within 3 days of hire in most cases.
  - Section 1 is completed AND signed by employee
  - Section 2 must be completed AND signed by employer
- Failure to do so can result in civil or criminal penalties.
- Except increased scrutiny in Form I-9 compliance audits.

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Form I-9 Changed on January 22, 2017

- Employers must now use the new form. Even though it is available in an Adobe-Fillable version, you still must sign the Form! (Digital signatures are acceptable if they meet certain USCIS requirements).
- New form is generally easier to complete because of added cues about entering information.
- Important Notes:
  - Use of new form is ONLY for new employees and re-hires.
  - Do not re-complete form for existing employees.
  - DO go back and audit your forms to ensure they are fully completed. If they are not, seek legal advice.

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Steps to Completing I-9

1. Employee accepts offer of employment. **Applicants do not complete the form when they apply.**
2. Employee completes section 1 no later than the first day of work.
3. Employee gives form to employer.
4. Employer completes section 2 no later than third business day of work.
5. If employee's work authorization expires or a re-hire situation occurs, complete section 3.

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I-9 Information

- **Download new form here:**

  http://www.thirdshiftblog.com/images/PDFs/Form-I-9.pdf

- **Download new directions here:**

  http://www.thirdshiftblog.com/images/PDFs/Form-I-9-Instructions.pdf

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ADA, FMLA, & Paid Leave Update

ADA Background

- ADA – Americans with Disabilities Act of 1990
  - Divided into five titles, two of which (Titles I and II) give rise to obligations in terms of employment. Goal of Title I: render employees capable of performing "essential functions" of their job without causing "undue burden" on employers or presenting a "direct threat" to employee or others.
  - Proscribes discrimination against individuals with disabilities, retaliation, and also includes an affirmative accommodation requirement not present in the civil rights era laws.
  - Significant amendments in 2009 (Americans with Disabilities Amendments Act) that broadened definition of "disability" and eliminated many technical defenses.
  - Enforced by EEOC.
  - Fully applicable to local governments.
    - State governments have sovereign immunity defense. See *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S . 356 (2001).
    - Local governmental entities do not have benefit of Eleventh Amendment immunity.

FMLA Background

- FMLA – Family and Medical Leave Act
  - Requires 12 weeks of unpaid leave for the care of oneself, one's child (including adopted children), one's spouse (including same-sex spouse), one's parents including those who were *in loco parentis* as to employee).
  - Includes provisions for 26 weeks for injured servicemembers and also allows "exigency leave" for servicemembers called to active duty.
  - Self-care provisions inapplicable to states under Eleventh Amendment, but other provisions apply, and ALL provisions apply to local governments. See *Coleman v. Maryland Court of Appeals* (2012).
  - Also includes anti-retaliation and anti-interference provisions.
  - Enforced by Department of Labor.

Interaction of FMLA and ADA

- ADA requires employers with 15 or more employees (and all governmental employers) to take affirmative steps to **accommodate** individuals with disabilities.
- ADA does not expressly provide for unpaid leave, but longstanding interpretations and guidance state that unpaid leave is a reasonable accommodation.
- FMLA applies to all governmental employers and all private employers with 50 or more employees.
- FMLA provides 12 weeks of unpaid leave (26 weeks in the case of an injured servicemember) and no more.

Types of Accommodation Under the ADA

- In 2002, the EEOC issued enforcement guidance outlining various accommodations for which employees may be eligible. These include:
  - Accommodations for job applicants
  - Job restructuring
  - Leave
  - Modified schedules, workplace policies, reallocation of nonessential job duties
  - Reassignment
- With regard to reassignment, the EEOC has long taken the position that there is a right to reassignment to any vacant position for which the employee is qualified, where reassignment would be a reasonable accommodation. EEOC held that only where the reassignment constituted a promotion must the employee compete for the new position.
- On December 7, 2016, the Eleventh Circuit decided *EEOC v. St Joseph's Hospital*, 842 F.3d 1333 (11th Cir. 2016) and rejected a part of this analysis.

EEOC v. St. Joseph's Hospital
842 F.3d 1333 (11th Cir. Dec. 7, 2016)

- Consistent with its 2002 enforcement guidance, EEOC took position that "the ADA mandates noncompetitive reassignment" to a vacant position.
- Eleventh Circuit held: "ADA does not require reassignment without competition for, or preferential treatment of, the disabled."
- Court emphasized that reassignment is not ALWAYS required but "may" be required. When reassignment is a reasonable accommodation, the Court made clear that an employer may continue to abide by an existing "best-qualified applicant policy," and thus, "**the ADA only requires an employer allow a disabled person to compete equally with the rest of the world for a vacant position**."

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New 2016 EEOC Guidance: Unpaid Leave as Reasonable Accommodation

- In May 2016, EEOC issued new guidance (supplementing its 2002 guidance) explaining that **unpaid** leave may be reasonable accommodation under ADA.
- The guidance clarifies that ADA reasonable accommodation leave is different from FMLA leave, and could even be in addition to 12 weeks of FMLA leave.
- EEOC says that unpaid leave is required even when:
  - the employer does not offer leave as an employee benefit;
  - the employee is not eligible for leave under the employer's policy; or
  - the employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program, or the FMLA or similar state or local laws).
- Eleventh Circuit has already held that unpaid leave may be a reasonable accommodation, but only where there is a definite return date. See, e.g., *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003).

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EEOC 2016 Leave Guidance (Con't)

- In its new unpaid leave guidance, EEOC also targets "maximum leave" policies and "100% healed" policies.
- EEOC position on "**maximum leave**" policies:
  - If an employee requests additional leave that will exceed an employer's maximum leave policy (whether the leave is a block of time or intermittent), the employer may engage in an interactive process as described above, including obtaining medical documentation specifying the amount of the additional leave needed, the reasons for the additional leave, and why the initial estimate of a return date proved inaccurate. An employer may also request relevant information to assist in determining whether the requested extension will result in an undue hardship.
- EEOC position on "**100% healed**" policies:
  - An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions -- that is, be "100%" healed or recovered -- if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship

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Paid Leave?

- FMLA permits substitution of accrued paid leave for unpaid leave at option of employer and employee.
- ADA in theory permits such substitution but does not speak to it directly.
- Neither ADA or FMLA provide any sort of true "paid leave"
  - Unemployment laws recognize exception to "voluntary quit" disqualifier in situations where employee has "good cause," and Alabama courts recognize disability as "good cause"

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New Developments on Paid Leave?

- Ivanka Trump has championed paid ***maternal*** leave.
- Trump as a candidate also appeared to embrace paid leave for mothers only, which presents a constitutional problem under the Equal Protection Clause.
- Trump administration has signaled ***potential*** support for paid leave for all sexes, but no details are available other than a suggestion it could be funded through eliminating unemployment fraud.
- Likely would be enforced by DOL under unemployment laws, funded through FUTA taxes, and would only apply to government entities and employers with at least 50 employees.
- States would likely be exempt under Eleventh Amendment, but not local governmental entities.

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Title VII & Sexual Orientation Update

Evolution of Sexual Orientation Jurisprudence

- It has been black-letter law in the Eleventh Circuit since the 1970s that "discharge for homosexuality" is not prohibited by Title VII of the Civil Rights Act, even though that law prohibits "sex" discrimination. *Blum v. Gulf Oil Corp.,* 597 F.2d 936 (5th Cir. 1979).
- However, Supreme Court in 1989 held that "gender stereotyping" is the same thing as sex discrimination. See *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). Case involved a female who males said "needed a course in charm school," but not a lesbian.
- In 2011, The Eleventh Circuit decided *Glenn v. Brumby,* 663 F.3d 1312 (11th Cir. 2011), holding that discrimination against an individual who announced the decision to proceed with gender reassignment surgery constitutes discrimination on the basis of "gender non-conformity" and violates Title VII.
- Almost all circuits have rejected "sexual orientation" as a protected category in and of itself.

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EEOC's Position

- In 2015, EEOC sitting as an adjudicative body over federal sector cases held:
  - Title VII protects against sexual orientation discrimination
  - Title VII protects against discrimination on the basis of transgender status

A contradiction?

- Several U.S. Circuit Courts of Appeal have acknowledged inherent contradictions in the holdings set out above:
  - Discrimination against someone who exhibits stereo-typical gay behavior is illegal.
    - You can't fire Ru Paul for being too flamboyant.
  - Discrimination on the basis of sexual orientation alone is not outlawed by Title VII.
    - But you can fire Will Smith because you've heard a rumor.

Evans v. Georgia Regional Hospital 850 F.3d 1248 (11th Cir. 2017)

- Pro se plaintiff was a former security guard who was gay but "did not broadcast her sexuality." Still, she said it was "evident" that she identified with the male gender because she had a short haircut, etc.
- Filed suit in district court alleging discrimination on basis of sexual orientation, gender non-conformity, and retaliation in violation of Title VII.
- Asserted that she was—
  - Denied equal pay and work.
  - Harassed
  - Physically assaulted.

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Evans (con't)

- District court dismissed outright.
- Plaintiff appealed with assistance of EEOC and Lambda Legal Defense Fund as *amici*.
- Eleventh Circuit acknowledges its prior holding in *Blum* but goes on to hold that "discrimination based on the failure to conform to a gender stereotype is sex-based discrimination."
- Thus, citing *Glenn,* the Court held that "a gender non-conformity claim is not just another way to claim discrimination based on sexual orientation" but an independent claim with roots in *Price Waterhouse.*
- Court then reaffirms that "binding precedent" forecloses a standalone "sexual orientation claim," and cites decisions of the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 9th, and 10th to the same effect.

Hively v. Ivy Tech
2017 WL 1230393 (7th Cir. April 4, 2017)

- Overruling prior precedent, Seventh Circuit on *en banc* rehearing becomes first court of appeals in the country to hold that "sexual orientation" is a standalone category of sex discrimination under Title VII.
- Court notes that Supreme Court has never addressed this question.

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Hively (con't)

- Hivley is "openly lesbian" professor who explicitly claimed sexual orientation discrimination.
- While original panel held that no such claim existed, *en banc* Court held that "Hivley represents the ultimate case of a failure to conform to the female stereotype . . . She is not heterosexual."
- Court held that discriminatory behavior in cases like this does not exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account."
- Court also holds that "it is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."
- Thus, the Court accepts two different methods of justifying recognition of sexual orientation discrimination: the comparative method, and the associational intimacy method channeled from *Loving v. Virginia*.

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Hively (con't)

"The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe [fine lines]."

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Anonymous v. Omnicom Group 2017 WL 1130183 (2d Cir. March 27, 2017)

- Employee-plaintiff was a gay man with HIV who alleged discrimination under ADA for his HIV status and under Title VII for discrimination on the basis of sexual orientation.
- Complaint alleged multiple instances of gender stereotyping (including supervisor describing plaintiff as “effeminate”).
- District court dismissed Title VII claim alleging sexual orientation discrimination.

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Omnicom (con't)

- Panel of the Second Circuit stuck with circuit precedent holding that Title VII does not prohibit discrimination on basis of sexual orientation.
- Panel nevertheless found that the record sufficiently established discrimination on basis of sexual stereotyping.
- Court was persuaded by characterizations of plaintiff as "effeminate" and "prancing about."
- Falls into the same dichotomy discussed above.

Omnicom (con't)

- End result: plaintiff stated a plausible claim of "sex discrimination," but not "sexual orientation" discrimination.
- District court decision was reversed and remanded.

Title VII Update

EEOC v. Catastrophe Management 852 F.3d 1018 (11th Cir. Dec. 13, 2016)

- Issue Presented: Is dreadlock discrimination actually *race* discrimination?
- EEOC sued arguing that "grooming policy" which prohibited dreadlocks was race-neutral, but claiming that a "prohibition on dreadlocks in the workplace constitutes race discrimination" because dreadlocks are a racial characteristic, i.e., they "are a manner of wearing the hair that is physiologically and culturally associated with people of African descent."
- Eleventh Circuit ruled that EEOC's argument "runs headlong into a wall of contrary caselaw." Court went on: "As far as we can tell, every court to have considered the issue has rejected the argument that Title VII protects hairstyles culturally associated with race."
- Bottom Line: Eleventh Circuit holds that "race" is an immutable characteristic, whereas hairstyles are not.

Ban the Box Initiative?

- EEOC has also been very active over the past 8 years on consideration of arrests in the employment context because of the belief that consideration of arrests creates a disparate impact on blacks and other minorities.
- While the EEOC has issued guidance directing that employers minimize reliance upon arrests in employment decisions, several states and numerous local governments have gone further and enacted so-called “ban-the-box” statutes or ordinances.
- What is the box?
  - ☐ Check here if you have ever been convicted of a felony.
  - ☐ Check here if you have been arrested in the last five years.
- Unlike these laws, EEOC guidance allows for consideration of arrests in safety-sensitive positions like caring for children, but not in circumstances where arrests are inconsistent with business necessity. EEOC also suggests that employers discount arrests that are older or less relevant to the job at issue.

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Equal Rights Amendment (ERA) Ratified in Nevada

- **Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
- **Section 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
- **Section 3.** This amendment shall take effect two years after the date of ratification.

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ERA: Mostly Symbolic—Or Not?

- First proposed in 1923, and failed after it was argued that women needed special protections regarding working conditions and employment hours.
- Over time, amendment took on a new significance. Supreme Court applies "strict scrutiny" to race discrimination claims, but a form of "intermediate scrutiny" to sex discrimination claims. This is still true.
- After being proposed in 1923, Congress passed in 1971.

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ERA (cont.)

- ***Congress*** imposed a deadline for ratification set as March 22, 1979.
- Insufficient states had ratified by that date.
- Congress then extended ratification deadline by 4 more years, but not enough states acted.
- Nevada became the 36th state to ratify the amendment.
- Article V of the Constitution provides no deadlines for amendments.
- Assuming that ratification is even possible, only 2 more states must act.

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Absence of the ERA Is Still No Excuse for Sex Discrimination

- Plenty of laws already proscribe sex discrimination.
  - Title VII of Civil Rights Act of 1964.
  - Equal Pay Act.
  - Pregnancy Discrimination Act.
  - Equal Rights Amendment unlikely to affect employers, except insofar as the President could tinker with paid leave applying only to women or men.

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Public Employees
and
First Amendment Rights

Heffernan v. City of Patterson
136 S.Ct. 1412 (2016)

- Heffernan worked in office of chief of police.
- Chief of police appointed by current mayor, who was running for re-election.
- Heffernan was friends with current mayor's opponent: Lawrence Spagnola.
- Heffernan was not involved in Spagnola's campaign.

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Heffernan (cont.)

- Heffernan's mother requested that he pick up a Spagnola yard sign.
- Heffernan went to Spagnola's distribution point to pick up sign.
- Other police officers saw Heffernan speaking to campaign staff and holding sign.
- Next day, Heffernan was demoted from detective to patrol officer for overt involvement in campaign.

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Heffernan (cont.)

- Heffernan sued under § 1983 because he had been engaged in conduct protected by First Amendment.
- District court ruled Heffernan had not been deprived of constitutional right because he had not engaged in First Amendment conduct.
- 3d Circuit affirmed because Heffernan was protected only if he actually engaged in constitutionally protected behavior.

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Heffernan (cont.)

- Heffernan's supervisors thought he was actively engaged in Spagnola's campaign even though he wasn't.
- Prior Supreme Court precedent did not address exact factual pattern this case involved. The following cases did not involve factual mistakes:
  - *Garcetti v. Ceballos,* 547 U.S. 410 (2006).
  - *Connick v. Myers,* 461 U.S. 138 (1983).
  - *Pickering v. Board of Education,* 391 U.S. 563 (1968).

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Heffernan (cont.)

- *Waters v. Churchill,* 511 U.S. 661 (1994), involved situation in which employer believed employee had **not** engaged in protected speech.
- In this case, employer believed the employee **had** engaged in protected speech, when he had not.
- Employer motive—not employee's actual behavior—governs case.

Heffernan (cont.)

- Objective of First Amendment is to protect speech and association.
- Government employees are not to be dis-couraged from participating in First Amendment activities (except as set out previously).
- Doesn't matter that government's action is based on factual error; legitimate First Amendment activities will still be discouraged.

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Heffernan (cont.)

- Furthermore, rule of law imposing liability despite employer's mistake is not likely to impose significant extra costs on employer.
  - Employee still bears burden of proving improper employer motive.

Watch the Blog for More!

- Lanier Ford maintains an employment blog tracking new developments:

www.ThirdShiftBlog.com

- You can sign up for email blasts by emailing DJC@LanierFord.com.

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Questions?

David J. Canupp
Shareholder
Lanier Ford Shaver & Payne, P.C.
2101 West Clinton Ave., Suite 102
Huntsville, Alabama 35805
256-535-1100
DJC@LanierFord.com

www.LanierFord.com

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