An Employment Law Update
5 Top Updates HR Should Know

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Gender Discrimination Update

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What does it mean to prohibit discrimination "based on sex"?

- Sexual orientation and sexual identity not explicitly covered by Title VII
- LGBT community relies on gender stereotyping to bring lawsuits
- *Price Waterhouse v. Hopkins* (1989): U.S. Supreme Court says cannot discriminate against someone because they do not fit the gender norms of their biological sex

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The "Stereotyping" Paradox

- Homosexual male bullied at work for not being "manly" or having effeminate characteristics vs. homosexual male bullied at work because co-workers find out that he is gay
- Latter claim is weaker
- *Law protects against discrimination based on dress, mannerisms, etc. but not against discrimination based on someone's attraction to or intimate relationship with someone of the same sex*
- *Can you really separate gender identity and sexual orientation from a person's sex?*

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Current Status

- Supreme Court has NOT held that gender identity and sexual orientation are protected categories
- EEOC, DOJ and DOE have made clear that they consider gender identity and sexual orientation to be protected categories under Title VII and Title IX
- Many district courts calling on Supreme Court and legislators to clarify the issue

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Current Status, cont.

- *McCrory, et al. v. United States of American, et al.* Dueling lawsuits between North Carolina and fed government over North Carolina transgender bathroom statute
- *State of TX, et al. v. United States of America, et al.* 13 states sue fed government over EEOC/DOJ/DOE transgender & sexual orientation guidance
- Title IX
  - *G.G. v. Gloucester County School Board.* Fourth Circuit finds that Title IX "sex" coverage applies to gender identity
  - *Videckis v. Pepperdine University*. California District Court Judge denies defendant's motion to dismiss, finding that there is no distinction between gender stereotyping and sexual orientation claims

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Hively v. Ivy Tech Community College

- Seventh Circuit, 2016
- Clear judicial precedent is that sexual orientation is not covered by Title VII
- Legislators have failed to expand Title VII coverage despite "emerging consensus" that discrimination based on sexual orientation can no longer be tolerated
- Time for action from the Supreme Court
- District Courts questioning the difference between sexual orientation and gender stereotyping claims are not finding "rational answers"

Hively v. Ivy Tech Community College, cont.

- Left with a paradox in which a lesbian is protected from discrimination based on her choice to dress in a masculine matter, but is not protected based on the "most essential of gender stereotypes" – her decision to marry a woman
- Essentially, the law protects "flamboyant" gay males and "butch" lesbians, but not gay men and lesbians who outwardly seem heterosexual in their dress, mannerisms, etc.

Tips

- Consider adding sexual orientation and gender identity to your anti-discrimination and anti-harassment policy.
- Train management and HR.
- Transgender issues to keep in mind:
  - Do not condition workplace changes on surgical/medical transition.
  - Be respectful of name and pronoun changes.

EEOC Report on Harassment Training

- EEOC established task force to study sexual harassment training
- Task force composed of members of academia, lawyers, organized labor, employers, advocacy group reps
- Gathered data, conducted interviews, held public and non-public meetings/discussions

Findings

- Sexual harassment training is not working!
- Culture has biggest impact on harassment in the workplace – culture is formed at the top and trickles down
- Harassment broken down as follows:
  - 45% sex
  - 34% race
  - 19% disability
  - 15% age
  - 13% national origin
  - 5% religion

Findings, cont.

- Harassment increases business costs, not just due to defense costs, but also because of decreased workplace performance and productivity, increased employee turnover, and reputational harm
- Diverse workplace = less harassment
- The following lead to less claims of harassment in the long run:
  - Effective anti-harassment program, including an effective and safe reporting system
  - Thorough workplace investigation system, and proportionate corrective actions
  - **Owning legitimate reports of harassment!!**

Task Force Report Tips

- Survey workforce periodically regarding workplace culture, harassment, reporting mechanism, etc.
- Rethink your training! Instead of focusing on avoidance of liability, focus on the type of work environment that you want to provide.
- Focus not only on harassment prevention, but also on diversity, civility, by-stander action and prompt and effective investigations.
- Update policy as necessary and regularly communicate policy to employees.
  - Make sure it includes multiple avenues for reporting, an assurance that reports are taken seriously and investigated promptly, and an assurance that prompt corrective action will be taken, as necessary.

Recent Attacks on Enforcement of Non-Competition Agreements

Overview

- Public Policy Drives Court Decisions
- Need for Protection
- Reasonable Geographic and Temporal Restrictions
- Consideration
- Context (Employment or Sale of Business)
- Court Reform of Agreement
- Varies by State

Growth of Non-compete Use

- Recent statistics suggest that nearly 1 out of every 5 workers is covered by a non-compete agreement.
- Nearly 1 out of every 3 workers reports having worked under a non-compete agreement during his/her career.
- Increased attention

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Case Study: Jimmy John's

- On June 8, 2016, Illinois Attorney General Lisa Madigan sued Jimmy John's for imposing highly restrictive non-compete agreements on its employees.
- Jimmy John's required ALL employees to sign a non-compete agreement as a condition of employment.
- The non-compete agreements prohibited employees for 2 years from:
  - working in any business that earns more than 10 percent of its revenue from selling "submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches"
  - if the sandwich business was located within 3 miles of a Jimmy John's.
- So what was the issue?

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Case Study: Jimmy John's

- Illinois Non-compete Law
  - A restrictive covenant may be held enforceable only if:
    - (1) the time and territorial limitations are reasonable; and
    - (2) the restrictions are reasonably necessary to protect a legitimate business interest of the employer

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Case Study: Jimmy John's

- Result
  - The Illinois Attorney General filed a lawsuit under Illinois Consumer Fraud and Deceptive Business Practices Act.
  - The New York Attorney General began an investigation in 2014 which recently concluded with a settlement agreement in which Jimmy Johns agreed to discontinue providing such agreements to franchisees and to notify franchisees that the New York Attorney General regards such agreements as illegal.

An Outlier Case?

- Other Examples
  - Camp Bow Wow
    - A doggy day care franchise (with in-home pet-sitting services) has allegedly subjected its employees to non-compete agreements to protect alleged trade secrets.
  - Law360
    - Legal news media company required all its editorial employees to sign 1 year non-competes
    - NY Attorney General issued the following statement:
      - "Unless an individual has highly unique skills or access to trade secrets, non-compete clauses have no place in a worker's employment contract."

Media and Legislative Outrage

- Jimmy John's and other companies' similar non-compete agreements have sparked a widespread debate about the proper use of non-compete agreements and how their improper use negatively impacts wages.

Media and Legislative Outrage

- U.S. Treasury Department Report
  - In March 2016, the U.S. Treasury Department published a report that found that non-compete agreements cause various harms to worker welfare, job mobility, business dynamics, and economic growth.

Media and Legislative Outrage

- White House Report
  - In May 2016, the White House issued a similar report.
  - According to the White House report, non-compete agreements can:
    - (1) reduce workers' abilities to change jobs
    - (2) reduce workers' abilities to negotiate for higher wages
    - (3) increase unemployment
    - (4) prevent employees form starting new companies (that may hire other workers)
    - (5) stifle innovation
    - (6) restrict consumer choice
  - Report states that the White House intends to continue to discuss the proper use of non-competes and will put forward a set of best practices and call to action for state reform.

So What's an Employer to Do?

- Limit the Use of Non-competes to Key Employees
- Include Non-Solicit Covenants
- Require that Non-competes be Provided with the Initial Job Offer for Review
- Do Not Rely on Court Reform of Agreement (Limit the Terms as Much as Possible)
- Additional Consideration Beyond Continued Employment
- Impact of Reason for Termination
- Importance of State Law Selection and Compliance

Continued Erosion of "At-Will Employment"

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Erosion of the Doctrine

- Employment At-Will
  - "Any reason or no reason at all" except:
    - Discriminatory / Unlawful Reasons
      - Title VII
      - ADEA
      - ADA / Rehabilitation Act
      - FMLA
      - Equal Pay Act
    - Implied-in-fact Contract
    - Violation of Public Policy

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Wrongful Discharge in Violation of Public Policy

- Under Tennessee law, an employee may not be discharged for:
  - attempting to exercise a statutory or constitutional right, or
  - for any other reason which violates a clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision.

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Self-Defense as an Exception to At-Will Employment

- *Ray v. Wal-Mart Stores, Inc.*
  - The Utah Supreme Court held that there is a clear and substantial public policy in Utah favoring the right of self-defense.
    - It is enshrined in Utah statutes, the Utah Constitution, and Utah common law.
    - A policy favoring the right protects human life and deters crime, benefiting the public.
    - The right outweighs any countervailing interests of an employer where the employee reasonable believes that force is necessary to defend against imminent harm and the employee has no opportunity to withdraw.
      - Outweighed OSHA Recommended Policies

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Wrongful Discharge in Violation of Public Policy

- *Swindol v. Aurora Flight Sciences Corporation*
  - Aurora discharged Robert Swindol for violating company policy prohibiting employees from storing firearms in the company parking lot.
  - Aurora sued, claiming WDPP (Mississippi).
  - Following certification from the Mississippi Supreme Court, the Fifth Circuit held that the employment at-will doctrine "must yield to express legislative action."
  - Mississippi law states that employers may not enforce any rule that prohibits a person from transporting or storing a firearm in a locked vehicle in a parking lot or other designated parking area.

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Wrongful Discharge in Violation of Public Policy

- *Landin v. Healthsource Saginaw, Inc.*
  - The court held that "the right to report alleged malpractice in one's workplace without fear of repercussion is of at least equal, if not greater significance than benefitting and protecting victims of work-related injuries."
  - Defendant unsuccessfully argued that the claim was preempted by the Michigan Whistleblower Protection Act.
    - Plaintiff alleged malpractice and not a violation of the Public Health Code.
    - To establish malpractice, one does not necessarily have to allege a violation of the Public Health Code.

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Summary

- The presumption of at-will employment is generally a very strong presumption.
- However, courts have demonstrated a willingness to craft more exceptions, including:
  - Self defense where no reasonable opportunity to safely disengage
  - Where the legislator has enacted a gun-in-trunk law
  - Allegations of malpractice (not just complaints of health code violations)
- Another possible example might include:
  - The right to an attorney if an employee hires an attorney and issues a demand letter
- And employers must be careful not to use overbroad "at-will" language in employment policies and other documents
  - Possible NLRA Section 7 violation

Retaliation

- EEOC Recently Released New Guidance
  - Instructs plaintiffs, investigators, and employee personnel on how it expects the law to be enforced
  - New Guidance because Retaliation is now the most alleged violation in all charges.
    - Retaliation claims alleged in 44.5% of all charges received.
    - Twice as many as in 1998 (previous guidance)

Retaliation Elements

- Engage in Protected Activity
  - Participation Clause
  - Opposition Clause
- Suffer an Adverse Employment Action
- Causal Connection between Protected Activity and Adverse Action

EEOC: Adverse Employment Action

- Courts have held that the to be "materially adverse" the action must affect work conditions (wages or work hours).
- EEOC Guidance suggests just about anything could constitute an adverse action if an employee would be reasonably dissuaded from opposing unlawful conduct or participating in an investigation.

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Takeaways

- Ensure that you have written anti-retaliation policies
  - Include examples of actions that managers may not realize are actionable
- Ensure that you conduct an investigation for all complaints and that you document findings
- Train employees regularly about retaliation
- Train on how to handle personal feelings
- Implement scenarios
- Review Employment Actions
  - Ensure that decision-makers identify their reasons for taking consequential actions and ensure that documentation supports the decision
  - Ensure that performance evaluations have a factual basis
  - Ensure consistency from managers

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Interplay Between OSHA's New Regulation Regarding Post-Accident Drug Testing and TOSHA Guidance

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OSHA'S NEW RULES

- In May of 2016, OSHA issued new final rules regarding (1) discrimination and retaliation and (2) the electronic submission of recordable injury and illness data.
- The electronic submission provisions take effect on January 1, 2017.
- Employers with >250 employees and employers in "high-hazard industries" with >20 employees must submit information from their 2016 Form 300A electronically by July 1, 2017.
- Same employers will be required to submit information from all 2017 forms (300A, 300, and 301) electronically by July 1, 2018.
- OSHA will post this data on a publicly available website, which will be accessible by employees, contractors and competitors. The specifics of the website and these disclosures have not been explained.

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OSHA'S NEW RULES (cont.)

- The new anti-discrimination and anti-retaliation provisions went into effect on August 10, 2016.
- Employers must establish by November 10, 2016 "a reasonable procedure" for employees to report work-related injuries and illnesses promptly and accurately.
- The rule requires employers to inform employees about their right to report workplace injuries and illnesses free from retaliation.
- Old rule: OSHA could not act unless an employee filed a complaint within 30 days of the retaliation.
- New rule: An OSHA compliance officer will have 6 months to cite an employer for retaliation even if the employee did not file a complaint, or if the employer has a program that deters or discourages reporting through the threat of retaliation.

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INTERPRETATION

- OSHA intends to interpret this anti-retaliation regulation broadly to prohibit any adverse action that might dissuade a reasonable employee from reporting a work-related injury or illness.
- OSHA did clarify that the new final rule only prohibits an employer from discharging or discriminating against an employee because the employee reported a work-related injury or illness. Employers may still discipline employees who violate legitimate safety rules or company procedures.

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OSHA's Interpretation – Automatic Post Accident Drug Testing

- OSHA believes that blanket post-injury drug testing policies deter proper reporting and such a policy constitutes an "adverse employment action."
- OSHA suggests that employers must limit post-incident testing to situations:
  - (1) in which employee drug use is likely to have contributed to the incident; and
  - (2) for which the drug test can accurately identify impairment caused by drug use (i.e., recent drug use and impairment).

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OSHA's Interpretation – Automatic Post Accident Drug Testing (cont.)

- If the injury or illness is unlikely to have been caused by drug use – no drug test.
- If the test does not measure impairment at the time of the injury (as opposed to past drug use) – no drug test.
- Employers may choose to abandon blanket post-accident drug testing polices in favor of reasonable suspicion testing and/or random drug testing.
- OSHA did clarify that employers who conduct drug testing to comply with federal or state laws, such as the TN Drug Free Workplace Act, will not be in violation of the new rule.

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TOSHA Guidance

- TOSHA has issued a press release indicating that it intends to adopt OSHA's new final rule so that it will be in effect by January 1, 2017.
- TOSHA recommended that employers continue to follow all elements of the TN Drug Free Workplace statute, including the mandatory post-accident testing.
- If you want to have a blanket post-accident drug testing policy, you need to comply with the TN Drug Free Workplace Act.

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Recent Developments Regarding Compensation Practices

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Background

- The Equal Pay Act requires that an employer provide equal pay to men and women who perform equal work.
- The purpose of the EPA is to ensure that, where men and women are doing the same job under the same working conditions that they will receive the same pay.

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Background

- Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort, and responsibility and that are performed under similar working conditions within the same establishment.
- Employers may avoid liability if they can show the challenged wages result from:
  - A seniority system
  - A merit system
  - A system that measures work by quantity or quality of production
  - Some other differential based on any factor other than sex

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Increased Scrutiny

- Equal Pay issues have come under increased scrutiny by the EEOC, legislators, and the President in recent years.
- According to statistics released this year by the White House, the median wage of a woman working full time year-round is about $39,600, whereas the median earning of a man is $50,400.

Presidential Scrutiny

- President Obama created the National Equal Pay Task Force in January 2010 to crack down on equal pay violations.
  - From 2010 to 2012, the Task Force obtained over $381 million in relief for sex discrimination, including $62.5 million based on wage discrimination. The Force also filed five sex-based wage discrimination cases.

Presidential Scrutiny

- President Obama has issued an order requiring pay transparency in federal contracts by prohibiting retaliation against employees or applicants for discussing wages and benefits (for all contracts entered into after January 11, 2016).

Presidential Scrutiny

- President Obama has also renewed a call to Congress to pass the Paycheck Fairness Act.
  - Limit employers' affirmative defenses/broaden "establishment"
  - Compensatory and possibly punitive damages
  - Bar retaliation against workers who disclose or discuss their wages
  - Permit joinder of plaintiffs in class actions without their consent

Presidential Scrutiny

- President Obama has also issued a Memorandum to the Secretary of Labor, requiring a rule that federal contractors and subcontractors submit to the DOL summary data on the compensation paid to their employees, including data by sex and race.
  - The proposed rule requires that all companies which file EEO-1 reports, have more than 100 employees, and hold federal contracts worth $50,000 or more for 30+ days submit summary employee pay and demographic data.

EEOC Scrutiny

- A significant number of commenters to the proposed rule requiring that only federal contractors provide additional pay data suggested that the OFCCP coordinate with the EEOC to amend the Employer Information Report ("EEO-1").
- As a result, the EEOC did so on January 29, 2016.
- The pay data collection proposal basically expands on and replaces the earlier plan by the DOL to collect similar information only from federal contractors.

Proposed Revisions to EEO-1

- Under the proposed rule, EEO-1 filers with 100 or more employees must include two additional data components:
  - (1) Pay Data
    - Employers must collect aggregate W-2 data in 12 pay bands for the 10 EEO-1 job categories.
    - Employers must count and report the number of employees in each pay band.
  - (2) Hours Worked
    - Employers must collect the total number of hours worked by the employees in each pay band.
- Contractors with between 50 to 99 employees will not be required to submit new data but would only continue to file standard EEO-1s.

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General Guidelines

- The 2017 EEO-1 will be the first report to require pay data.
- March 31, 2018 Deadline (at least for wage and hour data—unclear as to rest)
- W-2 Box 1 income will be the measure of pay.
  - It will be calculated on a calendar year basis, ending December 31.

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Additional State Actions

- California
  - Fair Pay Act, Effective January 1, 2016
  - From "equal pay for equal work" at the same establishment to "equal pay for substantially similar work" regardless of location
  - Anti-retaliation provisions
  - Weakened employer defenses

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Additional State Actions

- New York
  - Achieve Pay Equity Bill
  - Equal pay for equal work at the same establishment
  - Limited Defenses
    - Like CA, must demonstrate that a bona fide factor other than sex:
      - Is not derived from a sex-based differential in compensation
      - Is job related with respect to the position
      - And is consistent with business necessity
    - But even if an employer meets this burden, the employee can still prevail if:
      - The employer uses a practice that causes a disparate impact on the basis of sex;
      - An alternative employment practice exists that would serve the same purpose w/o causing a disparate impact; and
      - The employer has refused to adopt the alternative practice.

Additional State Actions

- Maryland
  - Equal Pay for Equal Work Act of 2016
  - The law:
    - Forbids discrimination in pay for "work of comparable character or work on the same operation in the same business or of the same type"
    - Expands "establishment" beyond a single facility to include all workplaces in the same county
    - Forbids providing "less favorable employment opportunities based on sex or gender identity"
    - Limits the "other than sex" defense to bona fide factors that are not derived from a sex based differential in compensation, are job related and consistent with business necessity, and account for the entire difference.
    - Also prohibits pay secrecy and retaliation

Additional State Actions

- Most recently, Massachusetts signed its own pay equity bill, effective January 1, 2018.
  - From "equal pay for equal work" to "equal pay for comparable work"
  - Limited Defenses
  - Unique Affirmative Defense for Employers
  - Unique Prohibition on the Use of Prior Pay in Hiring
  - Bars pay secrecy

Employer Takeaways

- Consider conducting a pay audit
  - Review and update job descriptions
  - Compare pay between comparable jobs with eye toward gender concentration in particular jobs
  - Plan of action to address disparities
- Document the reasons for each employee's compensation
- Maintain additional documentary evidence for at least 3 years.
- Create internal complaint mechanisms
- Adopt anti-retaliation provision.

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