EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION SUPPORTS NEW LAWS PROTECTING EMPLOYEES FROM DISCRIMINATION

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In this, the latest installment in our series discussing the Biden Administration's workplace initiatives, we will now consider the potential impact on employment discrimination laws. At the moment, there are two main legislative actions underway in Congress, and President Biden has lent his support to both these initiatives, as well as other proposals that would affect employment discrimination laws.

Equality Act

In February 2020, the House of Representatives passed the Equality Act, which was originally passed in 2019 but never received a vote in the Senate. The Equality Act would write protections for LGBTQ individuals into Title VII and other federal civil rights statutes and would explicitly prohibit discrimination based on sexual orientation and gender identity. The U.S. Supreme Court's 2020 *Bostock v. Clayton County* decision held that Title VII protects employees against discrimination due to sexual orientation and gender identity, but the Equality Act would codify that decision for employment purposes and also expand the protections to housing, public accommodations, and other contexts. During debate on the bill, Republican lawmakers in the House voiced concerns about how the Equality Act will affect religious freedom for religious organizations. The bill that passed the House specifically states that the Religious Freedom Restoration Act, which provides that the government cannot infringe on a person's religious rights unless it has a good reason to do so and does so in the least restrictive way, cannot be used as a defense against a claim of LGBTQ discrimination under the Equality Act.

The Equality Act now heads to the Senate, where it will need 60 votes to overcome the filibuster. To do so, it may require the addition of religious freedom protections. If the Senate passes the Equality Act, President Biden, who has stated that it is necessary to "lock[] in critical safeguards," is likely to sign the bill into law. Whether or not the Equality Act becomes law, given the recency of the *Bostock* decision, the EEOC is likely to prioritize the protection of LGBTQ employees under Title VII.

Pregnant Workers Fairness Act

In February 2020, the House reintroduced the Pregnant Workers Fairness Act ("PWFA"). The PWFA would require private employers with 15 or more employees and public sector employers to make reasonable accommodations for pregnant employees unless such accommodations would impose an undue hardship on the employer. This will codify and expand upon the U.S. Supreme Court's decision in *Young v. UPS*, which held that employers are required to treat pregnant employees no less favorably than they treat non-pregnant workers with similar inabilities to work. Given the *Young* decision, many employers are likely already providing a least some accommodations to pregnant workers. The PWFA, however, would eliminate the comparison to "non-pregnant workers with similar inabilities to work" and simply require reasonable accommodations, absent an undue hardship.

Under the PWFA, employers would also be prohibited from retaliating against pregnant employees for requesting a reasonable accommodation, and a pregnant employee could not be forced to take paid or unpaid leave if another reasonable accommodation is available. The PWFA has bipartisan support and will likely pass the House when it comes up for a vote. Like other legislation, the PWFA would need 60 votes in the Senate to over come the filibuster. Given the PWFA's broad bipartisan support, it is likely that it will get a vote in the Senate, pass, and be signed into law by President Biden.

Other Potential Changes

Currently, in order to prevail on a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"), an employee must show that age was the "but-for" reason for the adverse employment action. This is a more stringent standard than the "motivating factor" or "mixed motive" standards, which are required to prove other types of employment discrimination, including under Title VII. President Biden has indicated his support for legislation that would eliminate the "but-for" standard and bring the ADEA in line with other anti-discrimination laws that protect employees.

Finally, during his presidential campaign, President Biden expressed support for the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act ("BE HEARD Act"). This proposed legislation would expand Title VII to cover all employers, not just those with 15 or more employees; would expand the definition of employee to include independent contractors, volunteers, interns, and trainees; and would require anti-harassment policies and training. The BE HEARD Act was introduced in the House in 2019, but never received a vote. Given the other pending employment discrimination legislation, it may not be reintroduced, but its underpinnings of expanded rights are an important barometer for where employment discrimination legislation and policy through the EEOC is likely headed over the next four years.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding employment discrimination.

EMPLOYMENT LAWSCENE ALERT: WHAT'S A BIDEN PRESIDENCY GOING TO MEAN FOR EMPLOYERS? AN OVERVIEW

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The labor and employment law policies and enforcement goals of the federal government rely largely on which party's administration occupies the White House. When inaugurated in January, President Joseph R. Biden made some immediate and significant changes that will affect employers. Also, based on President Biden's statements made during his campaign and the stated goals of others in the Democratic Party, decidedly pro-employee policies, enforcement goals, and legislation are very likely on the way. These changes are all but certain, now, with a Democratically controlled Congress. Over the next five weeks, the OCHDL employment law team will examine five labor and employment areas that employers should know and understand in order to navigate through the new and significant changes that the Biden Administration will likely make in the coming months and years. In the following weeks, we will cover:

- **OSHA**: On January 21, 2021, President Biden signed an Executive Order requiring OSHA to provide guidance to employers on workplace safety during the COVID-19 pandemic. In response, on January 29, 2021, OSHA issued guidance related to COVID-19. This guidance, as well as OSHA's enforcement policies regarding COVID-19, will likely continue to evolve under the new administration.
- **Wage & Hour**: This blog series will also cover potential wage and hour changes such as an updated federal minimum wage and the proposed Paycheck Fairness Act, which would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be passed on "a bona fide factor other than sex, such as education, training, or experience."
- **Labor Law**: We'll discuss the future of the NLRB and labor law under a Biden Administration. Significant changes, including the roll back of certain enforcement guidance and the ousting of the General Counsel, have already occurred, and if campaign promises are to be believed, we could have significant additional changes,

including the passing of the Protecting the Right to Organize (PRO) Act, which would be a sweeping overhaul of federal labor law including prohibiting the use of class action waivers in arbitration agreements, making it easier for workers to form unions, limiting the impact of right-to-work laws, and codifying an expanded definition of what constitutes a joint employer.

- **Discrimination**: Then, we'll cover the Biden Administration's potential impact on issues of discrimination, including the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD) Act, which would require most businesses to provide anti-harassment policies and training and would codify the prohibition of discrimination on the basis of sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, and a sex stereotype under Title VII.
- **DOL**: Finally, this blog series will wrap up with potential changes that could come through the Department of Labor, including changes to the independent contractor test, changes to the joint employer test, and expansions of the FMLA.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We look forward to expounding on these topics over the next five weeks and providing you with timely and relevant information over the years to come. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding the anticipated labor and employment law changes under the new Biden Administration.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT RULES THAT TITLE VII PROHIBITION ON SEX DISCRIMINATION PROTECTS GAY AND TRANSGENDER EMPLOYEES

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Today, June 15, 2020, the United States Supreme Court issued a landmark ruling holding that an employer who fires an individual based on his or her sexual orientation or transgender status violates Title VII's prohibition against discrimination "because of . . . sex." In a 6-3 decision, the majority found that "[s]ex plays a necessary and undisguisable role" in a decision to terminate an individual for being homosexual or transgender, which is "exactly what Title VII forbids." Although the Court recognized that "homosexuality and transgender status are distinct concepts from sex . . . discrimination based on homosexuality or

transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

Title VII requires the Court to apply a but-for test, under which an employer violates the law if the employment decision is based in part on sex. Therefore, the Court concluded that if you change *only* the individual's sex and it results in a different outcome, that is a violation of Title VII. So, the fact that a man who is attracted to men is treated differently from a woman who is attracted to men means that sex is the but-for cause of the decision. Justice Gorsuch, who wrote the majority opinion, analogized this to an employer firing female employees who were Yankees fans but not male employees who were Yankees fans. Sex does not have to be the sole or even the primary cause of the adverse action. There may be two or more reasons for the termination, but if a different outcome would have been reached if the individual's sex was changed, sex is the but-for cause of the decision. Therefore, because "homosexuality and transgender status are inextricably bound up with sex," a decision based on homosexuality or transgender status takes sex into account in a way that is impermissible under Title VII. Additionally, the Supreme Court did not find it persuasive that homosexual men and homosexual women would be treated the same. Instead, the Court stated that the focus of Title VII is on the individual and how the individual is treated.

The Court found that this decision is in line with prior precedent finding that the following instances violated Title VII where, if the plaintiff had been a different sex, they would have been treated differently: a policy where women with young children were not hired when men with young children were; a policy where women were required to make larger pension fund contributions than men because of longer overall life expectancies; and an instance where a male employee was sexually harassed by male coworkers. In each of these situations, the Court found that there was a violation of Title VII because the result would have been different if the individual was a different sex.

Finally, the Court dismissed arguments that this interpretation was not what Congress intended. First, the Court reasoned that the term "sex" was broad and that, where there are no statutory exceptions to a broad rule, it is not the Court's role to write in such exceptions. Additionally, the Court stated that, while this *result* may not have been what the drafters of Title VII anticipated in 1964, the *meaning* of sex has not changed, and the Court is bound to the plain meaning of the words contained in the statute.

The Supreme Court's decision does not change business-as-usual for Wisconsin employers. In 2017, the Seventh Circuit ruled that sex discrimination under Title VII includes discrimination based on sexual orientation. In addition, the Wisconsin Fair Employment Act prohibits discrimination on the basis of both sex and sexual orientation, and since at least 2015, the EEOC has taken the policy stance that sexual orientation and transgender status were protected categories under Title VII. The U.S. Supreme Court's ruling serves as a reminder for employers to stay vigilant about enforcing their anti-discrimination and anti-harassment

policies and practices for all individuals.

EMPLOYMENT LAWSCENE ALERT: HAPPY HOLIDAYS! HERE'S A LAWSUIT!

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The holiday celebration season is in full swing and everyone is ready to celebrate! And while that hopefully means reflecting on successes of the past year and bonding with coworkers, employers need to be aware of their exposure to potential liability arising from holiday celebrations and what they need to do to reduce or avoid such potential liability. While not to drive the joy out of the holidays, here are some common concerns employers should be aware of during the holiday season and tips on how to reduce employers' risk:

1. **Is That Mistletoe?:** Prevent Sexual Harassment. In light of the continued focus on the #MeToo movement, employers should stay focused on preventing sexual harassment during the holiday season, which includes any holiday party where coworkers congregate or socialize together. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of your employment policies and rules apply. If you become aware of inappropriate conduct that occurs at the holiday party, you must deal with it appropriately in the same manner as you would address such an incident had it occurred in the workplace. Additionally, if you receive complaints post-party about activities that may have occurred at the holiday party, you must document the incident, do a proper investigation to deal with those issues, and take prompt corrective action, if necessary.
2. **Hey, What's in This Drink?:** Reduce the Risk of Alcohol-Related Incidents. Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider either not serving alcohol or hosting their holiday parties at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated. Employers may also consider providing information regarding or paying for a ride-sharing service such as Uber or Lyft to promote responsible behavior.
3. **It's Icy Outside!:** Minimize the Risk of Workers' Compensation Liability. Workers'

compensation benefits may be available to employees who suffer a work-related injury or illness arising from an employer-sponsored holiday party. To avoid this liability employers should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so employers should use licensed third-party vendors who have their own insurance coverage to provide food and beverages.

4. **Am I Required to Be Here?:** Prevent Wage and Hour Claims. Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, ensure that no work is performed during the party, and make sure that employees are not under the impression that they are performing work.
5. **Happy Non-Denominational Holiday Celebration!:** Avoiding Religious Discrimination Claims. An employer's holiday party or year-end celebration should be about the people who work there and the accomplishments of the organization, not a particular set of religious beliefs unless, of course, you are a religious organization. Employees of all religious and ethnic backgrounds need to feel invited and welcome to attend. Additionally, if employees do not want to attend based on their particular beliefs or practices, an employer may not discriminate or retaliate against the employee for that choice.

So, for this 2019 holiday season, we hope that you spread the joy of the season, have fun, be safe, appreciate the hard work of your employees, and avoid the employment law pitfalls that can come with the holidays!

The Labor & Employment Law Practice Group, O'Neil, Cannon, Hollman, DeJong & Laing S.C.

EMPLOYMENT LAWSCENE ALERT: COMPANY HOLIDAY PARTIES & TIPS FOR AVOIDING LIABILITY

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The holidays are upon us, and that means holiday parties. While holiday parties are a good

time to reflect on the year and gather employees to boost morale and camaraderie, they also have potential employment law pitfalls that employers should plan to avoid. If throwing a company-sponsored holiday party, employers should keep the following in mind:

1. Prevent Sexual Harassment. Although the #MeToo movement has not changed the legal requirements related to sexual harassment, it has certainly brought such issues to the top of employer's minds, and it should stay there during the holiday season and any holiday parties. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of the policies and rules of the company apply. If you become aware of inappropriate conduct that occurs at the holiday party, you should deal with it appropriately. Additionally, if you receive complaints about activities related to the holiday party, you must document the incident and do a proper investigation to deal with those issues.
2. Reduce the Risk of Alcohol-Related Incidents. Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider hosting their holiday parties at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated.
3. Minimize the Risk of Workers' Compensation Liability. Workers' compensation benefits may be available to employees who suffer a work-related injury or illness. To avoid this liability at a company-sponsored holiday party, the employer should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so companies should use licensed third-parties who have their own insurance coverage to provide food and beverages.
4. Prevent Wage and Hour Claims. Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, and ensure that no work is performed during the party and that employees are not under the impression that they are performing work.

EMPLOYMENT LAWSCENE ALERT: MULTI-MONTH NEED FOR LEAVE DISQUALIFIES

EMPLOYEE FROM ADA PROTECTIONS

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Last week, the Seventh Circuit Court of Appeals issued a decision in which it stated that the Americans with Disabilities Act (ADA) does not require employers to give employees more leave after their Family Medical Leave Act (FMLA) allotment runs out. In *Severson v. Heartland Woodcraft Inc.*, the employee had a back condition for which he took twelve weeks of FMLA leave. At the end of his FMLA leave, he requested an additional two or three months of leave to recover from back surgery. The employer denied his request and terminated his employment, telling him that he could reapply once healthy. Instead, the employee filed suit, claiming that the company had violated the ADA by refusing to grant him a leave of absence and by failing to transfer him to a vacant job or a light duty position.

The ADA prohibits employers from discriminating against employees who are "qualified individuals," meaning that they can perform the essential functions of their jobs with or without accommodation. The Seventh Circuit upheld the district court's grant of summary judgment to the employer, finding that the employee was not a "qualified individual" with a disability under the ADA because he could not work, as shown by his need for long-term medical leave. Although there is no bright-line rule for what is considered a disqualifying long-term leave, the Court noted that, while a few days or even a few weeks of non-FMLA time would be acceptable, a period of multiple months is too long as leave does not permit the employee to perform the essential functions of his job. Although the EEOC argued in an amicus brief that a long-term leave of absence is a reasonable accommodation if it is definite, requested in advance, and would allow the worker to return at the end of the leave, the Court rejected this argument stating that such a policy would make the ADA into a medical leave entitlement instead of an anti-discrimination law that requires reasonable accommodations. The Court also rejected the plaintiff's other reasonable accommodation arguments, as he presented no evidence that there were any vacant positions at the time of his termination or that the company provided light duty to employees in any situation.

Although employers should carefully consider their obligations to employees under both the ADA and the Wisconsin Fair Employment Act, determine whether a requested accommodation is reasonable on a case-by-case basis, and engage in the interactive process with employees, this decision will be helpful in guiding employers that are evaluating employees' requests for extended leave.

EMPLOYMENT LAWSCENE ALERT: SEVENTH CIRCUIT RULES THAT EEOC MUST TRY TO RESOLVE DISPUTES THROUGH CONCILIATION BEFORE FILING SUIT

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On December 17, 2015, the Seventh Circuit held in *EEOC v. CVS Pharmacy Inc.* that the EEOC was required to first attempt to resolve its dispute with CVS through conciliation before bringing suit over whether CVS's language in its severance agreements constituted a "pattern or practice of resistance to the full enjoyment" of rights secured by Title VII. The EEOC alleged that CVS's standard severance agreement was overly broad, misleading, and intended to deter terminated employees from filing charges with the EEOC even though the agreement provided a carve-out recognizing the employee's right to "participate with any appropriate federal, state or local government agency enforcing discrimination laws."

We have previously blogged about this specific case here and other attempts by the EEOC to broaden their enforcement powers by skirting its conciliation duties here, here, and here.

In February 2014, the EEOC filed suit in federal district court in Illinois alleging that CVS's severance agreements constituted a "pattern or practice" in violation of Section 707(a) of Title VII by interfering with an employee's full enjoyment of the rights afforded by Title VII. In granting CVS's motion to dismiss the complaint, the district court determined that the EEOC was first required to conciliate its claim before bringing a civil suit—a prerequisite that the EEOC claimed it did not have to meet because "pattern or practice" claims brought under Section 707(a) authorizes the agency to bring such actions without following the pre-suit procedures in Section 706—including conciliation. The district court granted CVS summary judgment dismissing the EEOC's suit finding that the agency was required to conciliate its claims before filing its civil suit. In dismissing the EEOC's suit, the district court also questioned whether or not an employer's decision to offer a severance agreement could be the basis for a "pattern or practice" discrimination suit without any allegation that the employer had actually engaged in retaliatory or discriminatory employment practices—an allegation that was missing from the EEOC's complaint.

On appeal, the Seventh Circuit rejected the EEOC's position that Section 707(a) relieved it

from any obligation to follow the pre-suit procedures found in Section 706. In addition, the Seventh Circuit held that the prohibition against "pattern or practice" discrimination found in Section 707(a) did not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes but, rather, simply permits the EEOC to pursue multiple violations of Title VII. Because several circuits, including the Seventh Circuit, have found that conditioning benefits on a promise not to file charges with the EEOC is not, in itself, retaliation under Title VII, the court found that simply offering the severance agreement was not discrimination, and therefore, the EEOC failed to state a claim under Title VII. The Seventh Circuit's holding is in line with the recent Supreme Court decision in *Mach Mining, LLC v. EEOC*, which found that the EEOC can only resort to litigation when informal methods of dispute resolution fail because conciliation is a "key component of the statutory scheme" of Title VII.

Although this case was decided in the employer's favor regarding the waivers contained in its severance agreement, it is still recommended that employers include explicit and express provisions in their severance agreements that make clear: (i) that even though a severance agreement may provide that an employee may waive his or her right to sue in any court or agency, an employee should still be permitted by the express language of the agreement to participate in agency proceedings that enforce discrimination laws; (ii) that the waivers and releases are not to be construed to interfere with the EEOC's rights and responsibilities to enforce federal anti-discrimination statutes under its jurisdiction or those rights of any state administrative agency; and (iii) that the employee has the protected right to file a charge or participate in an investigation or proceeding conducted by the EEOC or any state administrative agency charged with the authority to enforce anti-discrimination laws. Until the U.S. Supreme Court ultimately rules on the issues presented in the CVS case, employers should expect that the EEOC will continue to be aggressive on these issues regarding whether the use of covenants not to sue under Title VII violate an employee's rights to the full enjoyment of protections afforded by Title VII. Including the above recommended carve-out language in severance agreements places an employer on defensible ground against any EEOC attack regarding the lawfulness of covenants not to sue used in severance agreements. For now, the Seventh Circuit's recent decision is an important victory for employers in Illinois, Indiana, and Wisconsin with regard to their ability to effectively use severance agreements to protect themselves from future suits by terminated employees without fear that such agreements may be considered retaliatory by the EEOC.

EMPLOYMENT LAWSCENE ALERT:

TRANSGENDER EMPLOYEES & BATHROOMS—WHAT SHOULD AN EMPLOYER DO?

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A few weeks ago, we posted a blog about the protection of transgender employees under Title VII. Since then, Caitlyn Jenner has graced the cover of Vanity Fair, the EEOC has further solidified its position on the matter, and OSHA has weighed in on the issue.

One matter that has come up in many of the transgender discrimination lawsuits that have been filed to date is the use of bathrooms. This is the situation in the most recent lawsuit by the EEOC. It alleges that a Minnesota company discriminated against a transgender employee by not letting her use the women's restroom and subjecting her to a hostile work environment.

Likely in response to these issues, the Department of Labor's Occupational Safety and Health Administration (OSHA) issued "A Guide to Restroom Access for Transgender Workers." OSHA requires, among other things, that employees are provided with sanitary and available restrooms. It is estimated that 700,000 adults in the United States are transgender, and OSHA stated that restricting employees to restrooms that do not conform with their gender identities or by requiring them to use a segregated gender-neutral or other specific restrooms singles transgender employees out and potentially makes them fear for their safety. Therefore, OSHA recommends that all employees should be permitted to use the facilities that correspond to their gender identity, and each employee should determine the most appropriate and safe option for him or herself. OSHA proposed two other optional solutions: 1) single occupancy, gender-neutral facilities for all employees; or 2) use of multiple-occupant, gender neutral restrooms with lockable single occupant stalls for all employees. Further, OSHA's best practices recommend that employees should not be asked to provide any medical or legal documentation of their gender identity in order to have access to appropriate facilities.

Based on the EEOC's current litigation trend and OSHA's best practices recommendation, employers should permit all employees to use the facilities that correspond with their gender identity. For now, the stance of the federal government is that employees should have unrestricted access and use of restrooms according to their full-time gender identity. Employers will need to deal with these situations on a case-by-case basis to find solutions

that are safe, convenient, and respectful.

EMPLOYMENT LAWSCENE ALERT: ARE TRANSGENDER EMPLOYEES PROTECTED UNDER THE LAW?

In April 2015, the EEOC also settled one of the first cases in which it attempted to litigate that transgender discrimination is protected under Title VII. The EEOC filed an amicus brief in a previous case claiming that sex discrimination includes discrimination against those who do not conform to gender stereotypes and, therefore, would include transgender individuals who are either physically male and gender-identify as female or are physically female and gender-identify as male. In March, the U.S. Department of Justice also sued Southeastern Oklahoma State University and the Regional University System of Oklahoma for denying tenure to and eventually terminating an employee because of her gender identity. Although none of these cases have received decisions on the merits of the case, the EEOC has made its position clear, and employers need to take stock of their policies or prepare for litigation.

These and other cases that have been filed raise interesting and challenging questions for employers. Gender expression is not specifically covered under Title VII, but that doesn't necessarily mean that transgender employees can't be covered by the statute. The two Circuit Courts of Appeals that have addressed the issue, the Sixth and the Eleventh, have held that a transgender plaintiff can state a claim for sex bias if the defendant took an adverse action against them because the worker-plaintiff didn't conform to a sex stereotype or norm. However, this does not mean that the law is settled, and district courts across the country may be faced with interpreting the law in these cases sooner rather than later. Employers should also make sure to take state law into account.

With the backing of the EEOC, discrimination suits by transgender employees could be a rising trend that employers should be aware of. Employers should review their policies and practices as they relate to discrimination and harassment and take complaints of harassment and discrimination of any kind seriously and investigate them thoroughly.

EMPLOYMENT LAWSCENE ALERT: HONESTY IS THE BEST POLICY IN PERFORMANCE REVIEWS

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On February 10, 2015, the *Wall Street Journal* published an article entitled "Everything Is Awesome! Why You Can't Tell Employees They're Doing a Bad Job" extolling the virtues of praising employees' strengths and scaling back on criticism. Although this may be good for employees' confidence levels, it is bad for companies when they have to defend a discrimination lawsuit or oppose a bid for unemployment benefits.For example, in September 2011, a New York woman sued in federal court claiming that her employer "mommy-tracked" her by attempting to demote her, refusing to promote her, and cutting her bonus after she took maternity leave, despite repeatedly earning positive performance ratings during her career with the company. The company argued that she was lawfully terminated because her reviews were done by an "easy grader" and she was not meeting the company's other metrics. In January 2015, the federal judge overseeing the case stated that the case looked strong enough to go to trial due in part to the questions of fact presented by the positive performance reviews.

Performance reviews are valuable tools for employers. While they may be used to boost an employee's self-esteem and confidence, employers should carefully train their supervisors and manager to give honest feedback and critiques when necessary. Problems should not be sugar-coated; the issue, the steps to correct the issue, and the consequences for failing to correct the issue need to be included in evaluations and reviews. These honest assessments on an employee's performance are essential to being able to discipline and terminate an employee if that becomes necessary, as well as defending the company from a lawsuit or claim for unemployment compensation.