

## **EEOC Developments & Trends**

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## **Housekeeping Matters**

- Please use the “raise your hand” feature or chat with the webinar staff if you are not hearing us.
- You may submit questions to the webinar staff at any time through the chat feature.
- The slide deck will be made available to registered attendees after the presentation.
- Be sure to sign up for the next webinar on Federal law changes for government contractors, featuring partner Lindsey Coley.

## Basics about EEOC

- 5 Commissioners in D.C. appointed by President–set agenda for Agency
- 90,000 charges/year
- Significant backlog of charges –ave. time to resolve charge is over 300 days!
- New system: electronic filings w/ EEOC

## EEOC Activity in 2016

- Sexual Orientation/Gender Identity Initiative
- Pregnancy Discrimination
- Sexual Harassment Prevention
- ADA (additional leave as reasonable accom.)
- New Retaliation Guidance
- New Strategic Enforcement Plan (2017-21)

## Status of LGBT Protection in the Workplace

- Significant national priority for EEOC
- EEOC aggressive actions in effort to expand law



## What is “Sex” Discrimination under Title VII?

- Does “sex” discrimination include discrimination against a person due to “transgender” status or “gender identity?”
  - Emphatic **YES**, says the EEOC
  - Courts: Not sure/Maybe/  
Depends on facts



## Lessons From EEOC Transgender Case

- Deluxe Financial settled transgender charge in Jan. 2016 for \$115,000
- Transitioning employee belittled by managers & co-workers
- Is *your company* prepared to address workplace requests from a transgender employee?

## Is “Sexual Orientation” Discrimination Unlawful “Sex” Discrimination?

- Until recently, prevailing view was that discrimination based on sexual orientation did **NOT** violate Title VII
- EEOC aggressively seeking to expand law
- Courts conflicting decisions (destined for Supreme Court review)

## **EEOC Files First Sexual Orientation Lawsuits**

- 3/1/16 EEOC Press Release
- Two lawsuits alleging that discrimination based on sexual orientation **is** sex discrimination under Title VII
- Logical progression of EEOC initiative to develop and expand the law

## **LGBT Litigation in News**

- EEOC continues to publish additional guidance on its website
- Sup. Ct. agrees to review Gloucester Co. bathroom access case (10/28/16)
- Oct. 2016—Full 7<sup>th</sup> Cir. agrees to hear sex orientation discrim. case—Ivy Tech

## Practical Recommendations for Employers

- Are you prepared?
  - EEO handbook policy expansion?
  - Management training
  - Similar to harassment/EEO training;  
Managers cannot make stereotypical  
or ignorant comments



## New Developments Regarding Pregnancy Discrimination

- Young v. UPS (Supreme Court 2015):  
whether employer had to provide light duty  
work for pregnant employee
- Another priority  
for EEOC



## **EEOC Guidance Issued June 2015**

- Pregnancy Discrimination Enforcement Guidance (June 25, 2015)
- “Questions and Answers about the EEOC’s Enforcement Guidance on Pregnancy Discrimination” (June 25, 2015)
- 2-page “Fact Sheet for Small Businesses: Pregnancy Discrimination”

## **June 2016 EEOC Guidance**

- Legal Rights for Pregnant Workers under Federal Law
- Fact sheet for Health Care Provider to assist pregnant employee w/work requests
- Bottom Line: EEOC publishing info to emphasize rights to pregnant employees



## Pregnancy Discrimination Act (PDA)

- Under PDA, employer cannot fire, refuse to hire, or take adverse action against woman if pregnancy, childbirth or related medical condition was a motivating factor in action
- Ex.: Pharmacy Solutions paid \$85,000 to settle PDA lawsuit; owner refused to accommodate scheduling request, and then fired pregnant pharmacist

## ADA Protection for Pregnant Employees

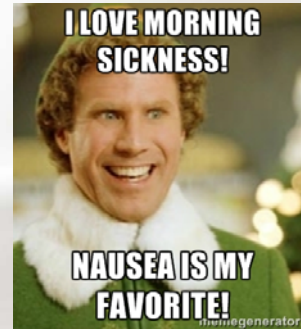
- Pregnancy is not a disability under the ADA
- However, medical impairments related to pregnancy *may* qualify as disability under ADA
- Interactive process – reasonable accommodation unless employer can prove undue hardship





## EEOC Examples of Reasonable Accommodations

- Modifying workplace policies, ex.: more frequent breaks
- Modifying a work schedule (later arrival because of morning sickness)
- Granting additional leave
- Temporarily reassigning employee to light duty (this was issue in UPS Sup. Ct. case)



## Preventing Sexual Harassment Remains National Priority for EEOC

- EEOC Select Task Force on harassment in workplace – June 2016 Report
- Harassment at work—still persistent problem—almost 1/3 of all charges
- Although sex is highest %, harassment claims can be based on **any** protected class (e.g., race, disability, national origin, age)

## EEOC's June 2016 Harassment Report

- 3 out of 4 persons who experience harassment at work never report it
- What is the culture in your workplace – leadership, accountability?
- Training has been largely ineffective!

## Court Decision makes Harassment Cases Easier to Prove

- Boyer-Liberto v. Fontainebleau (4<sup>th</sup> Circuit 2015)
  - Analysis as to what type of conduct constitutes “severe or pervasive” conduct
  - Court concluded that **1 or 2 isolated comments**, if extremely serious, may be sufficient



## **Other Employer Defenses Remain Intact**

- Real commitment to prevent harassment
  - Well-drafted and published policy & process
  - Management/employee training
- Once on notice, employer investigated and took effective action to end the conduct (if determined policy violated)

## **EEOC's May 2016 ADA Guidance**

- What must Employer do if EE seeks leave based on medical impairment/condition?
- (Assume FMLA not available or exhausted)
- EEOC Guidance: provide additional (unpaid) leave as reasonable accommodation
- Key Question: how long?

## **Additional Leave Under ADA**

- Beware of Inflexible Leave Policy/Practice (can't term automatically after 12 weeks off)
- ADA "interactive process" w/employee
- Seek medical certification & require updates from employee as to status/plans

## **Retaliation following Employee "Protected Conduct" under EEO laws**

- Employee complains about conduct that could violate your EEO policy/law (e.g., sexual harassment)
- Soon thereafter, Company takes adverse action against EE
- This is classic EEO Retaliation case!
- Largest # of charges filed with EEOC!

## **August 2016: EEOC Retaliation Guidance**

- EEOC new Retaliation Guidance (8-25-16)
- Sustained effort by EEOC to expand law on Retaliation
- Timing of adverse action is always factor
- Best practice: separate No Retaliation policy

## **EEOC's New Strategic Enforcement Plan (FY 2017-21)**

- Important New Plan published 10-17-16
- Continue to emphasize current priorities
- New: focus on contingent workers & the on-demand or gig economy
- New: focus on backlash discrimination against Muslims, Sikhs, others perceived as members of these groups

## Questions?

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### **SHRM Activity #16-BVLTS**

*This credit is available for those who attended the live event.*

#### **Is your company a government contractor?**

If so, register for the next webinar on November 15:

<https://www.gentrylocke.com/event/nov-15-webinar>