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Developments in Employment Practices: What Now?

Employment law is a complex whirlwind of ever evolving torts, statutes and rights that continue to develop based on changing social perceptions and practical politics, and sometimes the impacts are unpredictable. But forewarned is forearmed and this presentation will alert you to and concisely explore with you the hot button topics and new developments that are emerging in the employment landscape. Same sex marriage, obesity, the SMART Act, family responsibilities, and social media considerations are trending as issues to watch. Both experienced practitioners and those newly initiated to the employment practices field will come away with an increased awareness of late-breaking issues and practices.

WHO IS DRIVING THE BUS

The three major federal enforcement and policy agencies have adopted and published their strategic plans and priorities. In some respects, these are self-fulfilling prophecies. For instance, in 2006, the EEOC issued its Systemic Task Force Report (www.eeoc.gov/eeoc/task_reports/systemic.cfm) wherein it determined that the "Commission cannot effectively combat discrimination without a strong nationwide systemic program."

Unsurprisingly, the EEOC now predicts that by 2016, some 22%-24% of its cases in its active litigation docket will be systemic in nature.

Equal Employment Opportunity Commission (EEOC) Strategic Enforcement Plan 2013-2016. (www.eeoc.gov/eeoc/plan.sep.cfm)

1. **Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.
2. **Protecting Immigrant, Migrant and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of

their rights under the equal employment laws, or reluctant or unable to exercise them.

3. **Addressing Emerging and Developing Issues.** The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.

4. **Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on gender.

5. **Preserving Access to the Legal System.** The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.

6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.

If employers are feeling bullied by the EEOC and its agenda, they can take a little bit of comfort (glee even?) at the recent example of pushing back against the EEOC – *EEOC v. Peoplemark, Inc*. NO. 11-2582 (6th Cir. Oct. 17, 2013). The Sixth Circuit upheld an award of $750,000 in attorney fees for a prevailing employer in the EEOC's case for discrimination based on criminal background checks.

Department of Labor (DOL) Strategic Plan
(www.dol.gov/_sec/stratplan/StrategicPlan.pdf)

- Prepare workers for good jobs and ensure fair compensation
- Ensure work places are safe and healthy.
- Assure fair and high quality work life environment.
- Secure health benefits and, for those not working, provide income security.
    - nb – one selected measure is reemployment within two years
- Produce timely and accurate data on economics and conditions of workers and their families.

National Labor Relations Board (NLRB).

NLRB has become increasingly active and political particularly in the advent of expanded communications and social media. National Labor Relations Act (NLRA) can apply to non-union employers. 29 U.S.C. § 157. Activities engaged in for the purpose of

collective bargaining or other mutual aid or protection are covered. *Federal Security, et. al*., 359 NLRB No. 11 (Sept. 28, 2012).

With a new General Counsel recently confirmed, a sufficiently constituted Board and a new mobile app available for making complaints, expect significant activity regarding the right and ability to organize in the areas of social media and confidentiality.

DEVELOPMENTS AND TRENDS

Lies, Damn Lies and Statistics – where liability is trending most

Most costly types of Harassment and Discrimination settlements (http://www.eeoc.statistics.enforcement)

$177M – ***Retaliation claims***. These can survive even if the underlying discrimination claim does not.

- *Westendorf v. West Coast Contractors of Nevada, Inc*., No. 11-16004 (9th Cir. Apr.1, 2013). Offensive conduct insufficient to create a hostile work environment by sufficient factual questions still remain about whether termination was in retaliation for complaints.

- *Summa v. Hofstra Univ.,* No. 11-1743 (2d Cir. Feb. 21, 2013). Plaintiff failed to support her claim of sexual harassment yet could pursue retaliatory termination claim.

$139M – ***Sex related claims***. This is discussed more thoroughly below.

$103M **– *Disability related claims***. Litigation seems to focus on whether employers are meeting their responsibility to make reasonable accommodations and engage in the interactive process. The Fifth Circuit recently went to so far as to state that there is not even a nexus required between the requested accommodation (in this case, onsite parking for an employee with osteoarthritis) and essential job functions. *Feist v. Louisiana,* No. 12-31065 (5th Cir. Sept. 13, 2013).

$101M – ***Race related claims***. One area of systemic attack has been to attack criminal backgrounds checks as having a disparate impact on race. This is discussed more thoroughly below.

$92M - ***Age related claims***. Age discrimination charges have increased by 50% with the EEOC since 2000. Query whether the graying of America is going to feed this increase.

Leading the nation in H&D charges – 35.8%

- Illinois – 5490 (7th Circuit)
- Georgia – 5903(11th Circuit)
- California – 7399 (9th Circuit)
- Florida – 7940 (11th Circuit)
- Texas – 8929 (5th Circuit)

Implementing *Windsor.*

U.S. v. Windsor, 133 S.Ct 2675 (2013) did not hold that same sex marriage was the law of the land. It did hold that Section 3 of the Defense of Marriage Act violates the equal protection clause of the US Constitution by failing to recognize those same sex marriages valid under state laws, thus creating a subset of unequal marriages. Federal laws must recognize and provide equal benefits to valid same sex marriages.

- Revised Rule 2013-17 – Recognizes all legal same sex marriages performed in any of the 50 states, District of Columbia, US territories or foreign countries. This is also known as a "state of celebration" rule.

- DOL – Family Medical Leave Act. Revised its Filed Operations Handbook to state the "[s]pouse means a husband or wife as defined or recognized under state law for purposes of marriage o the state where the employee resides, including common law marriage and same sex marriage." This is the "state of domicile" rule. See also Fact Sheet #28.

- DOL – Employee Benefit Plans. Plans should use the state of domicile rule to determine validity.

- Some employers are preferring not to distinguish or vary from state to state.

- The Employment Non-Discrimination Act (ENDA). Essentially, this is legislation to extend Title VII like protection to sexual orientation and gender identity classes. This is not an interpretation or mandate of Windsor as much as a logical outgrowth of both that decision and the growing social acceptance of same sex orientation and gender identity. While many employers may be sympathetic and/or accepting of this development, the idea of more federal enforcement, particularly when an employer may not even be aware of the potential litigants protected characteristic, may meet with resistance. Additionally, the religious protection questions that are arising under ACA and the rights of private employers to abide by their religious conscience and dictates, is going to result in a multiplicity of litigation as these two values collide.

Pregnancy/Family Responsibility laws.

We continue to see a trend in greater protection for pregnant workers

- New York City. Amended to Administrative Code of the city of New York requiring employers with four or more employees to provide reasonable accommodations to pregnant workers, such as bathroom breaks, assistance with manual labor, and periodic rest for those who stand for long periods. Provides private right of action.

- San Francisco Family Friendly Workplace Ordinance. Intended to remove stigma from requests for flexible policies. Employees have the right to request flexibility and employers must show undue hardship in order to deny.

- Maryland. Reasonable Accommodations for Disabilities Due to Pregnancy Law. Employers with at least 15 employees must provide accommodation unless it presents an undue hardship. Possible accommodations include changing job duties or work hours or switching work areas.

This issue may be winding its way into Supreme Court jurisprudence. *Young v. United Parcel Service*, 707 F.3d 437 (4th. Cir. 2013) is on petition before SCOTUS and SCOTUS has requested briefing on the position of the solicitor General. The plaintiff sought light duty upon physician restriction on lifting post in vitro infertilization pregnancy. UPS denied light duty on basis that pregnancy is not itself a disability under the ADA. Fourth Circuit upheld summary judgment on basis that the UPS policy is gender neutral and not pregnancy related – UPS denied light duty to other "off the job" injuries. That is, it is "pregnancy blind."

Criminal Background checks and race

In 2012, the EEOC issued guidance to employers about the use of background checks, indicating that the agency was watching the issue closely. A number of suits followed alleging an unlawful employment practice due to the alleged disparate impact in African-Americans.

EEOC v. Freeman, RWT 09cv2573 (Maryland August 9, 2013). Judge points out numerous holes in the theory, including the "Hobson's Choice" of liability for criminal conduct it should have prevented or screening criminal backgrounds. Moreover, a disparate impact case must be carefully focused on the specific practice impacting a prohibited factor. "Careful and appropriate use of criminal history information is an important, and in many cases, essential part of the employment process of employers throughout the United States.

Religious Accommodation

Accommodating rights of employees

EEOC v. Abercrombie & Fitch, No. 11-5110 (Oct. 1, 2013) 10th Cir. Who bears the duty of requesting accommodation for religious belief? This is one of a number of Abercrombie cases brought by the EEOC over the conflict between Abercrombie's "Look Policy" and Muslim women wearing Hijabs. In this particular case, the applicant did not ask for accommodation because she did not understand there would be a conflict but the employer had superior knowledge that there would be and thus discriminated by not hiring her without opportunity for accommodation.

Adeyeye v. Heartland Sweeteners, Inc., No. 12-3820 (July 31, 2013) 4th Cir. Both a request case and reasonable accommodation case. Plaintiff had requested four weeks of leave to attend his father's funeral in Nigeria. He told employer that his failure to attend the rites would result in spiritual death for him and his family. Leave not granted and he was fired upon return. Court held both that the references to rites and ceremonies was sufficient to notify of the need for accommodation, and rejected employer's position that any inconvenience at all was sufficient to satisfy the "de minimis" standard for undue burden.

Accommodating the rights of employers

Currently on petition before SCOTUS are *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Sept. 17, 2013) and *Sebelius v. Hobby Lobby Store*s, 723 F.3d 1114 (10th Cir. 2013). These cases question the ability of the federal government to impose upon private employers the HHS mandate to provide birth control to employees in violation of their sincerely held religious beliefs in light of the Religious Freedom Restoration Act (RFRA). Although we can expect the Court to accept certiorari of one or both cases, there are standing issues raised as well.

EVOLVING MEDICAL ISSUES

Keep an eye out for what is happening in Workers Comp developments. They are often dealing with medical issues before the issues evolve into discrimination and other accommodation issues such as ADA

Obesity as a disability

"Our AMA recognizes obesity as a disease state with multiple pathopsychological aspects requiring a range of interventions and advance obesity treatment and prevention." 6/18/2013. How will this upgrade form a condition to a disease impact the employment force given that some 30% of the general public is overweight.

Workers Compensation has been dealing with this issue well before it has reached the area of ADA law and discrimination claims.

- *SAIF v Sprague*, 346 Or. 661, 217 P.3d 644 (2009) – Oregon Supreme Court orders gastric bypass as treatment for an on the job ankle injury.

- *Renner v. AT & T,* unpublished opinion from New Jersey. – Plaintiff is entitled to Worker's Comp widow's benefits after spouse dies from a pulmonary embolism attributed in part to sedentary job.

- *Pennington v. Wagner's Pharmacy*, 2012-CA-000573-MR (July 12, 2013) Kentucky. Plaintiff may proceed with her disability discrimination claim under state law, which is guided by federal law, after establishing that her morbid obesity had an underlying physiological component and interruption of major life activity.

- *Whittaker v. America's Car Mart.* A case to watch – this Plaintiff files Complaint in Eastern Dist. of Missouri for disability discrimination based on obesity within weeks of the AMA policy adoption.

Medical marijuana.

Twenty-one states and the District of Columbia have adopted medical marijuana laws, but it is still a Schedule 1 drug under the Federal Controlled Substance Abuse Act. http://www.norml.org/legal/medical-marijuana.2.

Employers generally not required to accommodate medical marijuana. *See Roe v. TeleTech Customer Care Management, LLC*, 171 Wn.2d 736, 257 P.3d 586 (2011). The Colorado constitutional amendment explicitly states that employers are not required "to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the availability of employers to have policies restricting the use of marijuana by employees."

But again, Workers Compensation has been dealing with this issue for a while.

Hopkins v. Uninsured Employees Fund, 359 Mont. 381, 251 P.3d 118 (2011). Employee who smoked marijuana before feeding the bears at Great Bear Adventures was attacked and mauled by bears. Court ruled that he was entitled to Worker's Comp because, while "mind bogglingly stupid" to smoke marijuana before feeding bears, marijuana was not the major contributing cause as bears are equal opportunity maulers.

SMART Settlements

There are important modifications to the Strengthening Medicare and Repaying Tax Payers Act that practitioners need to keep in mind when dealing with plaintiffs who are covered or may be covered under Medicare.

- Access to Information
- Pre Settlement Lien Demands
- Minimum Values established
- Penalty Modifications
- Statute of Limitations

SOCIAL MEDIA EVOLUTION

This is a rapidly evolving area. The existence of social media such as Facebook, Tumbler and other social sites results not only in healthy social interaction but also negative behavior such as harassment, negative statements about employers and their practices, and the possibility of revealing confidential information that is impossible to recover once it is disseminated.

NLRB and discipline considerations

No protection for individual gripes on social media. *Tasher Healthcare Group d/b/a Skinsmart Dermatology*, NLRB Div. of Advice, No. 04-CA-094222 (May 8, 2013); but,

Two employees griping and remarking about a supervisor on Facebook is protected concerted activity. *Bettie Page Clothing*, 359 NLRB No. 96 (April 19, 2013

Hiring Issues

Reviewing a prospective employee's social media, even public information, may put you in possession of information that makes them a protective class. For instance, GINA – Genetic Information Nondiscrimination Act or lawful off duty activity.

How you get to it. Many states are now making access requests to employees or prospective employees illegal.

Employee Misuse

A federal court has permitted a claim alleging employer liability for retaliation based on its owners', directors, managers' and supervisor's social media statements regarding the plaintiff, including Facebook statements. *Stewart v. CUS Nashville LLC*, 2013 US Dist. LEXIS 16035 (M.D. Tenn. Feb. 6,, 2013.).

SCOTUS (Supreme Court of the United States)

Important issues currently on the merits calendar and on the petitions calendar.

- *Schuette v. Coalition to Defend Affirmative Action*, 701 F.3d 466 (6th Cir. 2012). Constitutionality of color blind legislation.

- *Sandifer v. US Steel*, 678 F.3d 590 (7th Cir. 2012). More definition defining – this time changing clothes under the FSLA.

- *Town of Greece v. Galloway* 681 F.3d 20 (2d Cir. 2013) – legislative prayer services. The next opportunity for SCOTUS to address religious issues since the unanimous ministerial exception ruling.

- *NLRB v. Canning* 705 F.3d 490 (DC Cir. 2013). Should President Obama's recess rulings be voided?

- *Kaplan v. Code Blue Billing*, 504 Fed. Appx. 831 (11th Cir. 2013) – when are trainees allowed to be unpaid, unprotected interns. – on Petition

- *Young v. United Parcel Service*, 707 F.3d 437 (4th. Cir. 2013). Pregnancy Discrimination Act (PDA) case discussed above.