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Today’s Agenda

- Recent Court Decisions
  - Pregnancy Discrimination Act
  - Fair Labor Standards Act
  - EEOC Title VII Suits
  - Religious Discrimination
  - Same-Sex Marriage

- LGBT Employees

- The NLRB, Social Media, and Employee Handbooks

- The EEOC Strategic Enforcement Plan

- The ADAAA
Pregnancy Discrimination Act

Young v. UPS, No. 12-1226, 2015 WL 1310745 (U.S. March 25, 2015)

• Facts:
  – Part-time delivery driver for UPS becomes pregnant.
  – Dr. issues lifting restriction of <20 lbs.
  – UPS requires drivers to lift ≥ 70 lbs.
  – Young requests light duty.
  – UPS denies request.
Young v. UPS

- **Facts, cont.:**
  - UPS says light duty only available if employee:
    - Injured on the job;
    - Considered disabled under ADA; or
    - Lost their Dept. of Transportation certifications.
  - Young stays home w/o pay until after birth of child.
  - Young sues claiming pregnancy discrimination.
Young v. UPS

• **Issue:** Whether an employer who accommodates a large percentage of *non-pregnant workers* violates the PDA if it fails to accommodate a large percentage of *pregnant workers*?

• **Held:** An employer may violate the Pregnancy Discrimination Act (PDA) if it accommodates a large percentage of *non-pregnant workers* but fails to accommodate a large percentage of *pregnant workers*. 
**Pregnancy Discrimination Act**

*Young v. UPS*

- **Take-Away:** Employers must treat women affected by pregnancy the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.
  - Consider how pregnant women are treated compared to those requesting other accommodations across the org.
  - If policy makes accommodations for some (non-pregnant) employees, consider what accommodations might be made for pregnant employees.
Integrity Staffing Solutions, Inc. v. Busk, 135 S.Ct. 513 (U.S. 2014)

• **Facts:** Employees at Amazon fulfillment center required to pass through airport-style security screenings while off-the-clock before they are allowed to leave work for the day. Employees sued alleging violation of the FLSA for not being compensated for the ~25 minutes/day spent waiting for and doing security screening.
Integrity Staffing Solutions, Inc. v. Busk

- **Issue:** Whether the time employees spend waiting to undergo security screenings is compensable under the FLSA?
**Integrity Staffing Solutions, Inc. v. Busk**

- **Held:** No; the time spent by employees in security screenings before leaving work is not compensable under the FLSA
  - Portal-to-Portal Act exempts employers from FLSA liability for claims based on activities which are preliminary or postliminary to the performance of the principal activities that an employee is employed to perform.
**Take-Away:** Employers may not be subject to wage and hour claims for pre- or post-shift security screenings, even if the screenings are conducted for the employer’s own protection.

– Court employees likely not entitled to compensation while they are passing through court security measures.
Mach Mining, LLC v. EEOC, 135 S.Ct. 1645 (U.S. 2015)

• Facts:
  – After investigating a sex discrimination charge against Mach Mining, the EEOC determined that reasonable cause existed to believe the company had engaged in unlawful hiring practices.
Mach Mining, LLC v. EEOC

• Facts, cont.:
  – EEOC sent letter to Mach Mining inviting the employer and the charging party to participate in informal conciliation proceedings and notifying them that an EEOC rep would contact to begin the process.
  – Approx. 1 year later EEOC sends Mach Mining another letter stating that conciliation had been unsuccessful.
EEOC Title VII Suits

*Mach Mining, LLC v. EEOC*

• **Facts, cont.:**
  
  – EEOC sued Mach Mining in federal court.
  
  – Mach Mining asserted defense that EEOC had not attempted to conciliate in good faith, as Title VII requires, prior to bringing federal lawsuit.
Mach Mining, LLC v. EEOC

• **Issue:** Whether courts may review the EEOC’s efforts to settle discrimination charges before filing a lawsuit under Title VII.

• **Held:** Courts may review the EEOC’s efforts to settle charges before bringing a lawsuit but the ruling is very narrow.
Mach Mining, LLC v. EEOC

• **Take-Away:** Prior to bringing a Title VII suit, the EEOC is only required to:
  
  – Inform the employer about the specific discrimination allegation;
  
  – Describe what the employer has done and which employees (or class of employees) have suffered;
  
  – Try to engage the employer in discussion in order to give employer a chance to remedy allegedly discriminatory practice.

- **Facts:**
  - Job candidate, Samantha Elauf, is a practicing Muslim and wears a headscarf to job interview.
  - Under Abercrombie’s system for evaluating candidates, Elauf is qualified to be hired.
  - Abercrombie has a “Look Policy” that prohibits “caps.”
EEOC v. Abercrombie & Fitch Stores, Inc.

- **Facts, cont.:**
  - Elauf never asked for a religious accommodation to wear the headscarf.
  - Abercrombie “believed” (aka, assumed) that Elauf wore the headscarf as a religious practice and refused to hire Elauf because her headscarf, religious or otherwise, would violate the “Look Policy.”
  - EEOC sues on behalf of Elauf.
EEOC v. Abercrombie & Fitch Stores, Inc

• **Issue:** Whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a “religious observance and practice” where the employee did not provide the employer with direct, explicit notice of the need for a religious accommodation.
EEOC v. Abercrombie & Fitch Stores, Inc.

- **Held:** To prevail in a disparate treatment claim, a job applicant need only show that his/her need for an accommodation was a *motivating factor* in the employer’s decision, not that the employer had knowledge of his/her need for a religious accommodation.
EEOC v. Abercrombie & Fitch Stores, Inc.

- **Take-Aways:**
  - Title VII religious disparate-treatment claim requires plaintiff to show that employer:
    - 1) Failed to hire her;
    - 2) Because of;
    - 3) Her religion (including a religious practice).
  - “Because of” = protected characteristic cannot be a *motivating factor* in an employment decision.
Religious Discrimination

**EEOC v. Abercrombie & Fitch Stores, Inc.**

- **Take-Aways, cont.:**
  - Motive, not knowledge, is key in disparate treatment claim
    - I.e., Actions taken with the motive of avoiding the need to accommodate a religious practice are prohibited.
  - An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.


**Religious Discrimination**


- **Facts:** Job applicant filed complaint against employer for religious discrimination (failure to accommodate) because they refused to hire him because he failed to provide a social security number.
Yeager v. First Energy Generation Corp.

- **Issue:** Whether the applicant has stated a viable claim of religious discrimination under Title VII?
- **Held:** No.
- **Take-Away:** An employer is not liable under Title VII when an accommodation for an employee’s religious beliefs would require the employer to violate federal law.
Same-Sex Marriage and FMLA:

- **U.S. v. Windsor, 133 S.Ct. 2675 (U.S. 2013):**
  - The Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA)
  - Court held DOMA violated the equal protection component of the Fifth Amendment’s Due Process clause
  - For purposes of federal law, defining spouse to exclude same-sex spouse is unconstitutional
  - Did not provide federal constitutional right to same-sex marriage
  - Did not address constitutionality of state DOMA laws
Same-Sex Marriage and FMLA:

- DOL finalized new rule on February 25, 2015 expanding protections under FMLA for same-sex couples.
- All legally-married same-sex couples will now be entitled to FMLA protections (so long as they meet other statutory requirements), regardless of whether state of residence recognizes their marriage.
- As long as same-sex marriage is legal in state where union celebrated.
- Employer cannot ask for marriage certificate as proof.
Same-Sex Marriage and FMLA:

- Legally-married same-sex couples could:
  - Take leave to care for a seriously ill spouse
  - Take leave for activities related to spouse’s military deployment

- New rule intended to go into effect on March 27, 2015

- Currently on hold due to pending litigation, *Texas v. U.S.*
BUT...
Same-Sex Marriage


• **Facts:** 14 same-sex couples and 2 men whose same-sex partners were deceased filed suits in Federal District Courts in their home states.

• Plaintiffs claim that state officials violate the 14\textsuperscript{th} Amendment by denying them the right to marry or to have marriages lawfully performed in another state recognized.
Obergefell, et al. v. Hodges

• **Issues:** Whether states must license a marriage between two people of the same sex?
  • Whether states must recognize SSM between two people lawfully licensed and performed in another state?

• **Held:** Yes and yes.
Obergefell, et al. v. Hodges

• Held, cont.:
  • The due process and the equal protection clauses of the 14th Amendment require states to issue marriage licenses to two same-sex people on the same basis as opposite sex couples and to recognize lawful out-of-state same-sex marriages.
Obergefell, et al. v. Hodges

• Back to FMLA:
  – *Texas v. U.S.* is still technically pending
  – However, seems almost certain that *Obergefell* will cause FMLA coverage to be extended to all legally same-sex married employees.
Obergefell, et al. v. Hodges

• **Take-Aways:**

• Immediately start reviewing your policies
  – FMLA not likely to be the only policy/practice impacted
    • Bereavement leave
    • Sick leave
    • Benefits
**Same-Sex Marriage**

_Obergefell, et al. v. Hodges_

What the Supreme Court **DID NOT** hold:

- The Supreme Court did not designate LGBT persons as a protected class, so _Obergefell’s_ impact on the extension of Title VII protections is probably minimal, if any.
LGBT Employees

Application of Title VII to LGBT Employees:

• Courts historically rejected Title VII claims by LGBT employees, holding that discrimination based on sex applied strictly to biological sex

• Two U.S. Supreme Court cases significantly altered the landscape of sex discrimination claims under Title VII
  – *Price Waterhouse v. Hopkins* (sex stereotyping)
  – *Oncale v. Sundown Offshore Oil Services* (same-sex harassment)
Application of Title VII to LGBT Employees, cont.:

• **Take-Away:** This is an evolving area of the law and don’t be surprised if you see movement towards applying Title VII to LGBT employees.
Municipalities and LGBT:

- At least 185 cities and counties prohibit discrimination based on sexual orientation and/or gender identity
- Many also ban marital status discrimination
- Rapidly changing – and growing – statistics
- Must carefully review exact language of local ordinances
Employment Non-Discrimination Act (ENDA):
• First introduced in Congress in 1974
• Since 1994, ENDA has been reintroduced in every session of Congress except one
• Law would:
  – Ban hiring and employment discrimination based on sexual orientation or sexual identity
  – Apply to civilian, non-religious employers with at least 15 employees
Emerging Questions for Employers:

• Restrooms?
  – Unisex/gender neutral, restroom of choice or restroom of sex on driver’s license

• Dress Codes?
  – May be required to allow employees to dress consistent with gender identity if legal protections exist
  – If no applicable federal, state or local laws, disparate treatment analysis applies

• Perceived Customer Bias?
  – “Deference to the real or presumed biases of others is discrimination, no less than if the employer acts on behalf of his own prejudices.” Schroerer v. Billington (D.D.C. 2008)
Employer Best Practices:

• Be aware of and comply with all applicable state and local non-discrimination laws and ordinances where you have business operations.

• Ensure all hiring and employment decisions are based solely on merit and not on discriminatory preconceived notions and gender stereotypes.

• Ensure policies comply with all state and local laws and workplace non-discrimination objectives.

• Train employees on policies and place appropriate emphasis on inclusive company culture.
What is the NLRB?

The National Labor Relations Board ("NLRB"), is a five (5) member board appointed by the President to enforce the National Labor Relations Act ("NLRA").

Who does the NLRA cover?

- All employers engaged in interstate commerce above specified minimal standards
- Applies to both union and non-union employers
The NLRB, Social Media, and Employee Handbooks

• How does the NLRA/NLRB apply to social media and employee handbooks?
  – Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."
How does the NLRA/NLRB apply to social media and employee handbooks, cont.?

- Policies or employee handbooks may address or affect protected concerted activities.
- Protected concerted activities include:
  - Sharing information about wages;
  - Complaining about policies or managers;
  - Displaying union-related logos;
  - Expressing union support;
  - Attempting to unionize;
  - Discussing employment terms.
On March 18, 2015, NLRB General Counsel Griffin issued a Memorandum titled “Report of the General Counsel Concerning Employer Rules.”

Even though a rule may not explicitly prohibit Section 7 activity, it can still be found unlawful in any one of three circumstances:

– Employees would reasonably construe the rule’s language to prohibit Section 7 activity;

– The rule is promulgated in response to union or other Section 7 activity; or

– The rule is actually applied to restrict the exercise of Section 7 rights.
• “A confidentiality rule that broadly encompasses ‘employee’ or ‘personnel’ information, without further clarification, will reasonably be construed by employees to restrict Section 7–protected communications.”
• Examples of lawful confidentiality policies:
  – No unauthorized disclosure of “business ‘secrets’ or other confidential information.”
  – “Misuse or other unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.”
  – “Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.”
The General Counsel indicated that social media contact rules could be lawful if employees would reasonably interpret those rules to mean that employees should not speak on behalf of the company, but they were not prohibited from speaking to outsiders on their own behalf or on the behalf of other employees.
• Using that rationale, the following policy was found to be **lawful**:

  “The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To serve these objectives, the company will respond to news media in a timely and professional manner only through the designated spokespersons.”
The NLRB, Social Media, and Employee Handbooks

• *Three D, LLC.*, 361 NLRB No. 31 (2014):
  – The NLRB unanimously found that the employer had violated the NLRA by discharging two employees for their protected, concerted participation in a Facebook discussion in which they complained about perceived errors in the employer’s tax withholding calculations.
• EEOC Strategic Enforcement Plan (SEP) FY 2013-2016
  – Establishes EEOC’s priorities; and
  – Integrates all component’s of EEOC’s private, public, and federal sector enforcement.
  – Purpose: “To focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.”
  – Take-Away: These are things the EEOC is looking for.
Six National Priorities:

1. Eliminating barriers in recruitment and hiring;
2. Protecting immigrant, migrant and other vulnerable workers;
3. Addressing emerging issues and developing issues;
4. Enforcing equal pay laws;
5. Preserving access to the legal system;
6. Preventing harassment through systemic enforcement and targeted outreach.
1. Eliminating barriers in recruitment and hiring.
   - Exclusionary policies and practices
   - Restrictive application processes
   - Restrictive screening tools
   - Steering particular groups into specific jobs

   • This priority is embodied by “Ban the box” initiatives.
1. **Eliminating barriers in recruitment and hiring, cont.**
   - EEOC is focused on encouraging employers to do individualized assessments for job candidates and employees that have a criminal history.
     - Give candidates and employees a means to explain
     - Employer does individual assessment prior to disqualifying a candidate/employee
   - Pre-employment medical screening
• **Take-Away:**

  – If you use background checks, be sure to use them equally and fairly

    • Do not base the decision to do a background check on a candidate/employee’s race, national origin, color, sex, religion, disability, genetic info, age, etc.

  – Be cautious about automatically excluding candidates/employees who have been convicted of a crime

  – Do not ask medical questions before a conditional job offer is made
2. Protecting immigrant, migrant and other vulnerable workers.

- Disparate pay
- Job segregation
- Harassment
- Trafficking
3. Addressing emerging and developing issues

- ADAAA coverage and reasonable accommodation
- Accommodating pregnancy-related limitations under the ADAAA and PDA
- Coverage of LGBT individuals under Title VII’s sex discrimination provisions
3. Addressing emerging and developing issues, cont.

- EEOC Strategic Enforcement Plan FY 2013-2016: Commission recognizes that coverage of **lesbian, gay, bisexual and transgender** individuals under Title VII’s sex discrimination provisions, as they may apply, are elements of **emerging or developing issues**
3. Addressing emerging and developing issues, cont.

• Through 3Q of 2014, EEOC received 663 sexual orientation and 140 gender identity charges
• In September 2014, EEOC filed its first two transgender suits against private employers
• Recently filed an *amicus* brief in Seventh Circuit case arguing that even discrimination based on sexual orientation was form of unlawful sex stereotyping
4. Enforcing equal pay laws.

• Especially focused on compensation systems and practices that discriminate based on gender.

• **Take-Away:**
  
  – Have a pay plan for pay practices and compensation.
  
  – Document and preserve reasons for pay decisions.
5. Preserving Access to the legal system.

- Focused on policies or practices that prohibit or discourage individuals from exercising their rights or that impede investigative and enforcement efforts.
  - Focused on severance agreements that prohibit an employee from taking protected activity, e.g., filing a charge with the EEOC.
  - Also a heavy focus on retaliation.
The EEOC Strategic Enforcement Plan

6. Preventing harassment through systemic enforcement and targeted outreach.

• Focus on systemic harassment based on race, ethnicity, religion, age, disability, and/or sex.
• Focus on policies, practices, or cultures of harassment.
6. Preventing harassment through systemic enforcement and targeted outreach, cont.

- Systemic discrimination cases are pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area.
6. Preventing harassment through systemic enforcement and targeted outreach, cont.

- Triggers for a systemic investigation:
  - Individual charge includes a class allegation;
  - Charge does not include class allegation but EEOC discovers evidence of a larger problem and expands the investigation;
  - An allegedly discriminatory policy is at issue.

- **Take-Away:** Be proactive to prevent systemic issues.
The ADA Amendments Act of 2008 (ADAAA) became effective on January 1, 2009.

- Significantly and purposefully expanded ADA coverage for individuals by redefining the term “disability.”
- Clearly states that it should be construed in favor of broad ADA coverage.
- Under ADAAA, courts are required to focus primarily on whether discrimination has occurred or accommodations properly refused.
“Disability” means, with respect to an individual:

- A physical or mental impairment that substantially limits one or more major life activities of such individual;
- A record of such an impairment, or
- Being regarded as having such an impairment.
• Definition of major life activities more clearly defined:
  – Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
Definition of major life activities more clearly defined:

- Major life activities also now includes major bodily functions.
- Major bodily functions include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
The ADAAA

• The ADAAA also specifically and purposefully, without providing an exact definition, expanded the definition of “substantially limits.”
  – “Substantially limits” is not meant to be a demanding standard.
  – The ADAAA specifically rejects the *Toyota Motor Mfg. v. Williams* interpretation that “substantially limits” requires that an impairment “severely restricts” the individual from major life activities.
• Instead of providing a definition of “substantially limits” the ADAAA relied on the EEOC to enact regulations to provide guidance on the term.
• EEOC final regulations provide nine “rules of construction” to determine whether an impairment substantially limits an individual.
• The key factor is that the determination of whether an individual is substantially limited requires an individualized assessment.
• Take-Aways:
  – In most cases, don’t waste your time challenging whether an employee has a disability.
  – Instead, focus on engaging in the interactive process and making an individualized assessment as to whether an accommodation can be made and, if so, what it should be.
  – Review your ADA policies and practices for compliance.
  – Make and keep clear, organized documentation.
Final Questions?

Thank you!

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