LEGAL UPDATE

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June 2016
I. LGBT Issues: Charges Filed with the EEOC

- In FY 2015, the EEOC received 89,385 charges in the private sector.
- More than 1400 of these included sex discrimination allegations related to transgender status or sexual orientation.
- The EEOC also resolved 1,135 LGBT charges in FY 2015, including the full range of dispositions. Those resolved favorably to the charging party included voluntary agreements, obtaining approximately $3.3 million in monetary relief for workers and achieving changes in employer policies so that discrimination would not recur.
Gender Identity
*Macy v. Dep’t of Justice*

- In April 2012, the EEOC decided *Macy v. DOJ*, brought by an applicant for a federal job. The EEOC ruled that gender identity discrimination is always a form of sex discrimination, and explicitly overturned its previous federal sector decisions to the contrary.
  - Legal theories: stereotyping
    - "because of sex"

- The *Macy* decision also meant that EEOC staff across the country began to investigate charges of gender identity discrimination brought in the private sector as sex discrimination charges.
The EEOC continued to issue important federal sector decisions. In April 2015, in *Lusardi v. Dept. of the Army*, the EEOC ruled that a transgender employee has the right under Title VII to use the restroom and locker room consistent with his or her gender identity, regardless of what surgery the person may or may not have had.

The EEOC also ruled that the agency was liable for *sex-based harassment* for not stopping the consistent and inappropriate use of Lusardi’s wrong name & pronoun and denying her access to the appropriate restroom.
Complainant filed a complaint with DOT/FAA alleging that he was discriminated against on the basis of sexual orientation when he was not promoted to a permanent Front Line Manager position in the Air Traffic Control Tower at Miami International Airport.

The FAA declined to process the case under its Title VII procedures and instead applied its separate internal procedures for investigating complaints of sexual orientation discrimination on the grounds that Title VII does not cover discrimination based on sexual orientation.

On appeal, the EEOC concluded that Complainant stated a claim under Title VII.
Legal Theories Supporting Baldwin

- **Disparate treatment** based on sex, per a plain reading of Title VII’s statutory language prohibiting discrimination “because of . . . sex.” (e.g., male applicant not hired because has male spouse, but female applicant with male spouse would have been hired)

- **Associational discrimination** based on sex (employer took employee's sex into account by treating him differently for associating with a person of the same sex)

- **Discrimination based on gender stereotypes**, including about sex of person to whom male or female should be attracted
EEOC RESOURCES

➢ What You Should Know About EEOC and Enforcement Protections for LGBT Workers
www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

➢ Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964
https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm
II. Final Rules on the ADA, GINA, and Employer Wellness Programs

- EEOC issued final rules under both the ADA and GINA on employer wellness programs on May 17, 2016.
  - The agency has also published question-and-answer documents on both rules and shorter documents for small businesses.
  - A press release that includes links to the rules, the Q&A documents, and the documents for small business are available here: https://www.eeoc.gov/eeoc/newsroom/release/5-16-16.cfm.

- Why did we write these rules?
  - To harmonize HIPAA's goal of allowing incentives to encourage participation in wellness programs with ADA and GINA provisions that require that participation in certain types of wellness programs be voluntary.
The Issue: ADA and Wellness Programs

- ADA generally prohibits disability-related inquiries or medical examinations of employees except where job-related and consistent with business necessity.

- However, such inquiries and exams are allowed as part of an employee health program, if voluntary.
Question: Can a wellness program be considered voluntary if an employer offers incentives in exchange for an employee answering health questions or taking a medical examination?

Answer: Yes, within limits, and provided certain other requirements are satisfied.
GINA prohibits employment discrimination based on genetic information, including family medical history.

GINA strictly limits an employer’s right to request, require, or purchase genetic information.

One exception to the GINA rule prohibiting acquisition of genetic info is for voluntary health or genetic services provided to employees or their family members.
Question: If an employer offers an employee’s spouse or family members an opportunity to participate in a wellness program, are inducements in exchange for the spouse or family member providing current or past health status information permissible?

Answer: Yes, for spouses (not children) within limits and provided certain other requirements are met.
A Few Things You Need to Know About the Final Wellness Rules

1. **Permissible Incentive** under ADA for employee to answer disability-related inquiries/undergo medical exams in connection with a WP is **30% of total cost of self–only plan**.
   ◦ Same permissible incentive under GINA for spouse.

2. All WPs are covered under our rules.

3. Employer **cannot retaliate** against an employee for non–participation in WP.
A Few Things You Need to Know, cont’d

4. Employee who cannot participate in WP or reach WP outcomes because of disability is entitled to reasonable accommodation under ADA.

5. WP must be “reasonably designed to improve health or prevent disease.

6. Strict confidentiality rules

7. Clear notice requirement in ADA Rules

- Plaintiff, who is deaf, applied for a position as a Nurse Clinician. After she accepted the hospital’s offer, she requested an ASL interpreter. Citing cost, the Department of Medicine denied her request for accommodation and rescinded the job offer.

- HELD: The employer failed to prove that the projected $120,000 annual cost of an ASL interpreter was an undue hardship. Rejecting Hopkins’ focus on the budgets of the department and unit into which plaintiff was hired, the court found that the cost of an interpreter was 0.007% of the hospital’s $1.7 billion operational budget.

- The court also rejected Hopkins’ direct threat defense, finding that the hospital conducted no individualized assessment of the threat plaintiff may have posed.
ADA Update, cont’d

Undue Hardship & Direct Threat: *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260 (10th Cir. 2015)

- Plaintiff, who was deaf, applied for job as plasma center technician (PCT). Offer was rescinded because she could not hear alarms on plasmapheresis machines.

- Reversing summary judgment, court held that there was a material factual dispute whether plaintiff’s proposed accommodations (visual/vibrating alerts and call buttons) were reasonable.
  - **Visual/Vibrating Alert** is reasonable on its face and defendant did not prove undue hardship.
  - **Call Button** is reasonable on its face and defendant did not prove direct threat (showed minimal risk, not significant risk).
Leave as a Reasonable Accommodation

- Our investigators continue to see many violations of longstanding EEOC positions on ADA and Leave.

- New resource document, posted May 9th, reminds the public of these basic rules:
  
  Employer-Provided Leave and the Americans with Disabilities Act

  https://www.eeoc.gov/eeoc/publications/ada-leave.cfm
ADA and Leave as a Reasonable Accommodation, cont’d

Basic Rules:

1. Employer may have to modify maximum leave policy when employee needs more leave as a reasonable accommodation.

2. Employer policies requiring employees returning to work from leave to be “100% healed” may violate the duty of reasonable accommodation.

3. Reassignment must be considered as an option for employees who cannot return from leave to their current jobs.
IV. Pregnancy Discrimination

- One of the six national priorities identified in Strategic Enforcement Plan (SEP) is litigating “emerging or developing issues”

- One such “emerging or developing issue” is “accommodating pregnancy–related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act” (SEP, Part III.B.3)
More Pregnant Women in the Workforce

• **1961–65**: 35% of first-time mothers who worked during pregnancy worked into their final month.
• Compare to **2006–08**: 82% of first-time mothers who worked during pregnancy worked into their final month.

• **1970**: Mean age at first birth was 21.4.
• Compare to **2007**: Mean age at first birth was 25.

• **2012**: 41% of all births were to single women.
EEOC’s Pregnancy Discrimination Guidance
June 2015

- Enforcement Guidance: Pregnancy Discrimination And Related Issues
  http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
- Questions and Answers about the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues
  http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm
- Fact Sheet for Small Businesses: Pregnancy Discrimination
  http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm

- **Facts:** Employer’s light duty policy was limited to individuals injured on the job, those with disabilities, and those who lost Department of Transportation certification to drive commercial motor vehicles.

- **Issue in *Young v. UPS***: Whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations is required under Title VII (PDA) to provide comparable work accommodations to pregnant employees who are “similar in their ability or inability to work.”

- **Question in *Young*** was limited to the scope of the PDA, not the ADA.
Young v. UPS, cont’d

- HELD:
  - Employer light duty policies that do not explicitly exclude pregnant employees may still violate the PDA if they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification; and
  - Evidence of an employer policy or practice of providing light duty to a large percentage of nonpregnant employees while failing to provide light duty to a large percentage of pregnant workers might establish that the policy or practice significantly burdens pregnant workers.
ADA: Reasonable Accommodation for Workers with Pregnancy–Related Disabilities

- EEOC regulations still make a distinction between “normal” pregnancies and those with complications. See EEOC’s Questions and Answers on the Final Rule Implementing the Amended ADA, at Question 23, available at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

- Generally, under the ADAAA’s expanded rules of construction and definitions, many more pregnancy–related conditions now may qualify as “physical impairments” supporting “actual disability” and “record of such disability” claims.
Common Accommodations for Pregnancy-Related Limitations

- Modification of job duties, such as provision of “light duty” or redistribution of marginal functions
- Modification of work hours
- Relocation to a different work area
- More frequent breaks
- Modification of policies – permission to use a stool while on duty or to drink from a water bottle
- Additional leave
Worker with Pregnancy–Related Limitation May Have Claim Under both ADA and Title VII

*Bray v. Town of Wake Forest*, 2015 WL 1534515 (E.D. N.C. Apr. 6, 2015)

- **Facts:** After being hired as a police officer, Plaintiff discovered she was pregnant. After she submitted a doctor’s note stating she would not be able to run, jump or lift more than 20–25 pounds during her pregnancy, her employment was terminated.

- **Held:** Plaintiff alleged sufficient facts for her PDA and ADA claims to be plausible.
  - **PDA:** Statements that she “was not fit for her job” while two male officers received light duty assignments when they experienced physical limitations due to injury were sufficient allegations of discrimination.
  - **ADA:** Plaintiff’s alleged restrictions of lifting, running, and jumping were sufficient to establish a substantial limitation.
V. Consideration of Arrest and Conviction Records in Employment Decisions

- Enforcement Guidance issued March 25, 2012

- Employee Screen IQ 2015 Survey:
  (72% of respondents perform individualized assessments)

- **EEOC v. BMW** (D.S.C.) 9/8/15 consent decree – $1.6 million for 56 African American employees who were discharged; job opportunities for discharged workers and a class of applicants.

- **Gonzales v. Pritzker** (S.D.N.Y.) – $15 million in 4/19/16 preliminary settlement – suit alleged that black and Latino applicants for temporary jobs in the 2010 census were screened out by procedural barriers in the background check process.
VI. Proposed Enforcement Guidance on Retaliation

- Approximately sixty comments received – 20 from employer and worker advocacy groups.
- We have considered the comments and are drafting the final Guidance.
Proposed Enforcement Guidance on Retaliation, cont’d

Issues covered in proposed guidance include:

- Commission’s views on scope of the “participation” and “opposition” clauses
- Pay discussions as “opposition”
- Retaliatory conduct that would typically arise as a harassment claim
- New section on “interference” under the ADA

Detailed section on best practices.
VII. Proposed Enforcement Guidance on National Origin Discrimination

- Issued for 30-day public input period on June 2, 2016; comment period ends July 1st.
  
  [Link to EEOC website]

- 11% of charges are N.O. – vulnerable, immigrant, and migrant workers are a priority

- New issues addressed include: job segregation, human trafficking, intersectional discrimination, and promising practices.

- Reiterates longstanding EEOC positions on undocumented workers and English-only rules