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EEOC: Sexual Orientation Discrimination Is Gender Discrimination Under Title VII

On July 23, 2015, the EEOC ruled that discrimination based upon an applicant's or employee's sexual orientation is a violation of Title VII's gender discrimination protection. While the EEOC had previously argued with success that gender stereotyping is unlawful discrimination (*e.g.* discriminating on the basis of effeminacy for men or masculinity for women), this is the first time the agency has taken the position that sexual orientation is itself a protected category.

Notably, Title VII does not mention sexual orientation. As a result, courts have consistently dismissed employment discrimination claims based upon sexual orientation where there was no state or municipal regulation specifically extending protection to sexual orientation. According to the EEOC, "[T]he question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not." Rather, the question, according to the EEOC, is whether gender is a consideration when taking an employment action. In sum, the EEOC's position is that it is a gender stereotype for men to be attracted to women and women to be attracted to men. Taking an adverse action against an employee for not conforming to this stereotype is a violation of Title VII.

Religious organizations who object to same-sex relationships on religious grounds are likely to be excepted. This is similar to the exception already provided under Title VII, which allows religious organizations to make employment decisions based upon their religious beliefs.

The EEOC's most recent position has yet to be considered by a court. Moreover, state and federal legislation regarding this issue remains pending. GKH will provide updates as this issue develops.

Our recommendation continues to be that employment decisions should be based upon well-documented legitimate non-discriminatory reasons (*e.g*. qualifications, performance and disciplinary record), and that harassment or bullying for whatever reason should never be tolerated.

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Department of Labor Announces New Fair Labor Standards Act Proposed Rule Regarding Exempt Employees

As anticipated for the past year, the DOL has announced a proposed rule change that would broaden federal overtime pay regulations by raising the minimum salary from $455 per week or $23,660 per year to $921 per week or $47,892 per year to qualify for the FLSA's white collar overtime exemption. Additionally, the proposed change will increase the salary requirement for highly compensated employee exemption from $100,000 to $122,148 per year. An employee not meeting the salary basis must be paid overtime. The regulations were last updated in 2004 and it is anticipated that the rule change may affect as many as 11 million employees.

What does this mean for employers? If the proposed rule is enacted, employers will have to make the decision to, in some cases dramatically, increase employees' salaries or convert exempt employees to non-exempt hourly employees with overtime eligibility. Employers should consider how fluctuating overtime eligibility may affect payroll in comparison to current salaries.

Abercrombie & Fitch Loses Religious Discrimination Case Before the Supreme Court

The U.S. Supreme Court issued its opinion in *EEOC v. Abercrombie & Fitch Stores, Inc.* In this case, Samantha Elauf, a devout Muslim woman who wore a hijab – the traditional headscarf worn by Muslim women – alleged she was discriminated against by Abercrombie and Fitch, the once-popular U.S. clothing chain. According to Elauf's complaint, Abercrombie told her that she could not work for the store unless she removed her headscarf. Abercrombie told Elauf that her headscarf did not conform to the store's "Look Policy," which prohibits employees from wearing "caps" among other things in its "dress code." A lower court ruled in favor of Abercrombie, stating that it could not be held liable for discrimination on the basis of religion under Title VII (the federal statute that prohibits employment discrimination on the basis, among other things, of religion), because Ms. Elauf *did not specifically state* she was wearing the headscarf for religious reasons.

On appeal to the U.S. Supreme Court, the issue was whether, under Title VII, an employer can be held liable for refusing to hire an applicant (or discharge an employee) based on a "religious observance and practice" only if the employer has *actual knowledge* that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

The U.S. Supreme Court ruled in favor of Ms. Elauf, holding that Title VII bars employers from refusing to hire (or discharging) an employee "because of" his or her religion, which includes religious observances. Therefore, the phrase "because of" as used in Title VII requires only that "an individual's actual religious practice… not be a motivating factor" behind the failure to hire the individual. The Court held that there is

no requirement that the employer *actually knows* that there could be "a conflict between an applicant's religious practice and a work rule."

This means that an employer cannot use an applicant's or employee's religious observance or practice as a motivating factor in deciding not to hire, to terminate, or otherwise to take adverse action towards, the individual.

Colorado Supreme Court Rules That Medical Marijuana Use Is Not Lawful Off-Duty Conduct

As the laws regarding marijuana loosen, employers are left with wondering whether they can enforce a zero tolerance drug policy. In *Coats v. Dish Network* the Colorado Supreme Court ruled that an employer may enforce a zero tolerance drug policy even in a state where recreational marijuana is legal.

In *Coats*, the plaintiff, who is quadriplegic, used medical marijuana outside of work and consistent with his medical prescription. The plaintiff was terminated from employment after he tested positive for marijuana. In turn the plaintiff sued his former employer for wrongful termination. The Colorado Supreme Court reasoned that the termination was not illegal, because the federal government still deems the use of marijuana to be illegal.

While this is a Colorado case, it likely sets a gauge for other courts. Pennsylvania employers should consider their drug policies and determine how they intend to enforce their policies.

Department of Labor Guidance Narrows the Definition of Independent Contractor

Earlier this summer, the DOL issued further guidance regarding the misclassification of employees as independent contractors. The DOL states that improperly classified employees do not "receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation" and that misclassification "results in lower tax revenues for government."

The new guidance focuses on the multi-factorial "economic reality" test. Those factors include: (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss depending upon managerial skills; (3) the alleged worker's investment in equipment or material required for the tasks or the employment of helpers; (4) whether the service rendered requires special skills; (5) the degree of permanence of the working relationship; and (6) the extent to which the work is an integral part of the employer's business.

According to the DOL: "[u]ltimately, the goal of the economic realities test is to determine whether a worker is economically dependent on the employer (and is

therefore an employee) or is really in business for him or herself (and is therefore an independent contractor)."

Employers should take this time to review their independent contractor relationships to determine if they meet the economic reality test. Employers should note that there are significant penalties in place for misclassification and that the DOL is closely scrutinizing independent contractor relationships.

Supreme Court Rules in Favor of Pregnant Employees – *Young v. UPS*

The Supreme Court recently issued a ruling which dramatically changes the accommodations that many employers provide to their employees. It is common for employers to provide accommodations, such as light duty, to employees who are eligible for workers' compensation because of an on the job injury. Typically employers have not extended these same accommodations to pregnant employees who have workplace restrictions.

In *Young*, the plaintiff was a part-time driver for UPS who was placed on a 20-pound lifting restriction after she became pregnant. The position required the ability to lift 70 pounds. UPS refused to provide Young with an accommodation, instead placing her on leave without pay.

UPS did not provide such accommodations to pregnant employees; rather, it only provided accommodations to drivers who were injured on the job and drivers who suffered from a disability under the ADA. (It also provided accommodations to those who lost their DOT certifications.)

Young sued, arguing that UPS violated the Pregnancy Discrimination Act (PDA). The PDA provides that pregnant women have the right to be treated the same as others who are "similar in their ability or inability to work" but "not so affected" by pregnancy.

Before the Supreme Court, UPS argued that its policy was pregnancy blind because it did not consider or take pregnancy into account; rather, UPS only considered whether someone was injured at work, had a disability, or lost DOT certification. Therefore, according to UPS the policy did not violate the PDA. The Supreme Court disagreed with UPS's position.

Young argued that because UPS had provided other employees with an accommodation, it must likewise provide her with an accommodation. However, the Court rejected Young's argument as too broad an application of the PDA.

Instead, the Court crafted an approach which provides that an employer, absent a legitimate non-discriminatory reason, must provide a pregnant employee with the same accommodation it provides to others with a "similar ability or inability to work."

Inconvenience or cost will not qualify as a legitimate non-discriminatory reason. By way of example, an employer cannot rely on the fact that there is a cost incentive to provide workers compensation claimants with an accommodation, but there is a significant cost to employers to provide the same type of accommodation to pregnant employees.

The Court provided some possible legitimate non-discriminatory reasons based upon job class, the employer's needs or employee seniority. Thus, it is not the case that every pregnant employee will be entitled to the exact same accommodation previously offered to another employee, as Young had argued.

Employers should review their accommodation policy and practice. Employers need to be sure that they are conforming to the law. The EEOC is focused on this issue and prepared to litigate on behalf of aggrieved employees.