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ATTORNEYS & COUNSELORS AT LAW



GIBBEL KRAYBILL & HESS LLP
ATTORNEYS & COUNSELORS AT LAW

A Snapshot of GKH

- **Established in 1977**
- **General Practice Law Firm**
- **16 Attorneys**
- **21 Support Staff**
- **Multiple Office Locations**



M. Jason Asbell
Attorney



Justin J. Bollinger
Partner



Angelo J. Fiorentino
Attorney



John R. Gibbel
Partner



Donald H. Hess
Attorney



Melvin H. Hess
Partner



J. Elvin Kraybill
Partner



Peter J. Kraybill
Partner



Ann L. Martin
Attorney



Marci S. Miller
Partner



Lindsay J. O'Neil
Attorney



Sheila V. O'Rourke
Attorney



Douglas A. Smith
Attorney



Jonna E. Stratton
Partner



Jeffrey J. Worley
Partner



J. Dwight Yoder
Partner



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EMPLOYMENT LAW

REAL ESTATE,
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2017 Employment Law Seminar

Presented by GKH Attorneys
**Jeffrey Worley, Jonna Stratton, Justin Bollinger,
Lindsay O'Neil, and Doug Smith**

May 9, 2017

Gibbel Kraybill & Hess LLP presented these materials at its annual Employment Law Seminar to review current issues in employment law. As each employment situation is unique, these materials are not intended to be relied upon for specific employment decisions. Please contact an employment law attorney at Gibbel Kraybill & Hess to discuss a specific employment situation.

EEOC Charges

- Total EEOC charges for 2016: 91,503
- Total charges in PA: 4,564 (5% of all charges)
- 2015: 89,385; 2014: 88,778
 - Race: 35%
 - Sex: 29%
 - National Origin: 10%
 - Disability: 28%
 - Age: 23%
 - Color: 3%
 - Religion: 4%
 - Equal Pay Act: 1%
 - Retaliation: 46%

EEOC Enforcement Priorities

- Harassment in the workplace
- June 2016, the EEOC issued the Select Task Force on the study of Harassment in the Workplace Report
- 30 years ago in 1987 the Supreme Court ruled that harassment is actionable under Title VII

EEOC Enforcement Priorities

The report articulated the belief that most employer-conducted training focused too much on legal liability and not enough on creating “a holistic culture of non-harassment.”

EEOC Enforcement Priorities

Per the report, employers can create a holistic culture of non-harassment by:

- Committed leadership
- Demonstrated accountability
- Strong, comprehensive policies
- Trusted and accessible complaint procedures
- Regular, interactive training tailored specifically to the audience and the organization.

EEOC Enforcement Priorities

Per the EEOC:

- Employers should be cautious of one-size fits all approaches
- Avoid a zero tolerance policy

Title VII – Sexual Orientation and Gender Identity

- Title VII protects employees and applicants from workplace discrimination based on five specifically-enumerated categories:
 - Race
 - National Origin
 - Color
 - Religion
 - **Sex**

Title VII – Sexual Orientation and Gender Identity

Sex has generally been viewed as male vs. female

- “Sexual orientation” is not an enumerated protected class under Title VII
- However, 5,000 + sexual orientation claims filed with the EEOC in the last four years
- Above claims filed under “sex” discrimination category of Title VII

Title VII – Sexual Orientation and Gender Identity

What Have the Courts Said?

- U.S. Supreme Court has never ruled on it directly
- Many federal district courts have held that sexual orientation falls under sex discrimination
- In the past few months, three federal Circuit Court of Appeals have ruled on this issue, which results in what is known in the legal world as a “circuit court split”

Title VII – Sexual Orientation and Gender Identity

11th Circuit: NO

- March 10, 2017: *Evans v. Georgia Regional Hospital*
- Title VII does not cover sexual orientation as a protected class.

7th Circuit: YES

- April 4, 2017: *Hively v. Ivy Tech Community*
- Title VII does cover sexual orientation as a protected class.

Title VII – Sexual Orientation and Gender Identity

2nd Circuit: NO

- March 27, 2017: *Christiansen v. Omnicom Group*
- April 18, 2017: *Zarda v. Altitude Express* (lower court)
 - 2nd Circuit refused to hear another case on appeal that would say “yes” and reverse *Christiansen*
- Title VII does not cover sexual orientation as a protected class.

Title VII – Sexual Orientation and Gender Identity

What has the EEOC Said?

- Has repeatedly demonstrated its support for extending Title VII protections to include “because of sexual orientation”
- 2015: Issued a decision letter stating this
- 2016: Filed two cases regarding this
- The current administration has said it will back the EEOC’s commitment to prioritizing the emerging issues of LGBT discrimination

Title VII – Sexual Orientation and Gender Identity

What can we expect in the near future?

- Likely the U.S. Supreme Court will rule on the issue
- Congress may pass legislation to amend Title VII to include “because of sexual orientation”
- Most likely the first will occur, as past attempts at legislation have failed and a “circuit court split” historically pushes for U.S. Supreme Court action

Employer Information Report (EEO-1)

New EEO-1 reporting requirements set to take effect March 2018 (Employers with more than 100 employees)

- Require employers to annually report aggregate compensation data for all employees by gender, race and ethnicity across all pay bands

Salary History

Numerous states and municipalities are making it illegal to ask an applicant about salary history

- Rationale: Females are paid disproportionately lower than male counterparts. Asking about salary history – basing salary offers on past history – perpetuates this inequality
- Not federal and not Pennsylvania. Yes Philadelphia.

Immigration – H-1B Visa

- H-1B visa program for skilled workers
- Candidate Trump threatened to kill the H-1B program
- President Trump issued an executive order mandating a review of the program
 - Does not eliminate the program
 - No set timeline

Immigration

- Form I-9, updated January 22, 2017
 - Very similar to previous versions
 - No required amendment for existing employees
 - If wrong version used, staple blank new version to the form I-9 that was used, note why the blank version is attached, and sign the blank version.

Immigration

- Audit
 - If an error is discovered do not attempt to conceal the error – by erasing, whiting out, or re-doing the I-9. Make all corrections known and transparent.
 - If an error is discovered under Section 1 – Employee Information and Attestation – the employee must make the correction. Employee should cross out the line and initial.

Immigration

- If the employee is no longer working for the employer, the employer should attach to the I-9 a signed and dated statement identifying the error and why corrections could not be made.

Immigration

- Sections 2 and 3
 - The employer should correct the data on the original form I-9. Sign and date the correction.
 - Do not conceal any changes that are made.
 - If too many changes need to be made, the employer can fill out a new form I-9 sections 2 & 3 and attach to the original form I-9.

Immigration

- What if no I-9?
 - If employee hired before November 6, 1986 – no need for an I-9
 - I-9 needed for all other employees – require I-9 compliance
 - Attach notation to the completed I-9 explaining that it was not initially completed and that it was completed following audit

Affordable Care Act Update

- ACA is still the law of the land
- Pending components include:
 - 2018 – plans must cover preventive care and checkups without copayments
 - 2020 – Cadillac tax on premium plans takes effect
 - 2020 – Medicare Part D coverage gap (“donut hole”) is phased out

Affordable Care Act Update

- Employer mandate
 - Applicable Large Employers (≥ 50 FT/FTE employees)
 - Must provide minimum essential coverage (“affordable” and provides “minimum value”)
- Employer shared responsibility payment
 - No transitional relief for 2017 and subsequent years
- Employer reporting requirements

Affordable Care Act Update

- Individual mandate
- Individual shared responsibility payment
 - Greater of \$695 per person or 2.5% of household income
 - Indexed for inflation
 - Penalty is reduced by 50% for minors
- Premium Tax Credit

Affordable Care Act Update

- American Health Care Act
 - Passed the House on May 4, 2017
 - Vote was 217 – 213
 - Still must pass the Senate

Affordable Care Act Update

What's new under the American Health Care Act?

- ACA individual and employer mandates are repealed retroactively to 2016
- Lapsed coverage can cause 30% premium increase
- Small Business Health Care Tax Credit repealed in 2018 (≤ 25 FT/FTE employees)
- Premium Tax Credit changes from income-based to age-based in 2020
- Repeals net investment income tax and additional Medicare tax

Affordable Care Act Update

What's new under the American Health Care Act? (cont.)

- States can apply for waivers to accomplish the following:
 - Charge older people 5x the premium that applies to young people for the same policy
 - Eliminate the ten essential health benefits required for ACA plans
 - Charge more or deny coverage for people with pre-existing conditions

Affordable Care Act Update

American Health Care Act Estimated Premium Change in Lancaster County in 2020

	Income					
	\$20,000	\$30,000	\$40,000	\$50,000	\$75,000	\$100,000
Age 27	\$2,730	\$1,210	(\$390)	(\$1,410)	(\$2,480)	(\$480)
Age 40	\$3,560	\$2,040	\$440	(\$580)	(\$3,000)	(\$500)
Age 60	\$16,500	\$14,980	\$13,380	\$12,360	\$1,480	\$3,980

Source: Kaiser Family Foundation

See <http://kff.org/interactive/tax-credits-under-the-affordable-care-act-vs-replacement-proposal-interactive-map/>

PA's Medical Marijuana Act - Review

- In place since May 2016
- Expectation to be fully implemented by early 2018
- Legalizes marijuana use for certain enumerated reasons (“serious medical condition”)
- Patients required to have a prescription

PA's Medical Marijuana Act – Employer/Employee Context

Employer prohibited from employment discrimination or retaliation for medical use of marijuana. **BUT**, permits disciplinary action by employer against employee who is “under the influence” of medical marijuana when the “employee’s conduct falls below the standard of care normally accepted for that position.”

Further, prohibits these employees from performing various jobs that are a risk to life, to public health or safety sensitive, and this will not be an adverse employment decision even if the prohibition results in financial harm.

Where Are We Now – Current Landscape

- PA DOH program implementation continues
- PA DOH issued temporary regulations on various portions of the MMA
- Applications for the Grower-Processor released with FAQ guidance
- PA DOH received and published list of Grower – Processor applicants

Other Observations

- Controlled Substance – Remains illegal under federal law.
- ADA/Accommodation – Generally, it has been argued that an employer is not required to provide an accommodation for use on the property or premises of any place of employment. How will this be interpreted under the PHRA?
- But, what about what you can ask an employee relative to this under the ADA and the PHRA? How will the law be interpreted under the PHRA?

Other Observations

- What about DOT licensed drivers? Note: Employers not mandated to take any action violating federal law.
- What are the implications for drug testing in the workplace? No express prohibition is found in the law.

Fair Labor Standards Act

- Litigation by U.S. Chamber of Commerce and over 50 other business groups to halt the proposed changes
- Temporary injunction issued by the court
- No further action by the Trump administration
- Further action?

Salaried Exempt

Salary basis \$23,000 annually; \$455 weekly

No requirement to track hours

No overtime requirement

Flexibility as to schedule and time off

Fair Labor Standards Act

- What does this mean for employers
 - Salary increases: difficult to roll back benefits given to an employee
 - Change of status from exempt to non-exempt: consider moving employees back to exempt

Fair Labor Standards Act

- Continue to watch state municipalities for increases in salaried exemption under state law and increases to minimum wage
- PA remains at \$7.25 (since 2009)
- How does PA compare to its neighbors: DC \$11.50 (set to increase to \$15 by 2020); MD \$8.75 (\$10.10 by July 2018); Ohio \$8.15; New York \$9.70 (to increase to \$15.00 in coming years); West Virginia \$8.75; Virginia remains at federal rate \$7.25

Working Families Flexibility Act

- Employees given the option of overtime pay or comp time (paid time off)
- Employees can bank 160 hours of comp time
- Unused comp time is paid out to an employee at hourly rate (not at time and a half)
- Voluntary participation

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QUESTIONS & ANSWERS

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