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2019 Employment Law Seminar

Presented by GKH Attorneys
Jeffrey J. Worley and Lindsay J. O'Neil
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EEOC Charge Statistics

- 2018-Total Charges: 76,418
- 2017-Total Charges: 84,254
- 2008-Total Charges: 95,402
- Comparing 2018 and 2017 claims based upon
 - Race down by 3928
 - Sex down by 950
 - National origin down by 1,193
 - Retaliation down by 1,628
 - Age down by 1,465
 - Disability down by 2,233

EEOC Charge Statistics

- The only increases were based upon
 - The Equal Pay Act – 70 additional claims
 - Genetic Information Nondiscrimination Act (GINA) – 14 additional claims

GINA

- Prohibits discrimination based upon genetic information by health insurers and employers
- Employers are prohibited from using genetic information when making employment decisions

The Equal Pay Act

- The Equal Pay Act of 1963 is an amendment to the Fair Labor Standards Act which prohibits employers from discriminating between men and women by paying one gender more than the other “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”
- Back pay for up to two years, or three years if the violation was willful, and liquidated damages in an amount equal to back pay.

Unemployment Rates



SOURCE: TRADINGECONOMICS.COM | U.S. BUREAU OF LABOR STATISTICS

What's New with #metoo?

John is the CEO of a company employing 100 employees. John has always been aware of gender disparities in the workplace and has sought to include women in his management team. However, in light of the recent #metoo movement, John has become concerned that his interactions with his female counterparts-together with how his male employees interact with female employees-could become a liability. Specifically-what if an inappropriate relationship develops between one of his supervisors and the employee that he supervises or what if there are some unfounded allegation by a disgruntled employee? John decides to institute a policy that provides that employees cannot have one on one meetings with an employee with the opposite gender-this includes lunches, traveling, or after work happy hours.

What are your concerns with John's policy?

What's New with #metoo?

- Avoiding a sexual harassment claim and stepping right into a discrimination claim!
- What about same sex claims of discrimination and harassment?

Upcoming Case: Sexual Orientation

- Courts continue to grapple with whether sexual orientation (LGBTQ) is a protected class under the “sex” category protection from discrimination under Title VII
- Last year:
 - Circuit split, as no ruling by the U.S. Supreme Court
 - 3d Circuit: operating under 2001 case; not protected
 - Eastern District Ct. of PA said LBGTQ is protected
- Currently: Same

Upcoming Case: Sexual Orientation

- U.S. Supreme Court will hear 3 consolidated cases on this very issue (announced 4/22/19)
- Case Titled as: *Bostock v. Clayton County*
 - 2^d Circuit (*Zarda*): gay employee
 - 11th Circuit (*Bostock*): gay employee
 - 6th Circuit (*Harris Funeral Home*): transgender employee

TAKE AWAY: Other than in very limited situations (e.g. religious employer), employers should treat sexual orientation (LGBTQ) as a protected class and not make adverse employment decisions based on it.

Recent Ruling: Family Leave Policies

EEOC v. Estee Lauder (E.D. Pa., Aug. 2017)

- In 2013, Estee Lauder adopted a paid family leave policy that affords new mothers pregnancy disability leave *plus* 6 weeks of “bonding” leave *plus* flexible scheduling upon return to work
- New fathers afforded only 2 weeks of bonding leave and no flexible scheduling

Is this a problem?

Recent Ruling: Family Leave Policies

- YES – violates Title VII and Equal Pay Act
 - While language of Estee Lauder’s family leave policy uses terms of “primary caregiver” versus “secondary caregiver,” in practice, it ends up being woman versus man
- Case settled in pre-litigation negotiations in July 2018 for \$1.1 million for a class of 210 men

TAKE AWAY: If an employer has a Maternity Leave policy, there must be an identical Paternity Leave policy. The best practice is to have a single “Parental Leave” policy to cover all employees without reference to their sex.

Harassment by Non-Employee

Hillary works as a waitress at a local diner. A “regular” male customer, in his 70s, starts flirting with Hillary. At first his comments are rather innocuous – complimenting her hair and shoes. Eventually, he starts saying things like if he were younger, he would ask her out and give her a night she wouldn’t forget. Hillary reports this to her shift manager, who replies, “Oh he’s harmless, plus he’s a regular. Just ignore him.” A few days later the customer, while at the diner, grabs Hillary in the rear. Hillary reports this to her shift supervisor, stating she will no longer serve this customer. The customer continues to come in and Hillary refuses to serve him. Hillary quits a few weeks later because she doesn’t want to see that customer ever again.

Harassment by Non-Employee

- Should the diner have done something when Hillary complained the first time?
- Should the diner have done something when Hillary complained the second time, and therefore the incident wasn't just a one-time event?
- If Hillary files a claim against the diner for sexual harassment because of the *customer's* conduct, is the diner liable?

Harassment by Non-Employee

Jeff works for a pizza place, delivering pizzas. A female customer to whom Jeff delivers pizza, starts flirting with Jeff one day. At first her comments are harmless, stating that he has a great smile and is so polite. After several more interactions, she begins becoming more aggressive, answering the door in lingerie and inviting Jeff inside her house. Jeff says nothing to the customer, but each time, immediately tells his supervisor what occurred and that he is offended. A few weeks later, Jeff has to go back to that same customer's house. The customer, again, answers the door in lingerie, throws herself at Jeff and tells him she loves him and can't live without him. Jeff immediately leaves and reports it to his supervisor. Nothing is done about it. Several weeks later, Jeff quits when he is suppose to make a delivery to that same customer's house.

Harassment by Non-Employee

- Should the pizza place have done something when Jeff complained the first time?
- Should the pizza place have done something when it happened a second time, and therefore the incident wasn't just a one-time event?
- If Jeff files a claim against the pizza place for sexual harassment because of the *customer's* conduct, is the pizza place liable?

Recent Ruling: Harassment by Non-Employee

Hewitt v. BS Transportation of Ill. (E.D. Pa. 2019)

- Employee was a freight driver for BS Transportation
- BS Transportation had a contract with Sunoco
- Employee regularly at Sunoco's refinery as part of job
- Sunoco employee began sexually harassing Hewitt
- Hewitt repeatedly told the Sunoco employee to stop
- Hewitt reported the harassment to his supervisor, multiple times
- Employer does nothing; shortly thereafter, Hewitt is fired
- Hewitt files claims against BS Transportation, Sunoco and supervisors for discrimination and retaliation

Should the employer be held liable?

Recent Ruling: Harassment by Non-Employee

- Court says yes, employer is liable!
- Employer can be liable for discrimination and retaliation for the acts of a non-employee when the employer *knew or should have known* – through its agents, management or supervisors – that such action was occurring and the employer failed to act.

TAKE AWAY: If an employee complains of potentially discriminatory or harassing conduct by a customer, contractor or other non-employee, take action and investigate!

Recent Ruling: Policies on Confidentiality

Lowes Home Center, (NLRB, April 17, 2018)

- Employer's policy to keep wage/salary information confidential
- This policy violated the National Labor Relations Act
- Trade secret, customer lists and other proprietary information can be subject to confidentiality by employees because there is a *legitimate business necessity* for requiring the confidentiality
- Conversely, Lowes couldn't point to any *legitimate business necessity* for its policy mandating that salary and wage information must be kept confidential by its employees

Recent Ruling: Policies on Confidentiality

TAKE AWAY

- Do not make or have a policy requiring confidentiality of wage and salary information *unless you can show it serves a legitimate business necessity.*
- Do not have a policy mandating certain information be kept confidential *unless you can show it serves a legitimate business necessity.*

Salary History

- Employers in Pennsylvania can ask for salary history
- Salary history enables the employer to understand what the prospective employee was making and make an informed decision when setting compensation
- 2016 study showed that women made 80% of males' salaries and African American and Latino women made 55%-60% of white males' salaries

Salary History

- Paycheck Fairness Act introduced in Congress
 - Has been reintroduced since 1997 but has failed to pass both chambers of Congress
- Would prohibit employers for asking applicants about their salary history
- States with salary history bans
 - California, Connecticut, Delaware, Maine, Massachusetts, Oregon, Vermont
 - Philadelphia (on hold pending a legal challenge)

Changes to the Salary Exemption

- Currently \$455 per week/\$23,660 per year
- Department of Labor's proposed increase:
 - \$679 per week/\$35,308 per year
 - No changes to the duties test
 - DOL proposes to update salaries every four years
 - Likely to take effect in 2020

Changes to the Salary Exemption

TAKE AWAY: Employers with salaried employees who are making less than \$35,308 per week need to monitor this rule and be prepared to adjust their practices.

Recent Ruling: Releases Require Specific Language

Ray v. AT&T Mobility (E.D. Pa., Jan. 2019, Rice, MJ.)

- Specific requirements for a Release under the Age Discrimination Employment Act (“ADEA”) and The Older Workers Benefit Protection Act (“OWBPA”) for **anyone over age 40**
- Waiver must be “in writing in a manner calculated to be understood by the average individual eligible to participate” (ADEA language and DOL regulations)
- Applies to Severance or Separation Agreements, Releases, or any other similar document in which an employee or former employee is waiving rights under the ADEA

Recent Ruling: Releases Require Specific Language

- OWBPA **mandates** that a release of age discrimination (ADEA) claims include certain provisions and language for **anyone over age 40**
 - 21-day consideration period and 7-day revocation period
 - Conspicuously, specifically and clearly state that age discrimination claims are being waived
 - State that the waiver of ADEA claims is being signed knowingly and voluntarily
- Without the above, ADEA claim isn't actually waived in the Release
- Include this language regardless of whether an ADEA claim was or could be made

TAKE AWAY: For any employee over age 40, always include the language specifically Releasing claims under the ADEA in a conspicuous and understandable manner, including the waiting periods, otherwise you haven't actually released age discrimination claims!

Employee Data

- ABC law firm requires all new employees to provide certain information prior to starting work-such as Social Security numbers, date of birth and bank account information. After being employed, ABC stores information related to employees tax returns and salaries.
- ABC's managing partner's son is really interested in computers and so the managing partner has her son design ABC's computer network as a summer project.
- Nefarious hackers crack into the network and steal all of the employees' information. The hackers sell the information and it is used to file fraudulent tax returns, open credit card accounts, and generally make the employees' lives miserable.

Employee Data

- What responsibility does ABC owe to its employees to protect their data?
- Does ABC's obligations change since the data was stolen by nefarious hackers?

Protecting Your Employees' Data

Dittman v. UPMC (Pa. 2018)

- Data breach of UPMC's network resulting in the theft of 62,000 employees' data: Social Security numbers, tax information and bank account information
- Pennsylvania's Supreme Court held that employers have a duty of reasonable care to protect employees' data
- “The criminal acts of third parties in executing the data breach do not alleviate UPMC of its duty to protect [its employees'] personal and financial information from that breach.”

Protecting Your Employees' Data

TAKE AWAY: Employers have an affirmative duty to reasonably protect employees' data. Employers' networks and computer systems must be secure. Employers must be aware of cybersecurity.

Naloxone - NARCAN

- More than 70,000 people died of drug overdoses in 2017
- Narcan prevents death due to opioid overdose
- Can be administered through injection or nasal spray
- Good Samaritan law
 - Releases liability if administered in good faith
 - Note: No life-threatening issues if administered without actual overdose
 - Presumption of good faith if the individual has received training

Arbitration Clauses

- Require that an employee who wishes to sue their employer for claims of wrongful termination, discrimination, hostile work environment, wage and hour violations, etc. must proceed through arbitration rather than through court
- The arbitration process is generally much quicker than going through court: months v. years.
- No appeal from the arbitration decision
- Discovery is generally limited

Arbitration Clauses

- Employers can make arbitration a condition of employment-take it or leave it
- Arbitration clauses can prohibit class actions
 - Including claims for wage and hour violations-the most common class action brought against employers