



Redstone
Government Consulting

2019 Employment Law Round-Up

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Session Overview

1. 2019 Employment Law Updates
 - a. Recent developments
 - b. Changes on the horizon
2. Title VII and Employment Discrimination
 - a. Employment discrimination based on sexual orientation & gender identity
 - b. Discussion of pending Supreme Court cases
3. The #MeToo Movement in Today's Workplace

2019 Employment Law Updates

Recent Developments

- Alabama's Pay Equity Act – Effective August 1, 2019
 - Prohibits employers from discriminating against applicants based on their pay history
 - Prohibits employers from retaliating against or refusing to interview, hire, promote or employ any applicant because such applicant refuses to provide their wage history
- Employers may base a wage differential on:
 - A Seniority System
 - A Merit System
 - A System that measures earnings by quantity or quality of production
 - A Differential based on any factor other sex or race

New Federal Overtime Rule

- Issued by the DOL on September 24, 2019, effective January 1, 2020
- Employee salary threshold increases to \$684 a week (\$35,568 annually)
- Employees must be paid time and a half for all time worked beyond 40 hours in a workweek, unless certain duties tests are met
- Nondiscretionary bonuses and incentive payments (including commissions) may satisfy up to 10 percent of the standard salary level, if they are annual or more frequent

New Federal Overtime Rule

- The salary threshold for highly compensated employees increases to \$107,432 a year (previously \$100,000)
 - Of this amount, \$684 must be paid weekly on a salary or fee basis
 - Highly compensated employees are eligible for exempt status if they meet a reduced duties test
- No changes to the duties test previously used for determining exempt status
- New rule does not include automatic adjustments to the exempt salary threshold.

2019 OFCCP Recap

- Continued focus on issuing directives - a quicker way for OFCCP to get its message out there (vs. regulatory action), but tend to change when leadership shifts
- Implementation of “focused reviews” under EO 11246, Section 503, and VEVRAA. These included on-site investigations and interviews with managers & employees – **VEVRAA scheduling list issued November 8th**
- 2019 electronic CSAL list published in lieu of OFCCP sending scheduling letters to individual contractors

2019 OFCCP Directives

- Directive 2019-04 - Voluntary Enterprise-wide Review Program (VERP) (February 13, 2019)
 - Establishes a voluntary enterprise-wide compliance program for high-performing federal contractors
 - Provides an alternative to OFCCP's establishment-based compliance evaluations
 - Contractors can apply to the program electronically beginning in fiscal year 2020
 - During the application process, OFCCP will conduct compliance reviews of the contractor's headquarters location as well as a sample or subset of establishments.

2019 OFCCP Directives

- Participating contractors must meet established criteria that verifies compliance with OFCCP's requirements and demonstrate a commitment to equal employment opportunity
- Participating contractors will be exempt from OFCCP's neutral scheduling process for the duration of the agreement (up to an initial period of five years), as long as the contractor abides by all terms of the agreement
- OFCCP will retain the right to conduct individual and/or third-party complaint investigations of contractors participating in the program

2019 OFCCP Directives

- To remain in the program, contractors must maintain a workforce free of discrimination or other material violations and provide periodic reports and information to OFCCP
- Program applicants who do not qualify for the program will return to the pool of contractors that OFCCP may schedule for compliance evaluations through its neutral selection process
- OFCCP will retain the right to terminate agreements with contractors who do not maintain program requirements and return these contractors to the scheduling pool for customary compliance evaluations

2019 OFCCP Directives

- Directive 2019-05 - Contractors' Obligations Regarding Students in Working Relationships with Educational Institutions (September 5, 2019)
 - Limits OFCCP's compliance evaluations of educational institutions to non-student employees
 - OFCCP will still accept complaints alleging employment discrimination by and on behalf of student workers who qualify as employees under the relevant legal tests

2019 OFCCP Directives

- Directive 2020-01 - Spouses of Protected Veterans (November 8, 2019)
 - Encourages contractors to recruit, hire, and retain the spouses of veterans and active duty military
 - Requires OFCCP compliance officers to inquire with federal contractors during onsite investigations about their treatment of veteran spouses
 - Provides a sample policy statement that federal contractors can incorporate into their employee handbooks promoting the equal employment opportunity of all military spouses

Changes on the Horizon?

- Expansion of apprenticeship programs
- Changes to the “fluctuating workweek rule” under the Fair Labor Standards Act (FLSA)
- Changes to “tip sharing rules” for service employees
- Updates to the regular rate of pay under the FLSA (used to calculate OT premiums)

Changes on the Horizon?

- Increased clarity for the joint-employer rule
- Electronic delivery of certain retirement plan disclosures (EBSA)
- Marijuana in the Workplace
- Expansion of Paid Sick Leave Laws

Changes on the Horizon?

- **Comcast v. National Association of African American-Owned Media**

- On November 13, 2019, SCOTUS heard oral argument regarding the standard of proof in race discrimination claims under Section 1981 of the Civil Rights Act

- **Babb v. Wilkie**

- On January 15, 2020, SCOTUS will hear oral argument and consider the standard of proof for employees of the federal government who allege claims under the Age Discrimination in Employment Act

Title VII & Employment Discrimination

Title VII

- Included in the Civil Rights Act of 1964
- Prohibits discrimination and harassment based on protected characteristics, including race, religion, and sex
- Debate as to whether gender identity and sexual orientation are protected characteristics under Title VII (they ARE protected under FAR)
- Several pending Supreme Court cases seek to answer this question

Pending Supreme Court cases

R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission

- Aimee Stephens (formerly known as Anthony) was a funeral director employed by the plaintiff
- Her employment was terminated shortly after she revealed she was transgender and intended to transition
- She filed a complaint with the EEOC alleging termination based on unlawful sex discrimination
- EEOC determined that her employment was terminated “on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes.”

Does Title VII prohibit discrimination against transgender employees based on (1) their status as transgender or (2) sex stereotyping? *

Pending Supreme Court cases

Bostock v. Clayton County, Georgia

- In 2003, Gerald Bostock, a gay man, was hired as a child welfare services coordinator in Clayton County, Georgia
- In 2013, Bostock began participating in a gay recreational softball league
- Coworkers began criticizing Bostock for his participation in the league and for his sexual orientation and identity
- Shortly thereafter, Clayton County informed Bostock that it would be conducting an internal audit of the program funds he managed and allegedly terminated him for “conduct unbecoming of its employees”

Pending Supreme Court cases

Bostock v. Clayton County, Georgia

- Bostock filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and a subsequent pro se lawsuit against the county alleging discrimination based on sexual orientation, in violation of Title VII
- The district court dismissed his lawsuit for failure to state a claim, finding that Bostock's claim relied on an interpretation of Title VII as prohibiting discrimination on the basis of sexual orientation, contrary to a 1979 decision holding otherwise which was recently affirmed in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017)
- Bostock appealed, but the US Court of Appeals for the Eleventh Circuit affirmed the lower court

Pending Supreme Court cases

Altitude Express, Inc. v. Zarda

- Don Zarda, a skydiving instructor, filed suit against his former employer, Altitude Express, under Title VII
- Zarda alleged that he was terminated from his position because of his sexual orientation
- The district court asserted there was probable evidence that Zarda had faced discrimination based on his sexual orientation but held that Altitude Express was entitled to summary judgment because Second Circuit precedent holds that Title VII does not protect against discrimination based on sexual orientation

Pending Supreme Court cases

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Pending Supreme Court cases

- Bostock v. Clayton County, Georgia and Altitude Express, Inc. v. Zarda beg this question:

Does Title VII of the Civil Rights Act of 1964, which prohibits against employment discrimination “because of . . . sex” encompass discrimination based on an individual’s sexual orientation?

Additional Cases of Note

Title VII & ADA Case – 11th Circuit

Hartwell v. Spencer

"Just because an employer has, in the past, done more than required to accommodate an employee who cannot fulfill all the requirements of his job does not mean that the employer must continue to do so."

- Darrell Hartwell was a black firefighter/EMT who worked for a U.S. Navy military complex for over 16 years
- Hartwell was frequently late, but rarely received more than verbal reprimands until 2011, when the fire department changed its policy and he began reporting to another supervisor

Title VII & ADA Case – 11th Circuit

- Hartwell said his lateness was caused by ADHD, persistent depression, and generalized anxiety disorder
- As a reasonable accommodation, he asked to be allowed to use up to an hour of sick leave on the mornings that he was late
- Hartwell was eventually terminated due to chronic tardiness
- Upon termination, Hartwell alleged his supervisor treated him differently than his white colleagues and made race-based comments, referring to another black firefighter as a "little monkey," telling him that he thought his children went to school for free because they were black, and warning another firefighter that the employee liked to "play the race card"

Title VII & ADA Case – 11th Circuit

- Was punctuality an “essential function” of the job?
- Was the requested accommodation “reasonable?”
- Was Hartwell’s race the “but for” factor in his termination?

Hodge v. Walrus Oyster Ale House

- An African-American restaurant "server trainer" advanced her Section 1981 failure-to-promote claim even though she didn't formally apply for a particular position based on her claim that she previously expressed interest in a management role, that several white employees were promoted without applying, that her own prior promotion had been done informally, and that she had been promised a future promotion.

(November 15, 2019, D. Md., Chuang, T.).

EEOC v. Dollar General

- Dollar General has settled this race discrimination case for \$6 million
- Claims were brought by a group of black job applicants who allege they lost employment opportunities with DG between 2004 – 2019 based upon DG's reliance on a broad criminal background check that led to a disparate impact on black applicants who were denied job offers at a much higher rate than white applicants.

“Ok Boomer”

- More than 50 years after the ADEA was enacted, new data shows that age discrimination is still rampant with over half of older US workers being pushed out of longtime jobs before they choose to retire.
- Most successful claims of age discrimination are based on circumstantial evidence.
- Companies should be diligent avoiding the appearance of discrimination by avoiding comments/actions that perpetuate negative stereotypes about older employees

#MeToo in Today's Workplace

In the News

- Harvey Weinstein
- Jeffrey Epstein
- Matt Lauer
- Steve Easterbrook, McDonald's CEO, fired for not reporting consensual relationship with employee
- Brian Krzanich, Intel CEO, resigned in 2018 after violating Intel's nonfraternization policy

In the Workplace

According to a June 2016 report from the EEOC:

- About 30% of U.S. workers who experience sexual harassment informally talk about it with someone at the company, such as a manager or union representative, while far fewer make formal complaints
- 75% of employees never report harassment
- 75% of those who do formally complain say they face retaliation.
- Reasons for not reporting include fear they won't be believed, inaction on their claim, blame, and social or professional retaliation

In the Workplace

According to a 2019 survey conducted by **LeanIn.Org** and **SurveyMonkey**:

- “60% of [male] managers are uncomfortable participating in a common work activity with a woman, such as mentoring, working alone, or socializing together” (32% jump from 2018)
- “36% of men say they’ve avoided mentoring or socializing with a woman because they were nervous about how it would look”

Considerations for Employers

- It starts with YOU – create a company culture that encourages communication
- Company handbook should include a well-defined anti-harassment policy and easy-to-understand reporting procedures
 - Maintain confidentiality whenever possible
 - Test out your reporting system to make sure it is effective and functioning properly
- Training for **all employees**, including the executive team

Have Questions?

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