

# Hot Topics in Labor and Employment Law

Delaware Valley Labor and Employment Law Conference

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# DEVELOPMENTS IN THE U.S. SUPREME COURT

Key Issues Pending Before the Court  
and the impact of a new Supreme Court Justice

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# IMPACT OF TRUMP'S NOMINATION OF NEIL GORSUCH ON PENDING EMPLOYMENT ISSUES

- Gorsuch's judicial philosophy:
  - Strict "textualist" approach to interpreting the law - plain meaning
  - Distaste for administrative agency overreach
  - Heightened protection for free speech and expression
- Critical Issues pending before the Supreme Court
  - Enforceability of mandatory class action waivers in employment agreements
  - Title VII's application to sexual orientation discrimination
  - Constitutionality of agency fee requirements for employees who are members of a bargaining unit, but not the union that represents it
- How will Gorsuch impact the outcome of these issues?

# TRANSGENDER ISSUES

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## TITLE IX – WHAT IS IT?

- As a condition of receiving Federal funds, a school – K-12, colleges, graduate schools, medical residency programs
  - Agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations
    - Applies to students
    - Applies to employees
  - On the basis of sex, has been interpreted to mean sexual harassment, sexual misconduct and sexual assault



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## TITLE IX AND TRANSGENDER ISSUES

- There are a number of cases across the nation addressing transgender concerns
  - Many focus on the use of gender-based facilities, such as bathrooms and locker rooms
  - Some courts have come down with interpretations that “on the basis of sex” means not only biological gender, but gender identification
  - Other courts interpret the statute to mean only biological gender
  - There is no definition of “sex” (gender) in the statute

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## MAY 16, 2016 GUIDANCE

- Joint guidance from the DOE and DOJ (Civil Rights)
- Prohibitions on discrimination “on the basis of sex” apply not only to gender, but gender identity
- Schools must respond promptly and effectively to sex-based harassment, including harassment based on a student’s actual or perceived gender identity, transgender status or gender transition
- Schools must treat students consistent with their gender identity even if their school records or identification documents indicate a different sex
- Schools must permit students to participate in sex-segregated activities and access sex-segregated facilities consistent with their gender identity
- Schools must protect students’ privacy related to their transgender status
- DOE provided sample policies for Title IX institutions

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## TITLE IX – TRANSGENDER ISSUES

- But ... in February of 2017 new Department of Education Guidance
- Withdrew and rescinded May 2016 Guidance that took the position that Title IX included a prohibition on discrimination related to gender identity
- New Guidance stated that it needed to “further and more completely consider the legal issues involved”
  - Criticized the earlier Guidance because it did not contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process
  - “There must be due regard for the primary role of the States and local school districts in establishing educational policy”

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## NEW GUIDANCE DIDN'T COMPLETELY EVISCERATE PROTECTIONS

- Schools must still have anti-bullying and anti-discrimination policies, complaint and investigation procedures
- Provide an environment where all students feel safe and can learn
- Schools can enact polices to support any student's privacy



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## TAKE-AWAY FROM THE UPDATED GUIDANCE

- Schools may want to re-visit policies to be consistent with state law that may differ from federal law
  - Some states have explicit statutory language protecting sexual orientation or sexual identity
  - Some states case law has interpreted discrimination on the basis of sex to include sexual identity
- Schools should re-visit policies to be consistent with notions of educational policy
  - Establishing policies that are tolerant of diversity and inclusion
  - Establishing policies that are protective of privacy interests
- Bottom line – schools should be prepared to have legitimate reasons for policies that are adopted where there is an absence of direct statutory or case law

# EEOC UPDATES

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## EEOC STRATEGIC ENFORCEMENT PLAN

- On October 17, 2016, EEOC released its updated SEP for 2017-2021
- Continued focus on many of the same issues from 2012
- Priorities
  - Eliminating barriers in recruitment and hiring
  - Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination
  - Addressing selected emerging and developing issues
  - Ensuring equal pay protections for all workers
  - Preserving access to the legal system
  - Preventing systemic harassment

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## EMERGING ISSUES

- Notable updates made by this SEP are the addition of two areas to the emerging issues priority
  - Issues related to complex employment relationships in the 21<sup>st</sup> century workplace
    - Joint employment
    - Gig economy
    - Independent contractor vs. employee
  - Discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups
  - The lack of diversity in technology
  - The increasing use of big data driven screening tools
    - Think Google targeted ads based on your web browsing, but applied to employment setting

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## EEOC STRATEGIC ENFORCEMENT PLAN

- New or refocused areas (cont.)
  - Addressed selected emerging and developing issues
    - Qualification standards and inflexible leave policies that discriminate against individuals with disabilities
    - Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)
    - Protecting lesbians, gays, bisexuals and transgender (LGBT) people from discrimination based on sex

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## EEOC STRATEGIC ENFORCEMENT PLAN

- New or refocused areas (cont.)
  - Ensuring equal pay protections for all workers
    - Addressing pay discrimination based on sex, race, ethnicity, age, and disability
  - Preserving access to the legal system
    - Focus on
      - Overbroad waivers, releases and mandatory arbitration provisions
      - Employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations
      - Significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights
  - Preventing systemic harassment
    - Focus on strong enforcement through monetary and injunctive relief, as well as the promotion of training and outreach to deter future violations

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# EEOC RETALIATION GUIDANCE

## Background

- On August 25, 2016, the EEOC issued *EEOC Enforcement Guidance on Retaliation and Related Issues* which updates its 1998 Guidance
- 45% of discrimination claims brought before the EEOC are retaliation claims
- A retaliation claim challenging action taken because of EEO-related activity has three elements
  - **Protected activity:** "Participation" in an EEO process or "opposition" to discrimination
  - **Materially adverse action** taken by the employer
  - Requisite level of **causal connection** between the protected activity and the materially adverse action

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# EEOC RETALIATION GUIDANCE

Two categories of protected activity

- Participation
  - The anti-retaliation provisions make it unlawful to discriminate because an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA
  - The participation clause broadly protects EEO participation regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct
  - Playing any role in an internal investigation should be deemed to constitute protected participation

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# EEOC RETALIATION GUIDANCE

## Protected Activity (cont.)

- Opposition
  - An individual is protected from retaliation for opposing any practice made unlawful under the EEO laws
  - Protected "opposition" activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination
    - The manner of opposition must be reasonable AND
    - The opposition must be based on a reasonable good faith belief that the conduct opposed is, or could become, unlawful

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# EEOC RETALIATION GUIDANCE

## Materially Adverse Action

- Any action that might well deter a reasonable person from engaging in protected activity
- Examples
  - Denial of work benefits such as promotion, refusal to hire, job benefits, demotion, suspension, and discharge
  - Work-related threats, warnings, reprimands, transfers, negative or lowered evaluations, transfers to less prestigious or desirable work
  - Disparaging the person in the media
  - Making false reports to government authorities
  - Filing a civil action
  - Workplace surveillance
  - Taking a materially adverse action against a close family member

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## EEOC RETALIATION GUIDANCE

**Causation** (perhaps the biggest change for employers in the Guidance)

- A materially adverse action does not violate the EEO laws unless there is a causal connection between the action and the protected activity
- The causation standard requires the evidence to show that "but for" a retaliatory motive, the employer would not have taken the adverse action
  - EEOC also adopts the position that retaliation can be established by creating "a 'convincing mosaic' of circumstantial evidence" that would support the inference of retaliation
  - This standard is less stringent than the "but for" test

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# EEOC RETALIATION GUIDANCE

## Suggested Best Practices

- **Written Employment Policies**
  - Written, plain-language anti-retaliation policies
  - Provide practical guidance on the employer's expectations with user-friendly examples of what to do and not to do
- **Training**
  - For all managers, supervisors, and employees
- **Review Employment Actions**
  - Consider requiring an HR or EEO specialist, a designated management official, in-house counsel, or other resource individual review proposed employment actions to ensure they are based on legitimate non-discriminatory, non-retaliatory reasons
- **Follow Up**
  - HR or management to follow up with complaining party or others involved in protected activity

# CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

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## CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

*NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5<sup>th</sup> Cir. 2016) (*cert granted* 137 S. Ct. 809, Jan. 13, 2017)

- Facts
  - Employee signed “Binding Arbitration Agreement and Waiver of Jury Trial”
  - Agreement required employee to resolve all employment-related disputes by binding arbitration
  - Agreement required employee to waive right to pursue class or collective claims
  - Despite agreement, employee and others filed collective action under FLSA
  - Employer moved to dismiss, pursuant to arbitration agreement

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## CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

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- Facts (cont.)
  - Employee filed ULP, alleging that arbitration agreement interfered with employee's Section 7 rights
  - NLRB, relying on *D.R. Horton, Inc.*, 357 NLRB 184 (2012), held that agreement requiring employees to resolve all employment claims through individual arbitration, and attempting to enforce the agreements in court, was unlawful
  - District Court for Fifth Circuit held that agreement was unlawful, only to the extent that it could be construed as prohibiting employees from filing ULP charges

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## CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

- Issue: Whether class action waivers in employment arbitration agreements are valid under the NLRA
- Circuit Split
  - Fifth and Eighth Circuits have held that employers may require employees to waive class claims in favor of individual arbitration
  - Seventh and Ninth Circuits have held that employers may not require employees to waive class claims
- US Supreme Court has granted cert and we await the decision on the outcome
- How will the new Supreme Court justice come down on this issue?

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## NLRB – WILL IT CONTINUE TO BE ACTIVIST?

- NLRB has been very active making inroads into regulating employment relationship in non-union settings
  - Examples: Handbooks, confidentiality agreements, severance agreements, social media policies
    - Provisions cannot impact the right of employees to talk about terms and conditions of employment with co-workers
  - Arbitration agreements with class action waivers
- Will this activist approach change under the new administration?

# DOL OVERTIME REGULATIONS

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## DOL OVERTIME REGULATIONS

- Department of Labor issued Final Rule on overtime exemptions -- raising salary level, automatic adjustments every three years
- Rule was to take effect on December 1, 2016
- Injunction was issued after a challenge to the Rule – Rule did not take effect
  - Challenge based on the authority of the DOL to raise the salary level
  - Automatic three year adjustments
  - Argued exceeded the DOL's powers – not in the statute
- Litigation is proceeding – we have to wait and see

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## NOW WHAT?

- Some employers had re-classified employees or adjusted wages based on the impending change to the FLSA
  - Morale issues in going back to the way it was
- The controversy surrounding the change has prompted investigation into classifications anyway
  - Both state and federal DOL active investigating exempt vs. non-exempt classifications
  - Employee side attorneys challenging the classification as well – individually and through collective actions

# EMERGING ISSUES

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## KEEP YOUR EYES OPEN FOR CHANGES

- Legislation concerning criminal background checks and ban the box
  - Addressed in one of our panels today
- Whether Title VII or Title IX apply to sexual orientation, sexual stereotyping, sexual identity
- State and local paid sick leave or FMLA leave
- EEOC's Report on "Reboot to Harassment Training"
  - Critics – the training goes beyond what is required under the law
- ADA-AA accommodations
  - Telecommuting and its issues

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## LEGAL IMPLICATIONS OF TELECOMMUTING

- The ADA does not require that employers have telecommuting programs
  - However, the EEOC recognizes telecommuting as a reasonable accommodation
  - The determination should be made through an interactive dialogue between the employer and employee to determine whether working from home is reasonable accommodation that can be made without imposing an undue hardship on the employer
- Employers are not required to risk compromising the confidentiality of internal information to accommodate an employee's disability
  - If employee is telecommuting the employer must
    - Secure customer and client data through secured computer systems and secured Internet connections
    - Train employees to use technology in a safe way

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## LEGAL IMPLICATIONS OF TELECOMMUTING

- The Fair Labor Standards Act establishes minimum wage, overtime pay, and recordkeeping standards
- The same standards are applied whether an employer works on-site or is telecommuting, but it is harder to monitor telecommuters
  - Employers can take measures to reduce the risk of unpaid overtime provisions such as
    - Requiring non-exempt employees to sign an agreement that they are not permitted to work overtime without the prior consent of a supervisor
    - Establish procedures such as requiring the submission of daily timesheets or clocking in/out via software
    - Requiring permission for employer to monitor when the employee is signing on or off a work computer

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## QUESTIONS?



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# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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