THE YEAR IN REVIEW: LABOR & EMPLOYMENT LAW DEVELOPMENTS IN 2017 AND WHAT TO EXPECT IN 2018

2017 Labor and Employment Law Conference

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CONTINUED EXPANSION OF CIVIL RIGHTS LAWS TO PROHIBIT DISCRIMINATION BASED ON SEXUAL ORIENTATION

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WHERE IT ALL BEGAN: CIVIL RIGHTS ACT OF 1964

- There is no prohibition on discrimination against a person based on any characteristic, unless there is a constitutional prohibition, or unless Congress or a state or local legislature enacts a law prohibiting that discrimination
  - Courts do not make laws; they interpret laws that legislatures enact
- Title VII: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).
  - Title VII makes no mention of sexual orientation or homosexuality
- Was it Congress' intention in 1964 to ban discrimination based on sexual orientation or homosexuality?


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PRICE WATERHOUSE: SEXUAL STEREOTYPING

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

- Facts:
  - PW denied a female accountant a promotion to partner
  - Evaluations (by male partners) stated that the female accountant should walk more femininely, talk more femininely, dress more femininely, and go to charm school
  - Female accountant sued for sex discrimination under Title VII
- *Price Waterhouse* Holding:
  - "Because of sex," as used in Title VII, can include non-conformity to sexual stereotypes (i.e.– not acting in a manner that society expects a woman or man to act)
  - *Price Waterhouse* was the birth of the gender non-conformity/sexual stereotyping theory

APPLICABILITY OF SEXUAL STEREOTYPING THEORY TO HOMOSEXUALS

Prowel v. Wise Business Forms Inc., Case No. 07-3997 (3rd Cir. 2009)

- Facts:
  - The plaintiff was a machine operator at a business forms company in Butler, PA
  - The plaintiff was a male homosexual
  - He contended that as a homosexual, he acted in ways that did not conform to society's views about the ways in which men should act (e.g. – he filed his nails at work; he sat with his legs crossed "like a woman;" he talked about interior design rather than football)
  - The employer discharged him
  - He sued under Title VII
- Holding:
  - Summary judgment in favor of the employer was reversed
  - The plaintiff was entitled to a jury trial on the issue of whether the employer discriminated against him based on his alleged gender non-nonconformity
  - If an employer discriminates against an employee based on gender non-conformity, the employer is discriminating against the employee based on sex, even if the reason why the employee is gender non-conforming is because he is homosexual

EEOC V. SCOTT MEDICAL HEALTH CENTER, P.C., 2016 WL 6569233 (W.D. PA., NOV. 4, 2016)

- Facts:
  - Male homosexual telemarketer alleged that he was harassed by his male heterosexual manger
  - The alleged harassment included the manager's: Calling the employee a "fag" and "queer;" asking how "you fags have sex;" and asking "who was the butch and who was the bitch"
  - The employee quit allegedly because of the harassment
  - The plaintiff sued under Title VII, contending that he was constructively discharged based on his sexual orientation, in violation of Title VII
- Holding:
  - The employer's Motion to Dismiss was denied
  - Title VII's prohibition on discrimination "because of sex" is broad enough to cover discrimination based on sexual orientation
  - "There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality"

HIVELY V. IVY TECH COMMUNITY COLLEGE, 2017 WL 1230393 (7TH CIR., APR. 4, 2017)

- Facts:
  - The plaintiff was an openly-gay female adjunct professor at the defendant community college
  - She claimed that the college denied her full-time employment as a professor because of her sexual orientation
  - The college obtained dismissal of the plaintiff's complaint, on the ground that Title VII does not prohibit discrimination on the basis of sexual orientation
- Holding:
  - U.S. Court of Appeals for Seventh Circuit reversed the trial court's decision
  - "We conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination" prohibited by Title VII
  - Bases for the court's decision: (1) discrimination based on sexual orientation necessarily is discrimination based on gender non-conformity; (2) Title VII prohibits discrimination on the basis of association with someone with a protected characteristic, and the plaintiff alleged that the college discriminated against her based on her association with a woman

WHERE THIS IS HEADING?

- In July 2017, the Trump Administration DOJ filed a friend-of-the-court brief in *Zarda v. Altitude Express,* Case No. 15-3775 (2nd Cir.), arguing that Title VII does not prohibit discrimination based on sexual orientation
- Congress is unlikely to act
- Issue will ultimately be resolved by U.S. Supreme Court

CONTINUED ATTENTION TO PAY EQUITY (AND DISPARITY)

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PAY DISPARITY IS A HOT TOPIC

- Equality in pay was a cornerstone on the Obama Administration's civil rights agenda (Lily Ledbetter Fair Pay Act of 2009)
- 100s of companies have signed the Equal Pay Pledge
- There has been a steady rise in the number of Equal Pay Act (EPA) EEOC charges filed
  - Over the past three years, the number of EPA charges filed rose by 15%

THE FUTURE OF COMPENSATION ISSUES

- Under the Trump Administration, employers can expect an increased EEOC interest in the reasons for gender pay differences

- On February 9, 2017, Acting EEOC Chair Victoria Lipnic stated:

  "I am very interested in equal pay issues. It's something I would consider a priority."

- EEO-1 Report

  - A revised report would have required private-sector employer employing 100 or more employees and covered federal contractors to provide information regarding employee compensation, hours worked and demographic information

  - BUT, Victoria Lipnic announced August 29, 2017, that the OIRA was initiating a review and immediate stay of the effectiveness of the pay data collection aspects of the EEO-1 Form revised on September 29, 2016

THE EQUAL PAY ACT (EPA)

- Equal Pay Act (EPA) requires that equal wages be paid to men and women who perform jobs that require **substantially equal skill, effort, and responsibility**
  - The "substantially equal" requirement does not mean identical!
- Equality of pay under the EPA includes all forms of compensation, including:
  - Wages, salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, allowances, reimbursements, benefits, etc.

THE EQUAL PAY ACT (EPA)

- Equal Pay Prima Facie Case
  - Lower wages paid to employees of opposite sex in the same establishment
  - Employees perform substantially equal work
  - Jobs performed under similar working conditions when comparing job duties

AFFIRMATIVE DEFENSES

- If a plaintiff can show he or she is receiving different wages for equal work, the burden shifts to the employer to establish one of the EPA's four affirmative defenses
  - Seniority system
  - Merit system
  - Incentive system
  - Factors "other than sex"
- A seniority, merit or incentive system must be **bona fide**, meaning…
- Factors "other than sex" must be related to job requirements

RIZO V. YOVINO (04/27/17)

- The County had a step/level compensation policy. To determine which step within Level 1 a new employee would begin, the County considered the employee's most recent prior salary and placed the employee on the step corresponding to his or her prior salary, increased by 5%.

- This resulted in the female plaintiff being paid less than all of her male co-workers who performed the same job

- The County conceded the disparity, but filed a motion for summary judgment because the differential was based on a factor other than sex (i.e., prior salary)

- The District Court denied the motion. It said "prior salary alone can never qualify as a factor other than sex" because "a pay structure based exclusively on prior wages is so inherently fraught with the risk . . . that it will perpetuate a discriminatory wage disparity between men and women."

RIZO V. YOVINO (04/27/17) (CONT.)

- On appeal, the Ninth Circuit reversed
- It held that an employer can maintain a pay differential based on prior salary (or based on any other facially gender-neutral factor), if it can show the factor "effectuates some business policy" and the employer "uses the factor reasonably in light of the employer's stated purpose as well as its other practices"
- The Court remanded the case for the District Court to evaluate the four business reasons offered by the County:
  - The policy is objective
  - The policy encourages candidates to leave their current jobs, because they will always receive a 5% pay increase over their current salary
  - The policy prevents favoritism and ensures consistency in application
  - The policy is a judicious use of taxpayer dollars
- On August 29, 2017, the Ninth Circuit agreed to reconsider this case!

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION

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STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION – BACKGROUND

- The DOL issued its Final Rule on May 18, 2016
  - The rule would have increased the minimum salary level for applicability of FLSA white-collar exemptions from $455 per week to $913 per week ($47,476 per year)
  - The rule would have increased the minimum salary for FLSA exemption for highly – compensated employees from $100,000 to $134,004 or the 90th percentile of full-time salaried workers nationally
  - The rule would have established an automatic updating mechanism that would adjust the minimum salary level every three years
  - The rule was to take effect on December 1, 2016
  - Legal challenges were filed, which employment law experts scoffed at as unlikely to succeed

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION – THE BOMBSHELL

- *State of Nevada v. United States Department of Labor*, C.A. No. 4:16-CV-00731 (E.D. Tex., Nov. 22, 2016)
  - A nationwide injunction was issued
  - The court found that the plaintiffs had established a prima facie case that the DOL lacked statutory authority to increase the salary level, or to automatically increase the salary level in the future
  - The judge questioned whether the DOL even had authority to impose a salary test, given the fact that the language of the FLSA suggests that only a duties test is appropriate

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION – DOL APPEAL

- The Obama Administration DOL filed an appeal to the U.S. Court of Appeals for the Fifth Circuit on December 1, 2016
- The Trump Administration DOL has not withdrawn the appeal
- The Trump Administration filed a responsive brief on June 30, 2017
- The position of the Trump Administration:
  - The DOL does have the authority to set a minimum salary threshold for the white-collar exemptions
  - The DOL is not advocating in support of the salary threshold set by the Obama Administration ($913/week; $47,476/year)
  - The DOL intends to undertake further rulemaking to determine what the appropriate salary level should be

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION – FURTHER ACTIVITY AT THE TRIAL COURT LEVEL

- On August 31, 2017, the district court granted summary judgment in favor of the plaintiffs
  - Holding: The DOL has the authority to use a salary test, but not to increase the salary threshold to high levels, or to provide for automatic increases in the salary threshold
- In light of the district court's decision, the Trump Administration DOL will likely withdraw the appeal

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION – DOL RULEMAKING

- On July 25, 2017, the DOL posted a "Request for Information" on potential revisions to the FLSA overtime exemptions
  - The DOL will use the information that is submitted to draft a new proposal for updating the tests for FLSA exemption
  - RFI response period closed on September 24, 2017
- Information that the DOL requested included:
  - Should only a duties test be used?
  - If a salary test is used, should the current salary threshold, which was established in 2004, be increased just to account for inflation?
  - Should the regulations include multiple salary levels (e.g. – different levels based on the size of the employer or based on geographic location)?
  - Should there be different salary levels for each of the three standard white-collar exemptions (administrative; executive; professional)?

STATUS OF CHANGES TO SALARY TEST FOR FLSA EXEMPTION – CONCLUSION

- The Obama Administration rule is dead
- No changes in the regulations that apply to FLSA exemptions are imminent

LEGAL LANDSCAPE OF MEDICAL MARIJUANA

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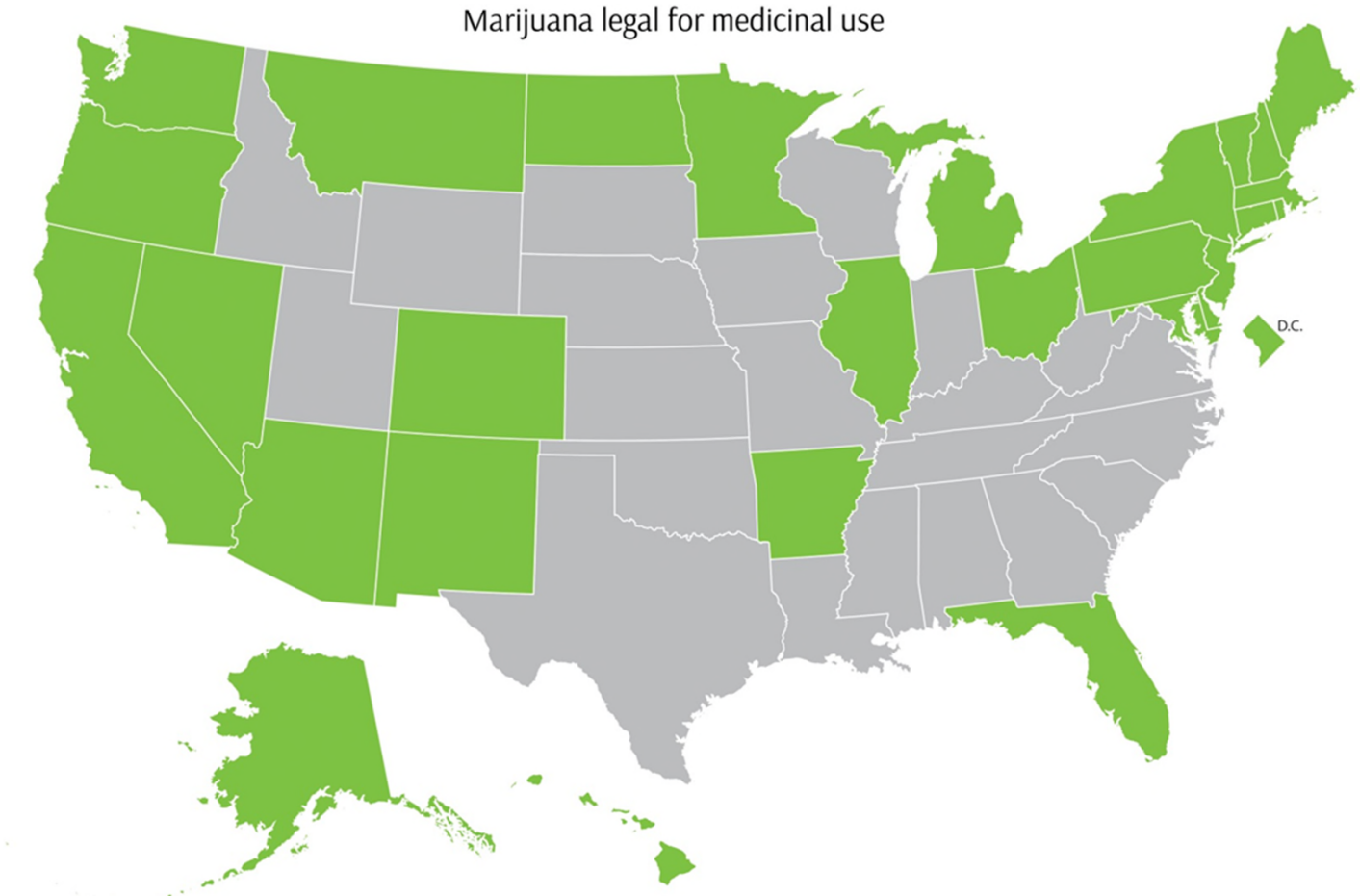
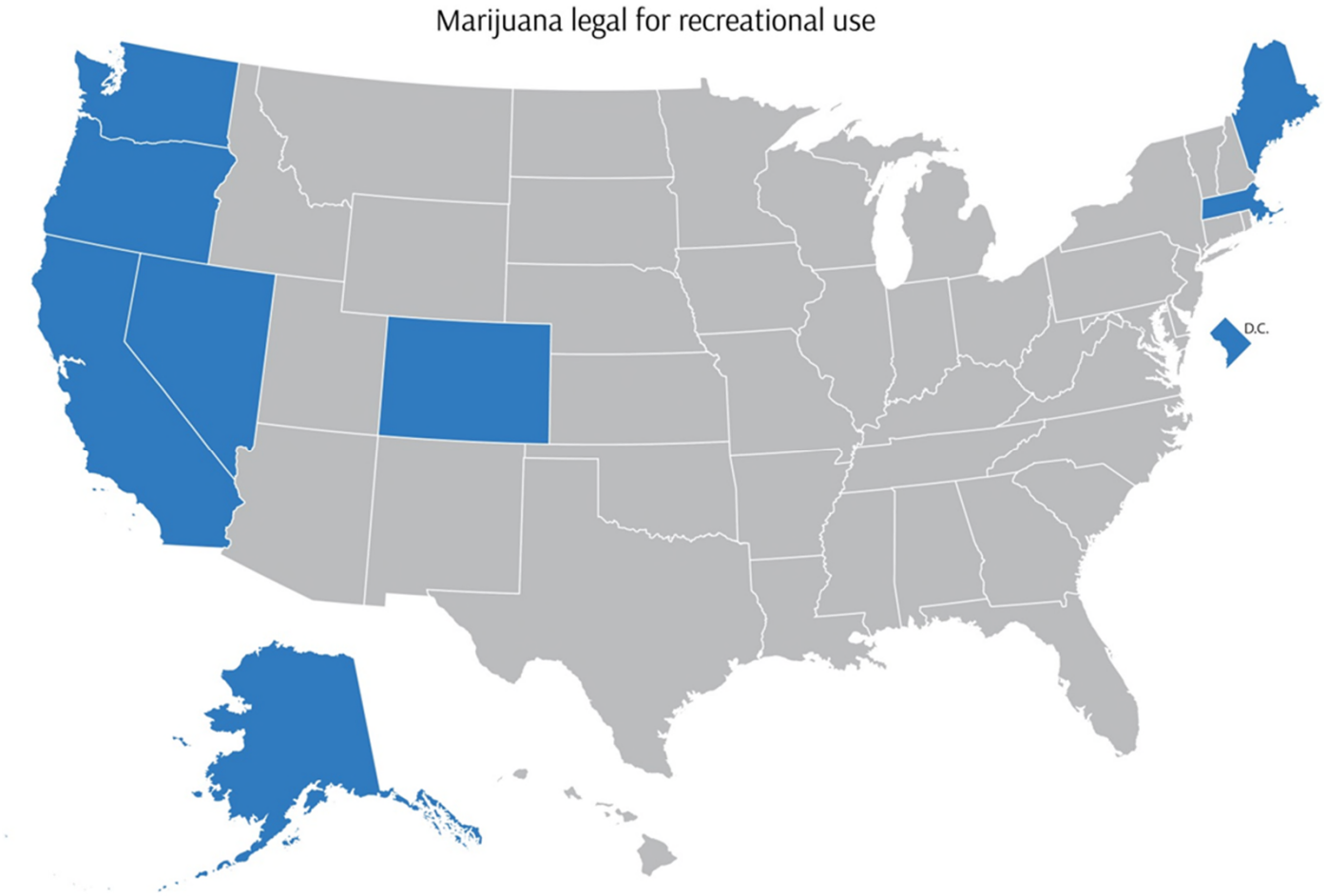
STATES THAT HAVE LEGALIZED MARIJUANA FOR MEDICINAL PURPOSES



STATES THAT HAVE LEGALIZED MARIJUANA FOR RECREATIONAL PURPOSES



FEDERAL POSTURE, REDUCED PROSECUTION, NOT LEGAL

- Marijuana remains an illegal controlled substance under federal law
- Attorney General Jeff Sessions stated recently that the DOJ and the Drug Enforcement Administration **probably will not** take action against the eight states that have legalized recreational marijuana
- "But if you … smoke marijuana, for example, where you have no idea how much THC you're getting is probably not a good way to administer a medicinal amount. So forgive me if I'm a bit dubious about that."
- In short, he will have more to say on this topic. Stay tuned.

SOME COMMON CHARACTERISTICS APPLICABLE TO EMPLOYERS AMONG STATES THAT HAVE LEGALIZED MEDICINAL MARIJUANA

- Employers may not discriminate against patients for their status as registered patients or for their use of medicinal marijuana
- Employers can discipline employees for being under the influence at work
- Employers do not have to take any action that violates federal law
- Employers are still permitted to drug test

PENNSYLVANIA'S MEDICAL MARIJUANA ACT

- Act 16 of 2016 became effective May 17, 2017
- "Medical marijuana" is marijuana obtained for a certified medical use by a Pennsylvania resident with a serious medical condition and is limited by statute in Pennsylvania to the following forms:
  - Pill
  - Oil
  - Topical forms, including gel, creams or ointments
  - A form medically appropriate for administration by vaporization or nebulization, excluding dry leaf or plant form; tincture
  - Liquid
- Department of Health has issued proposed regulations for comment; comment period closed on October 2, 2017

PENNSYLVANIA'S MEDICAL MARIJUANA ACT (CONT.)

- Employers are prohibited from discharging, threatening, refusing to hire, discriminating or retaliating against employees "solely on the basis" of the employee's status as an individual who is certified to use medical marijuana
- The Act does not require employers to accommodate the use of marijuana on the job
- Employers are permitted to discipline employees who are "under the influence" of medical marijuana at work or working under the influence when the employee's conduct falls below the standard of care normally accepted for that position
  - What does "under the influence mean?

PENNSYLVANIA'S MEDICAL MARIJUANA ACT (CONT.)

- Perhaps stating what should be the obvious:
  - Employers can prohibit employees from performing any task which the employer deems life threatening while under the influence of medical marijuana
  - Employers can prohibit employees from performing any task which involves operating or controlling government-controlled chemicals or high-voltage electricity, or that involve performing duties at heights or in confined spaces, including mining
  - Employers who are subject to federal laws prohibiting the use of drugs, such as the Department of Transportation, are still permitted to comply with those laws, even when the employee holds a valid prescription for medical marijuana

EMPLOYER ACCOMMODATION OF MEDICAL MARIJUANA USE

- Federal courts have generally held that employers do not have an obligation to accommodate the use of medical marijuana, even when an employee is a qualified individual with a disability
  - The ADA is a federal law, and marijuana is illegal under the Controlled Substances Act, a federal law
  - Does it fall within an exception to the ADA for the use of a drug taken under the supervision of a health care professional?
- State law is less clear regarding whether an employer must accommodate
  - Usually interpreted in accordance with ADA
  - Medical marijuana is legal under Pennsylvania law
- Employees could advance the argument that the employer is failing to accommodate the underlying disability, not the use of medical marijuana

EMPLOYER ACCOMMODATION OF MEDICAL MARIJUANA USE

- Recent Massachusetts Supreme Court case
- First state court to definitively hold that a medical marijuana user may assert a state law claim for handicap or disability discrimination
- Held that an employer had a duty to accommodate the employee's use of medical marijuana
- Looked at the reason for the use of medical marijuana, i.e. a disability
- Held that, because of the disability, the employer was required to engage in an interactive process with the employee to determine if the medical marijuana user can continue to perform his or her job duties with a reasonable accommodation to the disability
- Will this open the floodgates to similar state law handicap or disability discrimination claims in other states?

EMPLOYER CONSIDERATIONS REGARDING MEDICAL MARIJUANA USE BY EMPLOYEES

- Handle matters relating to any applicant or employee who uses medical marijuana pursuant to a valid prescription carefully
  - Protected class under the MMA
  - Likely protected under the ADA and PHRA
- Ensure that drug testing policies and procedures address the authorized use of medical marijuana
- Ensure that there is a policy that addresses reasonable accommodations, which may include permissible use of medical marijuana
- Review job descriptions to ensure that safety-sensitive duties are properly identified, as well as determining whether there is a standard of care included

EMPLOYER CONSIDERATIONS REGARDING MEDICAL MARIJUANA USE BY EMPLOYEES (CONT.)

- Do not ask applicants or employees if they are certified to use medical marijuana
- In the event of a drug test result that is positive for marijuana, proceed with caution
  - Be clear with vendors regarding steps that will be taken in event of a test result that is positive for marijuana
  - Instruct MRO to discuss medical marijuana card holder status with the employee
- If employer is subject to federal mandatory drug-free workplaces, continue to comply with those laws

AMOUNT OF MEDICAL LEAVE THAT MUST BE PROVIDED AS A FORM OF ADA ACCOMMODATION

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ISSUE:

HOW MUCH MEDICAL LEAVE IS AN EMPLOYER REQUIRED TO PROVIDE A SICK OR DISABLED EMPLOYEE?

THE FEDERAL STATUTORY FRAMEWORK FOR MEDICAL LEAVE -- FMLA

- The FMLA requires covered employers to provide employees with up to 12 weeks of unpaid medical leave during any 12-month period. 29 U.S.C. § 2612(a)(1)(D).
  - The requirement applies only if the employer has 50 or more employees within 75 miles of the worksite at which the employee is employed. 29 U.S.C. § 2611(2)(B)(ii).
  - Only employees who have worked at least 12 months for the employer, and who have at least 1,250 hours of service during the preceding 12-month period, are eligible. 29 U.S.C. § 2611(2)(A).
  - An employee is entitled to medical leave only if the employee has a "serious health condition" that makes the employee unable to perform the functions of the employee's position. 29 U.S.C. § 2612(a)(1)(D).

THE FEDERAL STATUTORY FRAMEWORK FOR MEDICAL LEAVE -- ADA

- The ADA requires employers to make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability, unless the employer can prove that the accommodation would impose an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A).

- The ADA defines "reasonable accommodation" as including "part-time or modified work schedules. . . and other similar accommodations," but does not refer to leave as a reasonable accommodation. 42 U.S.C. § 12111(9).

- The ADA defines "undue hardship" as "an action requiring significant difficulty or expense," considering factors such as the cost of the accommodation, the employer's financial resources, and the impact of the accommodation on the employer's operations. 42 U.S.C. § 12111(10).

THE EEOC'S POSITION ON LEAVE AS A FORM OF ACCOMMODATION UNDER THE ADA

- Permitting unpaid leave is a form of reasonable accommodation when necessitated by an employee's disability. *EEOC Enforcement Guidance on Reasonable Accommodation*, Q. 16 (2002).

- Employers may need to accommodate employees by providing additional leave to employees who are unable to return to work after exhausting their 12 weeks of FMLA leave entitlement. *Enforcement Guidance*, Q. 21.

- Employers may not automatically apply, to disabled employees, policies that call for employment termination after the employee has been on leave for a specified period of time (e.g. – six months). *Enforcement Guidance*, Q. 17.

THE EEOC'S POSITION ON LEAVE AS A FORM OF ACCOMMODATION UNDER THE ADA (CONT.)

- In order to deny continued leave to a disabled employee after the employee has exhausted his/her FMLA leave entitlement, the employer must prove that granting additional leave would cause undue hardship. *Enforcement Guidance*, Q. 17.

- Employers are not required to provide open-ended or indefinite leave as a form of reasonable accommodation

EEOC ENFORCEMENT OF ITS POSITION ON LEAVE

EEOC v. United Parcel Service, Inc., Case No. 09-CV-5291 (N.D. Ill.)

- Facts:
  - UPS maintained a policy of discharging employees who could not return to work from medical leave after 12 months
  - The EEOC sued on behalf of 70 UPS workers who were discharged under the policy
- Settlement – July 28, 2017
  - UPS agreed to pay $1.7 million
  - UPS agreed to discontinue its leave policy providing for automatic termination of employees after 12 months of leave
  - UPS agreed that its HR personnel would consult with legal counsel before terminating the employment of an employee on medical leave

SEVERSON V. HEARTLAND WOODCRAFT, INC., NO. 15-3754 (7TH CIR., SEPT. 20, 2017)

- Facts:
  - The plaintiff, a production employee, was on FMLA leave for a herniated disc
  - Near the end of the employee's FMLA leave, the employee's doctor recommended surgery
  - The employee requested two-to-three months of unpaid leave beyond his 12-week FMLA entitlement
  - The employer denied the employee's request, and terminated the employee's employment after the employee had exhausted his 12-week FMLA leave entitlement

SEVERSON V. HEARTLAND WOODCRAFT, INC., NO. 15-3754 (7TH CIR., SEPT. 20, 2017)

- Holding
  - The ADA is an anti-discrimination statute, not a medical leave statute
  - The EEOC's position that long-term leave may be a required form of ADA accommodation has no basis in the statute
  - ADA reasonable accommodation is limited to measures that enable the employee to work
  - An employee who needs long-term leave cannot work, and therefore is not a "qualified individual with a disability"
  - A multi-month leave of absence is beyond the scope of a reasonable accommodation
  - Intermittent time off, or a short leave of a few days or a couple of weeks, may be analogous to a part-time or modified work schedule, which an employer may need to provide as a form of accommodation

SEVERSON V. HEARTLAND WOODCRAFT, INC., NO. 15-3754 (7TH CIR., SEPT. 20, 2017)

- Implications
  - The decision currently applies only in the Seventh Circuit (Illinois, Indiana, and Wisconsin), but likely will be followed by other circuit courts
  - If the decision is followed:
    - Employers will not be required to allow multi-month or even multi-week additional leave after an employee's exhaustion of FMLA leave
    - For disabled employees who do not qualify for FMLA leave, employers will not be required to allow multi-month or even multi-week leave
    - Employers should be able to adopt definite policies providing for employee termination if an employee is unable to return to work within a specified period of time after exhaustion of FMLA leave (e.g. – termination one month after exhaustion of FMLA leave; termination after six months of leave)

EEOC UPDATE

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EEOC'S CONTINUED FOCUSES

- EEOC members have indicated that the EEOC will continue to follow the enforcement priorities outlined in the agency's strategic enforcement plan ("SEP") for 2017-2021

- The SEP goals prioritize:

  - Eliminating barriers in recruitment and hiring

  - Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination

  - Ensuring equal pay protections for all workers

  - Preserving access to the legal system

  - Preventing systematic harassment

EEOC'S CONTINUED FOCUSES (CONT.)

- Addressing selected emerging and developing issues:
  - Qualification standards and inflexible leave policies that discriminate against individuals with disabilities
  - Accommodating pregnancy-related limitations under the ADA and the PDA
  - Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex
  - Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy
  - Addressing discriminatory practices 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, arising from backlash against them from tragic events in the United States and abroad

EEOC'S END OF FISCAL YEAR FILING SURGE

- EEOC's fiscal year ended on September 30th
- Historically, see a surge of lawsuit filing, as well as other activities, by the EEOC in September
- Roughly 90 lawsuits were filed by the EEOC in September
- EEOC filed more cases in the last three months of FY 2017 (July, August and September) than it did during all of FY 2016
- Of the cases filed by the EEOC in FY 2017
  - More than 50% of lawsuits were brought under Title VII
  - Roughly 30% of lawsuits were brought under ADA
  - 11 EPA claims, compared to six in 2016, five in 2015, and two in 2014
- Activity in 2017 increased significantly over activity in 2016

EEOC'S OUTREACH EFFORTS

- EEOC's Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace was completed in 2016
- To assist in the implementation of some of those recommendations, on October 4, 2017, the EEOC announced that it is launching two new trainings for employers:
  - Leading for Respect (for supervisors)
  - Respect in the Workplace (for all employees)
- Trainings are conducted on-site by EEOC Training Institute staff

WHAT TO EXPECT IN 2018

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WHAT TO EXPECT IN 2018

- Decision of the U.S. Supreme Court in *NLRB v. Murphy Oil USA Inc*., Case No. 16-307 (U.S.)
  - Issue: Whether an employer's individual agreements with employees barring them from pursuing employment-related claims as class actions are unenforceable, because the agreements limit employees' right to engage in "concerted activity" under the NLRA
  - Argued on October 2, 2017
- Decision of the U.S. Court of Appeals for the Fourth Circuit in *Grimm v. Gloucester County School Board*, Case No. 15-2056 (4th Cir.)
  - Issue: Whether school districts must allow students to use restrooms and locker rooms of the gender with which the students identify, even if the district provides alternative private facilities for students who have gender identity issues
  - Circuit court decision vacated and remanded on March 6, 2017
- No new federal employment legislation
- No new federal employment regulation
- Rescission of certain federal employment-related regulation

WHAT TO EXPECT IN 2018 (CONT.)

- Continued transition of membership on employment-related federal agencies from Democratic to Republican majorities
- More employer-friendly attitudes and rulings as agencies convert to Republican majorities
- Robust legislative activity in liberal states and municipalities, to expand employee rights and to limit employer rights
- Issuance of additional federal district court and court of appeals decisions holding that Title VII prohibits discrimination based on sexual orientation
- Union demands for higher wage increases, due to a healthy economy
- Continued Union and Democratic efforts to discourage or regulate the “sharing economy”
- Continued debate over an employer’s right to discipline employees for political or off-duty conduct

QUESTIONS?

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THANK YOU

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