

Hot Button EEOC Issues

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TODAY'S WEBINAR

- The EEOC's Strategic Enforcement Plan
- Eliminating Barriers in Recruitment and Hiring
- Use of Arrests and Criminal Convictions
- LGBT Issues
- Religion and Disability
- Severance Agreements
- Retaliation
- Harassment
- Discipline and Performance

EEOC'S STRATEGIC ENFORCEMENT PLAN

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EEOC STRATEGIC ENFORCEMENT PLAN

Priority: Eliminate barriers in recruitment and hiring

“The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women and people with disabilities.”

Includes:

- Facially neutral policies that adversely impact protected groups
- Exclusionary policies and practices
- Steering individuals to particular jobs due to their status in particular group
- Restrictive application processes
- Usage of criminal background checks in making employment decisions

EEOC STRATEGIC ENFORCEMENT PLAN

Priority: Protecting immigrant, migrant and other vulnerable workers

“The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.”

Includes:

- Claims brought by or on behalf of migrant, intellectually disabled or foreign workers

EEOC STRATEGIC ENFORCEMENT PLAN

Priority: Addressing emerging and developing issues

“The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decision and administrative interpretations.”

Includes:

- ADA
- Sex/Pregnancy Discrimination: *Weight Watchers* suit and settlement
- LGBT issues
- Social media in the workplace

EEOC STRATEGIC ENFORCEMENT PLAN

Priority: Enforcing equal pay laws

“The EEOC will target compensation systems and practices that discriminate based on gender.”

- The Commissioner “particularly encourages the use of directed investigations and Commissioner Charges to facilitate enforcement.”

EEOC STRATEGIC ENFORCEMENT PLAN

Priority: Preserving access to the legal system

“The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC’s investigative or enforcement efforts.”

- Retaliation against employees involved in EEOC investigations
- Waivers and releases signed by employees
- Failure to retain records required by the EEOC

EEOC STRATEGIC ENFORCEMENT PLAN

Priority: Preventing harassment through systemic enforcement and targeted outreach

“The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.”

- Systemic Discrimination: a pattern or practice, policy or class of cases where the alleged discrimination has a broad impact on an industry, occupation, business or geographic area
- More EEOC resources are being devoted to claims that involve discrimination affective categories or groups of employees, as opposed to individual employee claims

ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

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ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

- Vulnerable Groups:
 - Racial, ethnic and religious groups
 - Older workers, and
 - People with disabilities
- EEOC Target
 - Class-based intentional recruitment and hiring discrimination
 - Racially neutral recruitment and hiring practices with discriminatory impact

ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

EEOC focus:

- Exclusionary policies
- Channeling/Steering of individuals into specific jobs due to their status in a particular group
- Restrictive application processes
- The Use of Screening Tools
 - Certain kinds of background checks
 - Zero tolerance policies
 - Pre-employment physicals

Disparate Treatment v. Disparate Impact

5 RECRUITMENT PRACTICES THAT MAY BE GIVEN PARTICULARLY CAREFUL SCRUTINY BY THE EEOC

- Illegal use of job advertisements and recruitment agencies
- Word-of-mouth recruiting
- Homogenous recruiting
- Use of stereotyping in decision-making
- Discriminatory screening of applicants

USE OF ARRESTS AND CRIMINAL CONVICTIONS

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EEOC POSITION

- Federal law prohibits employers from treating people with similar criminal records differently because of a protected class
- Title VII prohibits employers from using policies or practices that screen individuals based on criminal history if:
 - They significantly disadvantage Title VII protected people
 - They do not help the employer accurately decide who is likely to be a responsible, reliable or safe employee

ARREST RECORDS

- Arrest (where a conviction did not result)
 - No proof of criminal activity
 - Many states preclude use of arrest records
 - Should only be done with approval of counsel
- Data shows disproportionate impact
 - EEOC claims that, proportionally, African Americans arrested more often than whites
- Michigan prohibits use in hiring (with some exceptions)
- Possible to base decisions on conduct that prompted the arrest

CONVICTION RECORDS

- Conviction
 - Usually sufficient to prove criminal activity
 - May or may not be legitimate basis for excluding a candidate
- But it still presents a risk of disparate impact
 - EEOC Report claims 1 in every 31 adults are under some form of correctional control (probation, parole, prison or jail)
 - EEOC claims 1 in 6 Hispanic men, and 1 in 3 African American men expected to fall in this class

CONVICTIONS (CONT.)

Two circumstances where EEOC believes employers can use convictions:

1. Employer validates criminal conduct exclusion for the position - i.e., if data supports job-relatedness
2. Employer develops a targeted screen considering at least:
 - The nature of the crime
 - The time elapsed
 - The nature of the position sought
 - Opportunity for individualized assessment

EEOC v. KAPLAN HIGHER LEARNING EDUC. CORP

- EEOC sued claiming use of credit checks were unlawful because they disproportionately excluded African-Americans
- Outcome:
 - Case thrown out due to faulty statistics
 - EEOC likely to try again

LGBT ISSUES

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SEXUAL ORIENTATION DISCRIMINATION – KEY POINTS

- Sexual orientation is not a legally-protected classification under federal law
 - Lawmakers tried to introduce Employment Non-Discrimination Act (ENDA) during the second half of 2013
- Nineteen states have statutes that protect against both sexual orientation and gender identity discrimination
- Michigan currently does not ban sexual orientation discrimination in employment
- East Lansing , Ann Arbor and other cities have local municipality protections for LGBT civil rights

SEXUAL ORIENTATION DISCRIMINATION – KEY POINTS (CONT'D)

- Even in jurisdictions that do not have legislation that prohibits discrimination based upon sexual orientation, employers may be liable on a theory of “sex stereotyping/gender nonconformity.”
- Employers should consider prohibitions on sexual orientation discrimination in their Policies. Look into your area’s laws to make sure you’re compliant
 - Once it is in your employment policy, you are bound by it

TRANSGENDER DISCRIMINATION

- 18 states (not Michigan) prohibit discrimination against transgender people
- If ENDA is signed into law, it will protect gay, lesbian, bisexual and transgender people
- The EEOC recently found that discrimination against a transgender individual because he/she is transgender is discrimination based upon sex and a violation of Title VII
- Employers should set a tone of tolerance, sensitivity and mutual respect when dealing with transgender issues
- Employers who face transgender issues (i.e. bathroom designations) in the workplace should consult with counsel, their staff and the transgender employee to create an atmosphere that is acceptable for all

EEOC V. LAKELAND EYE CLINIC, P.A.

The EEOC sued Lakeland Eye Clinic, a Lakeland, Fla.-based organization of health care professionals, alleging that it discriminated based on sex in violation Title VII by firing an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. According to the EEOC's lawsuit, the defendant's employee had performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her.

EEOC V. R.G. & G.R. HARRIS FUNERAL HOMES INC.

- EEOC alleges that G.R. Harris discriminated based on sex in violation of Title VII by firing a Garden City, Mich., funeral director/embalmer
 - because she is transgender,
 - because she was transitioning from male to female, and/or
 - because she did not conform to the employer's gender-based expectations, preferences, or stereotypes

EEOC V. BOH BROS. CONSTR. CO. LLC

- The Commission won a jury verdict in this Title VII enforcement action with evidence showing that the supervisor of an all-male construction crew, harassed one of his subordinates on the basis that he was not “manly enough” which created a hostile environment
- A panel of the Fifth Circuit reversed, and the EEOC sought rehearing. The full court affirmed the jury verdict except for the punitive damages award
- The harasser's subjective perception that the victim failed to conform to gender stereotypes

RELIGION AND DISABILITY

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REQUESTING A MEDICAL EXAMINATION

- The ADA protects employees not just from inquires about their physical health, but also their mental health as well
- An employer's good intentions do not justify requesting a medical exam
 - Document reasons for requesting a medical exam → observed behavior, comments by employee or others, workplace incident etc.
 - Evaluate these things in relation to the employee's ability to do his or her job

EEOC RENEWS INTEREST IN PREGNANCY AND DISABILITY

- In July 2014, the EEOC issued new guidance on Pregnancy Discrimination signaling its interest in the issue.
- Pregnancy is not a disability – even under the broader ADAAA.
- However, pregnancy related impairments can be disabilities, such as:
 - Pregnancy-related sciatica
 - Gestational diabetes
 - Preeclampsia

TELECOMMUTING

- EEOC v. Ford Motor Company
 - Employee with IBS request to work from home; request denied
 - Ford alleged the position was highly interactive
 - Job duties to purchase and resell steel to individuals responsible for manufacturing and supplying vehicle parts to Ford's plants
 - 6th Circuit said that communications technology has advanced to the point that it is no longer an “unusual case where an employee can effectively perform all work-related duties from home.”
- Telecommuting is a possible accommodation – look to whether the employee can actually perform his/her job duties remotely
- Consider a formal telecommuting agreement

RELIGIOUS ACCOMMODATION UNDER THE EEOC

- Unless it would be an undue hardship on the employer's operation of its business, an employer must reasonably accommodate an employee's religious beliefs or practices
 - Schedule changes or leave for religious observances
 - Dress or grooming practices that an employee has for religious reasons
 - Examples: wearing particular head coverings or other religious dress (such as a Jewish yarmulke or a Muslim headscarf)
 - wearing certain hairstyles or facial hair (such as Rastafarian dreadlocks or Sikh uncut hair and beard) or
 - an employee's observance of a religious prohibition against wearing certain garments (such as pants or miniskirts)
- Undue hardship – i.e. costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work

ACCOMMODATIONS (DISABILITY AND RELIGION)

- Have a policy in your handbook and follow it
- Train your supervisors to promptly direct employees to HR for further dialogue.
- Interactive process with the employee (case-by-case assessment)
- Document each step of the process

ACCOMMODATIONS (DISABILITY AND RELIGION)

- Employee's preferred accommodation is not necessarily required
- Accommodation must be effective
- Accommodation must be reasonable
- Accommodation must not result in undue hardship on employer's business (more than a de minimus fee or burden on the operation of the business – does not include co-worker disgruntlement or customer preferences)
- Document findings and conclusion (including any undue hardship finding)
- Leave of absence beyond time allowed by policy or FMLA may be required for a medical-related accommodation

SEVERANCE AGREEMENTS

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SEVERANCE AGREEMENTS

- Under scrutiny by the EEOC
- Targets
 - Agreements not in “plain English”
 - Releases that don’t include an exception for EEOC or other administrative charges
 - Provision requiring the employee to cooperate with the company in any future legal proceedings
 - Non-disparagement language
 - Confidentiality provision preventing disclosure of information concerning other employees or their compensation

Whether courts will agree with the EEOC’s position on these issues remains up in the air

RETALIATION AND HARASSMENT

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TEMPORAL PROXIMITY

- Remains a strong indicator of retaliation, but can help employers
 - Temporal proximity is merely one factor in judging causation
- EEOC v. Product Fabricators, Inc.
 - Employee engaged in the protected activity a year prior to his termination – did not support a finding of causation
- Malin v. Hospira, Inc.
 - Even though Plaintiff's harassment complaint was filed 3 years before Plaintiff's demotion, Plaintiff was denied other promotional opportunities and pay increases during the 3 year period. The person with a reason to be upset about Plaintiff's initial harassment complaint was arguably involved in each decision during that 3 year period

EMPLOYER LIABILITY FOR HARASSMENT

- Previous Supreme Court cases did not define the term supervisor
- In *Vance v. Ball State*, the Supreme Court rejected the EEOC's broad definition of "supervisor"
 - An employee is a "supervisor" for purposes of vicarious liability only when the employer has empowered that employee to take tangible employment action against the victim, i.e. ability to hire, fire, fail to promote or a decision causing a significant change in benefits
- Employers should review and revise job descriptions and performance expectations for supervisor-level employees to clarify supervisory responsibilities
- Employers must continue to guard against discriminatory, harassing behavior and promptly investigate any allegations of harassment, discrimination or retaliation to demonstrate reasonable care in addressing or correcting inappropriate conduct

HARASSMENT PREVENTION

- Know your company's policy
- Ensure supervisors can recognize potential issues and handle them appropriately
- Have at least 2 individuals to whom harassment can be reported (preferably, one male, one female)
- Effectively investigate the claim (don't promise complete confidentiality)
- Ensure no retaliation to any parties involved
- Periodic training of supervisory personnel
- Periodic reminders to employees of anti-harassment policy and procedures

QUESTIONS?



Note: 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.

THANK YOU!



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