THE YEAR IN REVIEW: LABOR AND EMPLOYMENT LAW DEVELOPMENTS IN 2016; WHAT TO EXPECT IN 2017

2016 Labor & Employment Law Conference

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DEVELOPMENTS AT THE EEOC

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EEOC – ELECTRONIC PORTALS

- 2015: Respondent Portal
- 2016: Claimant Portal (not active yet)

NEW POSITION STATEMENTS DISCLOSURE

- January 1, 2016: EEOC announces it will disclose position statements and exhibits to Charging Party
- Trade secrets or confidential information must be labeled as such and separated
- Confidential attachments can include
  - Medical information (except the charging party's)
  - Social security numbers
  - Confidential commercial or financial information
  - Trade secrets
  - Irrelevant personally identifiable information of witnesses, comparators, or other nonparties
  - Any references to charges filed against that employer by other charging parties

EEOC – CHARGES

- 89,385 Total Charges
  - Race Charges 34.7 %
  - Sex Charges 29.5%
  - National Origin Charges 10.6%
  - Religion Charges 3.9%
  - Retaliation Charges 35.7%
  - Age Charges 22.5%
  - Disability Charges 30.2%
  - Equal Pay Act Charges 1.1%
  - GINA Charges 0.3%

EEOC – LITIGATION

- 2015 - 142 merits lawsuits
- Individual vs. Systemic
  - 100 individual
  - 15 systemic
  - 26 non-systemic, multiple claimants
- Types of discrimination
  - 83 Title VII
  - 53 ADA
  - 14 ADEA
  - 7 EPA
  - 1 GINA

EEOC – UPDATED STRATEGIC ENFORCEMENT PLAN

- EEOC has released its updated SEP for 2017-2021
- Continued focus on many of the same issues from 2012
- Some new or refocused areas

1. Eliminating barriers in recruitment and hiring
   - Class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities
2. Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination
   - Continued focus on job segregation, harassment, human trafficking, pay, retaliation and other policies and practices harmful to vulnerable workers, including immigrant and migrant workers, and individuals perceived to be members of these groups, and against underserved communities

EEOC – UPDATED STRATEGIC ENFORCEMENT PLAN

3. Addressing 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, 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

EEOC – UPDATED STRATEGIC ENFORCEMENT PLAN

4. Ensuring equal pay protections for all workers
   - Addressing pay discrimination based on sex, race, ethnicity, age, and disability
5. 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
6. 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

EEOC – UPDATED STRATEGIC ENFORCEMENT PLAN

- Review hiring and promotion practices to ensure they do not create barriers for applicants and employees in recruiting and promotions
- Review employment practices to avoid any practice which may discriminate against immigrant or migrant workers
- Examine company use of temporary workers, staffing agencies, independent contractor relationships, and workers in the on-demand economy to avoid findings of an employer-employee or joint employer relationship
- Prevent harassment of all employees in a protected category, including Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent
- Review employee pay to ensure that you can justify differences in pay between employees who perform the same or similar work
- If you require arbitration of employment claims, ensure that the arbitration agreement signed by the employees provides due process including some limited discovery, a neutral arbitrator and the ability to recover the damages allowed by statutes such as Title VII

EEOC GUIDANCE ON RETALIATION

- New Guidance and Q & A issued August 2016
- A retaliation claim challenging action taken because of EEO-related activity has three elements
    1. Protected activity: "participation" in an EEO process or "opposition" to discrimination
    2. Materially adverse action taken by the employer
    3. Requisite level of causal connection between the protected activity and the materially adverse action
- EEOC interprets "opposition" as having an "expansive definition"
- "Adverse action" now includes any activity that could be reasonably likely to deter protected activity even if it has no tangible impact
- Casual connection can be established by "but for" causation

EEOC – GENDER IDENTITY

- Examples of LGBT-Related Sex Discrimination Claims
  - Failing to hire an applicant because she is a transgender woman
  - Firing an employee because he is planning or has made a gender transition
  - Denying an employee equal access to a common restroom corresponding to the employee's gender identity
  - Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees

EEOC – GENDER IDENTITY

- Denying an employee a promotion because he is gay or straight
- Discriminating in terms, conditions, or privileges of employment, e.g.
  - Lower salary
  - Denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman
- Harassing an employee because of his or her sexual orientation, e.g.
  - Derogatory terms, sexually oriented comments, disparaging remarks

EEOC – GENDER IDENTITY

- *Lakeland Eye Clinic*: 4/9/15 EEOC entered into first conciliation agreement regarding trans-gender employee
  - EEOC has identified as enforcement priority, both currently and for 2017 - 2021
  - Title VII "Sex" – EEOC position is that it protects anything relating to sex or gender (gender identity, sexual preferences, gender changes) (LGBT)

DEVELOPMENTS AT THE NLRB

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NLRB SPEEDY ELECTION RULES

- Old Rules
  - Minimum of 25 days between petition and election
  - Median of 38 days between petition and election
  - Employer must provide union with Excelsior list of names and addresses of employees, within seven days after approval of election agreement
  - Authorization cards must be signed, by hand

NLRB SPEEDY ELECTION RULES

- New Rules
  - Rules took effect on April 14, 2015
  - 25-day minimum time period eliminated
  - Accelerated, eliminated, or postponed procedural steps between filing of petition and election, resulting in quicker elections
  - Requires employer to provide union with more employee information, more quickly
  - NLRB will now accept electronic signatures of employees, in support of a showing of interest

EFFECT OF SPEEDY ELECTION RULES

- No significant increase in election petitions
  - 2,144 in first year under new rules, compared to 2,141 in prior year
- Decrease in pre-election and post-election litigation
  - NLRB is refusing to hold pre-election hearings on Union issues unless unit issues would affect the eligibility of at least 20% of the employees in the petitioned-for unit
- Unit sizes are down slightly
  - Prior to new rules, medium unit size ranged from 23 to 28, depending on the year
  - Medium unit size is currently approximately 23

EFFECT OF SPEEDY ELECTION RULES

- Number of days between filing of petition and election has decreased significantly
  - 24 days in first year under new rules, compared to 38 days in prior year
  - Some elections held in under two weeks
- Unions are not winning more elections
  - 70% employer win rate in first year under new rules, compared to 71% in prior year

WHOLE FOODS MARKET GROUP, INC., 363 NLRB NO. 87 (DECEMBER 24, 2015)

- Background
  - Many employers prohibit the use of cameras, in order to prevent photographing of manufacturing processes and confidential business information
  - Many employers prohibit the use of audio recording devices, in order to encourage open communication in an atmosphere of trust, and in order to protect the confidentiality of confidential business information

WHOLE FOODS MARKET GROUP, INC., 363 NLRB NO. 87 (DECEMBER 24, 2015)

- Facts
  - Whole Foods maintained a policy prohibiting employee use of recording devices without prior management approval
  - Prohibited devices included cell phones, digital recording devices, and digital cameras
  - UFCW sought to unionize employees at a Whole Foods location, and filed ULP regarding Whole Foods' recording device policy

WHOLE FOODS MARKET GROUP, INC., 363 NLRB NO. 87 (DECEMBER 24, 2015)

- NLRB Holding
  - Audio and video recording in the workplace is protected by Section 7, if employees are engaging in the recording for their mutual aid and protection, and if no compelling employer interest is present
  - Employees are permitted, for example, to photograph hazardous working conditions and to record discussions concerning terms and conditions of employment
  - No-recording policies are permissible only where the employer has a compelling business reason for the policies (e.g. – protecting patient privacy in a hospital)

WHOLE FOODS MARKET GROUP, INC., 363 NLRB NO. 87 (DECEMBER 24, 2015)

- Implications
  - Most broad no-recording policies are now impermissible
  - Narrowly-tailored policies are lawful (e.g. – policies prohibiting photographing of trade secrets; policies prohibiting recording other than recording of Section 7 activity)

AMERICAN BAPTIST HOMES OF THE WEST, 364 NLRB NO. 13 (MAY 31, 2016)

- Background
  - Under the NLRA, an employer may hire permanent replacements for economic strikers
  - An employer need not discharge permanent replacements at the conclusion of the strike
  - Strikers who are permanently replaced are entitled to return to work, after the conclusion of the strike, only if and when positions become available

AMERICAN BAPTIST HOMES OF THE WEST, 364 NLRB NO. 13 (MAY 31, 2016)

- Facts
  - SEIU represented employees at a continuing care facility in Oakland, CA
  - After the end of contract term, SEIU announced a five-day strike
  - Strike was part of SEIU plan of intermittent strikes until a new CBA was reached
  - During the initial five-day strike, the employer hired 44 permanent replacements
  - The employer stated that it hired the permanent replacements because they would be willing to work during any subsequent intermittent strikes
  - The employer's lawyer said that, in hiring permanent replacements, the employer wanted to "teach the strikers and the Union a lesson"
  - At the end of the five-day strike, the employer refused to reinstate the strikers who were permanently replaced

AMERICAN BAPTIST HOMES OF THE WEST, 364 NLRB NO. 13 (MAY 31, 2016)

- NLRB Holding
  - The employer's permanent replacement of strikers violated the NLRA, because the employer had an "independent unlawful purpose" in replacing the strikers
  - The unlawful purpose was to punish strikers and to discourage future strikes
- Implications
  - Employers may still hire permanent replacements
  - If the employer does hire permanent replacements, the employer should avoid making any statements to the effect that the employer is hiring the replacements in order to avoid future strikes or to teach employees a lesson

PAC 9 TRANSPORTATION, INC., NLRB DIV. OF ADVICE, NO. 21-CA-150875 (AUGUST 26, 2016)

- Case Summary
  - The employer informed its truck drivers that they were independent contractors, and not employees
  - The employer's drivers did not meet the criteria necessary for a true independent contactor relationship
  - Under the NLRA, only employees have the right to unionize; independent contractors do not
  - Because only employees are entitled to unionize, employers may terminate independent contractors who engage in union organizing activity
  - Teamsters filed ULP charge, alleging that PAC 9's drivers were actually employees, and that the employer violated the NLRA by misinforming drivers that they were independent contractors

PAC 9 TRANSPORTATION, INC., NLRB DIV. OF ADVICE, NO. 21-CA-150875 (AUGUST 26, 2016)

- NLRB Advice Memo
  - Falsely informing employees that they are independent contractors operates to "chill" the drivers' exercise of their Section 7 rights
  - The employer's insisting that its drivers were independent contractors was tantamount to telling the drivers that they may engage in Section 7 activities at the risk of losing their jobs
  - The remedy required was that the employer must stop informing employees that they are independent contractors and must rescind any agreements referring to the drivers as independent contractors

PAC 9 TRANSPORTATION, INC., NLRB DIV. OF ADVICE, NO. 21-CA-150875 (AUGUST 26, 2016)

- Implications
  - Incorrect classification of non-supervisory/non-management employees as independent contractors may constitute a ULP, in addition to giving rise to other liability
  - Further reason for employers to carefully review their independent contractor relationships

MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC., 364 NLRB NO. 115 (AUGUST 27, 2016)

- Facts
  - The employer maintained an employee recognition program known as the "WOW Program"
  - The employer issued "WOW Awards" to employees who demonstrated superior performance
  - The employer maintained a dress code that prohibited clothing that was "degrading, confrontational, slanderous, insulting, or provocative"
  - An employee wore a T-shirt to work: "I don't need a WOW to do my job"
  - The employer required the employee to remove the shirt

MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC., 364 NLRB NO. 115 (AUGUST 27, 2016)

- Issue
  - Did the employer's dress code unlawfully interfere with employees' Section 7 rights?
- Holding
  - The dress code was unlawful
  - A total prohibition on wearing degrading, confrontational, slanderous, insulting or provocative clothing unlawfully chills employees' Section 7 rights
  - The employer failed to show that the employee's wearing of the T-shirt would adversely affect the employer's business
- Implications
  - Review dress codes to ensure NLRA compliance

MARIJUANA AND WORKPLACE DRUG TESTING

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MARIJUANA AND WORKPLACE DRUG TESTING

- There are four states, Alaska, Colorado, Oregon and Washington, and a few cities in Maine and Michigan as well as the District of Columbia where recreational and/or medical marijuana have been entirely legalized
- 12 states have medical marijuana and decriminalization laws, 10 states have legalized medical marijuana, and three states have decriminalized possession laws
- Medical marijuana is legalized in Pennsylvania
- Some medical marijuana laws provide accommodation requirements as well as limitations on adverse actions for employees using medical marijuana (Delaware and New Jersey have employee protection laws)

MARIJUANA AND THE WORKPLACE

- All 50 states allow employers to restrict marijuana use; therefore, even though marijuana use may be legalized in their state, employees can still face sanctions or dismissal by their employers if they use illicit drugs on employer premises

- The most pressing question for employers is whether they may lawfully impose discipline (including termination) on an employee who tests positive for marijuana. The answer is dependent upon state law!

- State statutes are very new and most have not yet had opportunity for judicial interpretation

- Practical Implication: There is little (if any) guidance about what the statutes mean much less any clear direction for employers who are trying to grapple with how their employment policies and practices should be modified (if at all – federal law still prohibits marijuana use, distribution and possession)

MARIJUANA AND THE WORKPLACE – BEST PRACTICES

- Employers Should
  - As more states trend towards legalization, keep a close watch on legal developments in this area in your state
  - Review substance abuse testing policies
  - Update employee handbook to include an explicit statement on medical marijuana
  - Before disciplining an employee for a positive drug test arising from marijuana use outside of work, consult with experienced employment legal counsel
  - If the employee in question has sought (or expresses a plan to seek) accommodation, employers must ensure compliance with reasonable accommodation obligations

PAID LEAVE

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BACKGROUND ON EFFORTS TO REQUIRE PAID SICK LEAVE

- FMLA requires employers that employ 50 or more employees to provide leave for "serious health conditions;" FMLA leave is unpaid
- Under the FMLA, employees are not entitled to even unpaid leave for illnesses or injuries that do not constitute "serious health conditions"
- Many employers already provide paid sick leave, either designated as paid sick leave or as PTO days which may be taken for any reason, as well as disability benefits
- Initiative to require paid sick leave is primarily the initiative of labor unions, particularly the SEIU and UFCW
  - Lobbying state and local legislatures
  - Appealing to fears of populace

RESULTS OF PAID SICK LEAVE INITIATIVES

- Jurisdictions Requiring Paid Sick Leave
  - Five states (CT, CA, MA, OR, VT)
  - 28 cities (including Chicago, Los Angeles, New York City, Philadelphia, San Diego, San Francisco, Seattle, and Washington, D.C.)
  - Two counties (Cook County, IL (Chicago); Montgomery County, MD (suburban Washington, D.C.)

PITTSBURGH PAID SICK LEAVE ORDINANCE

- Background on Ordinance
  - Enacted by Pittsburgh City Council, and signed into law, in August 2015
  - Was to have taken effect on January 11, 2016
  - Would have required most employers operating in the City of Pittsburgh to provide paid sick leave to employees working in City of Pittsburgh
  - One hour of paid sick time for every 35 hours worked, up to 40 hours per year, for employees working for employers with 15 or more employees
  - Paid sick time could be used for time off for employee or family member who is sick, injured, or receiving medical or preventative care

PITTSBURGH PAID SICK LEAVE ORDINANCE

- Demise of Ordinance
  - On December 22, 2015, Court of Common Pleas of Allegheny County ruled that Ordinance was an invalid exercise of municipal authority
  - Pennsylvania Home Rule Charter Law prohibits home rule municipalities, including Pittsburgh, from regulating businesses by determining their "duties, responsibilities or requirements"

PAID SICK LEAVE FOR FEDERAL CONTRACTORS

- Background
  - On September 7, 2015, President Obama signed Executive Order 13706, requiring paid leave for federal contractors
  - On September 30, 2016, DOL issued the final rule implementing the executive order
  - Applies to government contracts awarded on or after January 1, 2017
  - Applies to most construction and service contracts with the federal government
  - Does not apply to contracts for the manufacture or furnishing of materials, supplies, articles, or equipment to the federal government
  - Requires that employees accrue one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract

PAID SICK LEAVE FOR FEDERAL CONTRACTORS

- Background (cont.)
  - Contractors may limit accrual to 56 hours
  - Paid leave must be allowed for illness, injury, preventative care, domestic violence, sexual assault, or stalking, of employee or employee's child, parent, spouse, domestic partner, or closely-associated individual
- Implications
  - Rule affects approximately 1.15 million workers
  - Provides further reason for employers to maintain PTO policies, rather than separate vacation, sick, and other time-off policies
  - Example of the use of federal government's procurement authority to enact, by executive order, laws that would not pass in Congress

PAID LEAVE PLANKS IN PRESIDENTIAL PLATFORMS

- Clinton
  - Guarantee up to 12 weeks of paid family and medical leave, per year
  - Employees would be paid at least two-thirds of their current wages while on leave
  - Paid leave would impose "no additional costs on business, including small businesses"
  - Paid leave would be funded by "making the wealthy pay their fair share"

PAID LEAVE PLANKS IN PRESIDENTIAL PLATFORMS

- Trump
  - Guarantee of six weeks of paid maternity leave, per child
  - Paid leave would apply only to women who give birth
  - Administered through state unemployment insurance programs
  - Funded by eliminating fraud in the programs

OSHA REGULATIONS

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OSHA FOCUS ON TEXTING WHILE DRIVING

- Leading cause of workplace fatalities is motor vehicle accidents
- The Occupational Safety and Health Administration's (OSHA) top priority is keeping workers safe, and the Department of Labor (DOL) through OSHA is partnering with the Department of Transportation to combat distracted driving
- OSHA's focus on texting while driving – OSHA calls upon employers to prohibit any work policy or practice that requires or encourages workers to text while driving
- Employers who require their employees to text while driving—or who organize work so that doing so is a practical necessity even if not a formal requirement—violate the Occupational Safety and Health Act (OSH Act) and Michigan law
- BEST PRACTICE: Adopt a clear, comprehensive policy that prohibits using hand-held device while driving; requires hands free calls and/or driver to pull over

OSHA FINAL RULE

- Final Rule issued August 2016
  - Requires employers to comply with electronic submission of injury and illness data
  - Requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation
  - Requires that an employer's procedure for reporting work-related injuries and illnesses be reasonable and not deter or discourage employees from reporting
- The rule does not prohibit drug testing of employees but does prohibit employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses
- Drug testing to comply with state or federal laws/regulations is not retaliatory

DOL WHITE COLLAR REGULATIONS

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REGULATIONS GO INTO EFFECT ON DECEMBER 1, 2016

- Set the required salary level for exempt employees at $913 per week (compared to the former $455 per week), or $47,476 annually (compared to the former $23,760 annually) for a full-year worker
- Set the total annual compensation requirement for highly compensated employees who meet a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally, or $134,004 (compared to the former $100,000)
- Permit employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level
- Establish a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption. Future automatic updates to those thresholds will occur every three years, beginning on January 1, 2020

UNLESS…

- 21 states have filed or joined a lawsuit in a Texas federal court to challenge the Department of Labor's regulations
- The lawsuit challenges the regulations on the basis that they will increase the threshold for eligibility for exempt status automatically every three years without valid congressional authorization
- The lawsuit is not likely be successful, and the regulations will likely go into effect as planned on December 1, 2016

U.S. SUPREME COURT REVIEW
2015 – 2016 TERM

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ZUBIK V. BURWELL, 136 S. CT. 1557 (MAY 16, 2016)

- Issue
  - Applicability of ACA contraceptive mandate to religious-affiliated institutions.
- Applicable Law
  - ACA's contraceptive mandate requires employers that employ 50 or more full-time employees, and that provide health insurance coverage, to offer contraceptive coverage and related services at no cost to employees
  - Churches, synagogues, mosques, and religious orders are exempt
  - Under Department of Health and Human Services regulations, non-exempt employers that object, on religious grounds, to providing contraceptive coverage may file Form 700 with their insurer, notifying the insurer of the employer's objection
  - Insurer may then provide contraceptive coverage directly to employees, without any involvement from the employer

ZUBIK V. BURWELL, 136 S. CT. 1557 (MAY 16, 2016)

- Facts
  - Certain non-exempt employers objected, on religious grounds, to having to file Form 700
  - Non-exempt employers argued that filing Form 700 would make the employer compliant in providing contraceptive coverage, which is a sin in many religious doctrines

ZUBIK V. BURWELL, 136 S. CT. 1557 (MAY 16, 2016)

- Holding
  - After further briefing, U.S. Supreme Court concluded that it may be possible for the health insurance plans of non-exempt employers to provide contraceptive coverage without requiring the employers to do anything
  - Non-exempt employers could simply contract for employee insurance that does not include contraceptive coverage
  - Insurer then could do the rest (e.g. – provide contraceptive coverage under a plan that the employer does not sponsor; communicate with employees directly regarding that plan)
  - Case remanded to lower court to determine whether matter could be resolved in this manner

GREEN V. BRENNAN, 136 S. CT. 1769 (MAY 23, 2016)

- Issue
  - When does the time limit for the filing of an EEOC charge begin to run, in a case of constructive discharge?
- Applicable Law
  - Under Title VII, federal government employees must contact an EEO Counselor where they work or applied, within 45 days of a discriminatory event, in order to pursue an EEO charge based on that event
  - "Constructive discharge" occurs when harassment or discrimination makes an employee's working conditions so intolerable that a reasonable person in the employee's position would feel compelled to resign

GREEN V. BRENNAN, 136 S. CT. 1769 (MAY 23, 2016)

- Facts
  - Marvin Green, an African-American male, worked for the USPS for 35 years in Colorado
  - He applied for a promotion to a Postmaster position in Boulder, CO, but was not given the promotion
  - Green complained that he was passed over for the promotion because of his race
  - Green's supervisors subsequently accused him of intentionally delaying the mail, a federal crime
  - Supervisors threatened criminal charges, even though the Office of Inspector General reported to Green's supervisors that no further investigation regarding Green was warranted
  - Supervisors gave him a choice of retiring or taking a demotion to a small postal office in Wyoming

GREEN V. BRENNAN, 136 S. CT. 1769 (MAY 23, 2016)

- Facts (cont.)
  - On December 16, 2009, Green and USPS signed a settlement agreement in which Green agreed to either retire or accept the demotion by March 31, 2010
  - On February 9, 2010, Green elected to retire, effective March 31, 2010
  - On March 22, 2010, 96 days after signing the settlement agreement, but 41 days after giving notice of his resignation, Green contacted an EEO Counselor regarding an alleged discriminatory constructive discharge

GREEN V. BRENNAN, 136 S. CT. 1769 (MAY 23, 2016)

- Question Decided by Court
  - Whether that statute of limitations for a constructive discharge claim begins to run on the date when the last discriminatory act resulting in that constructive discharge occurred, or on the date when the employee gives notice of resignation, or on the employee's last day of work?
- Holding
  - Cause of action for constructive discharge is not "complete" until the employee gives notice of resignation
  - Statute of limitations for constructive discharge claim begins to run on the date when the employee gives notice of his/her resignation

GREEN V. BRENNAN, 136 S. CT. 1769 (MAY 23, 2016)

- Implications
  - Rationale of holding is also applicable to employees and employers who are subject to 300-day statute of limitations
  - Allows employees to pursue claims based on alleged discriminatory acts that occurred outside of the 300-day statute of limitations (e.g. – harassment more than 300 days before filing, that results in notice of resignation or retirement less than 300 days before filing)
  - Does not change the rule that the statute of limitations begins to run on the date when the employee gives notice of resignation or retirement, as opposed to the employee's final day of work

GOBIELLE V. LIBERTY MUTUAL INSURANCE COMPANY, 136 S. CT. 936 (MARCH 1, 2016)

- Applicable Law
  - ERISA contains broad preemption clause
  - Under ERISA, all state laws relating to employee benefit plans are preempted, with the exception of state laws regulating health insurance
  - Under ERISA preemption, states generally may regulate fully-insured health plans, but not self-insured health plans

GOBIELLE V. LIBERTY MUTUAL INSURANCE COMPANY, 136 S. CT. 936 (MARCH 1, 2016)

- Facts
  - Vermont maintains a law requiring hospitals, health insurers, and other entities that provide or pay for health care within the state, to report certain claims information to a Vermont state agency for the purpose of inclusion in a health care database
  - The information includes costs, prices, quality, utilization, claims data, and enrollment information
  - Vermont law applies to fully-insured plans, as well as TPAs

GOBIELLE V. LIBERTY MUTUAL INSURANCE COMPANY, 136 S. CT. 936 (MARCH 1, 2016)

- Facts (cont.)
  - Database is available to insurers, employers, health care providers, and consumers, to enable them to review utilization, expenditures, and performance
  - Liberty Mutual Insurance, as employer, sponsored a self-insured health plan for the benefit of its own employees, including employees in Vermont
  - Blue Cross/Blue Shield was the TPA for the plan
  - Vermont health care reporting law would have required BC/BS to disclose certain eligibility and claims information for Liberty Mutual's Vermont employees

GOBIELLE V. LIBERTY MUTUAL INSURANCE COMPANY, 136 S. CT. 936 (MARCH 1, 2016)

- Facts (cont.)
  - Liberty Mutual was concerned that the disclosure of confidential patient information might violate Liberty Mutual's fiduciary duties
  - Liberty Mutual directed BC/BS not to comply and filed a declaratory judgment action
  - Liberty Mutual argued that ERISA preempts VT statute

GOBIELLE V. LIBERTY MUTUAL INSURANCE COMPANY, 136 S. CT. 936 (MARCH 1, 2016)

- Holding
  - Vermont's law is preempted by ERISA, and therefore does not apply to self-insured plans
  - ERISA imposes uniform federal requirements for reporting, disclosure, and recordkeeping relating to employee benefit plans
  - Vermont's law similarly purports to regulate plan reporting, disclosure, and recordkeeping
  - Preemption is necessary in order to prevent multiple jurisdictions from imposing differing regulations, creating wasteful administrative costs, and subjecting benefit plans to wide-ranging liabilities

GOBIELLE V. LIBERTY MUTUAL INSURANCE COMPANY, 136 S. CT. 936 (MARCH 1, 2016)

- Implications
  - 18 states maintain databases
  - Only self-insured plans are exempt from state database requirements; requirements still apply to fully-insured plans
  - Gobielle limits usefulness of database information, due to exclusion of information from self-insured plans
  - Gobielle hampers efforts to track quality and cost of care

FISHER V. UNIVERSITY OF TEXAS, NO. 14-981, 136 S.CT. ___ (JUNE 23, 2016)

- Issue
  - Legality of consideration of race in college admissions process
- Facts
  - University of Texas (UT) accepts, to its freshman class, any applicant who graduated in the top 10% of the applicant's class from a Texas high school
  - For other applicants, UT considers applicants' "Personal Achievement Index" (PAI) in making admission decisions
  - PAI is based on "holistic review" of applicant's grades, SAT scores, entrance essays, work experience, community service, and other "special characteristics," including race

FISHER V. UNIVERSITY OF TEXAS, NO. 14-981, 136 S.CT. ___ (JUNE 23, 2016)

- Facts (cont.)
  - Caucasian student, Abigail Fisher, was denied admission to freshman class
  - Fisher had a 3.59 GPA and was in the top 12% of her high school class; she had an 1180 SAT score
  - Fisher sued, contending that UT's consideration of race disadvantaged her and other white applicants in violation of the Equal Protection Clause

FISHER V. UNIVERSITY OF TEXAS, NO. 14-981, 136 S.CT. ____ (JUNE 23, 2016)

- Fisher Holding
  - Government decisions based on race must pass a strict scrutiny analysis
  - Strict scrutiny requires the government to prove that it has a compelling government interest in considering race, and that the race-based criterion is narrowly tailored to achieve that interest
  - UT had a compelling interest to consider race: ending racial stereotypes; promoting cross-racial understanding; preparing students for a diverse workforce
  - Race-based criterion was narrowly tailored

FISHER V. UNIVERSITY OF TEXAS, NO. 14-981, 136 S.CT. ____ (JUNE 23, 2016)

- Implications
  - Victory for the affirmative action
  - Applies to governmental employers, not private employers
  - Signals that affirmative action is still alive and well

WHAT TO EXPECT IN 2017

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WHAT TO EXPECT FROM THE U.S. SUPREME COURT IN 2017

Grimm v. Gloucester County School Board (petition for Writ of Certiorari granted October 28, 2016)

- Facts
  - Plaintiff was born as a biological female, but identifies as male
  - Plaintiff attends Gloucester High School, in Virginia
  - During high school, Plaintiff legally changed his name to Gavin Grimm, to conform to his sexual identity
  - Beginning in his sophomore year (2014), he used the boys' bathroom at Gloucester High School for approximately two months
  - School board adopted policy in December 2014, requiring students to use the restrooms and locker rooms appropriate to their biological gender, but providing for alternative private facilities for students who had gender identity issues

WHAT TO EXPECT FROM THE U.S. SUPREME COURT IN 2017

- Facts (cont.)
  - Grimm sued under Title IX: District court upheld school district policy, but U.S. Court of Appeals for Fourth Circuit reversed
  - Fourth Circuit: Schools must treat transgender students consistent with their gender identity
  - School board filed petition for Writ of Certiorari; U.S. Supreme Court granted petition on October 28, 2016
- Likely Outcome of Grimm
  - Fourth Circuit decision will be affirmed
  - Schools and employers must allow individuals to use restrooms/locker rooms consistent with the individuals' perception of their gender identity

WHAT ELSE TO EXPECT IN 2017

- Efforts to increase national minimum wage
- Efforts to expand paid leave
- Continued NLRB challenges to employer policies and contracts
- Efforts to amend ACA
- Increased incidence of appointment of judges based on political orientation
- Continued proliferation of "ban-the-box" statutes and ordinances
- Continued efforts to limit the use of criminal background checks and criminal histories, in making employment decisions

WHAT ELSE TO EXPECT IN 2017

- Efforts to amend discrimination statutes to include sexual orientation and sexual identity as protected classes
- Continued restrictions on employer rights under the guise of "regulation"

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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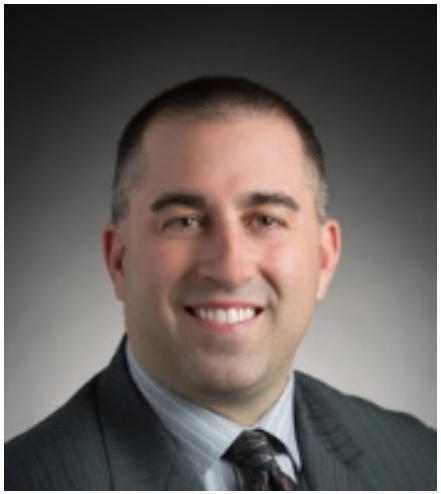
E-Learning	▪ Discrimination, Harassment and Retaliation
Resources	• Documents, templates, policies, applications, etc… • Benefits compliance documents • Links to frequently used outside resources

QUESTIONS?



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