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Spring 2016

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For more details on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article or Tim McDonald, editor-in-chief. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

Discrimination

Employers Should Update Policies & Training to Address Sexual Orientation & Transgender Discrimination

By Heather M. Muzumdar & Candice S. Thomas

On March 1, the Equal Employment Opportunity Commission (EEOC) filed its first two lawsuits alleging sex discrimination under Title VII on the basis of sexual orientation.

In its lawsuit against Scott Medical Health Center, the EEOC alleged that a gay male employee was subjected to harassment because of his sexual orientation, including allegations that the employee's manager repeatedly referred to him using various anti-gay epithets and made other highly offensive comments about his sexuality and sex life. The complaint alleges that when the employee complained to the clinic director, the director responded that the manager was "just doing his job," and refused to take any action to stop the harassment. After enduring weeks of such comments by his manager, the employee quit rather than endure further harassment.

In the lawsuit against IFCO Systems, the EEOC charged that a lesbian employee was harassed by her supervisor because of her sexual orientation. The complaint alleges that her supervisor made numerous comments to her regarding her sexual orientation and appearance, such as "I want to turn you back into a woman" and "you would look good in a dress," according to the complaint. The EEOC alleges that at one point, the supervisor blew a kiss at the employee and circled his tongue at her in a suggestive manner. The employee complained to management and called the employee hotline about the harassment. The suit alleges that IFCO fired the female employee just a few days later in retaliation for making the complaints.

As evidenced by these lawsuits, the EEOC is taking the position that sexual orientation discrimination is, by definition, discrimination because

of sex for a variety of reasons, including that sexual orientation discrimination is rooted in noncompliance with sex stereotypes and gender norms. These lawsuits come on the heels of the EEOC issuing policy guidance and bringing lawsuits under Title VII to address discrimination based on transgender status as well.

As a result, employers should consider updating their EEO policies to specifically state that discrimination and harassment based on sexual orientation and gender identity and expression are prohibited. Many states and local laws already specifically prohibit discrimination based on sexual orientation and transgender status.

In addition, harassment and diversity trainings should be updated. Employees and supervisors should be trained that lesbian, gay, bisexual or transgender employees cannot be harassed or discriminated against in the workplace. Training should promote tolerance in the workplace and provide specific examples of conduct that can be deemed a violation of the harassment policy, such as making offensive comments about an employee's sexual orientation, gender or gender identity, or refusing to allow a transgender employee to utilize the restroom or adhere to the dress code policy that aligns with their gender identity. An employer may need to remind employees and supervisors to check their personal and religious beliefs at the door and treat everyone with respect without regard to their sexual orientation or gender identity. And, as demonstrated in the above factual allegations in the two cases brought by the EEOC, managers must be trained to recognize and properly respond to complaints of sexual orientation, transgender and other types of harassment and discrimination to avoid retaliation claims.

For more information, please contact Heather Muzumdar or Candice Thomas.

Affordable Care Act

2016 ACA Changes: Should Employers Rethink Their Leave of Absence Policies?

By Kim Wilcoxon

When it comes to leaves of absence, employers have different methods of dealing with health coverage. Some will terminate health coverage at the beginning of the leave or after a defined period after the leave begins. Others will maintain health coverage as long as the employee continues to pay for it. Still other employers will continue health coverage throughout the leave even if the employee fails to pay for it.

Employers who have not already done so should consider how their leave practices may create increased liability for an excise tax (the "employer mandate penalty") under the Affordable Care Act (ACA). The ACA's penalty provisions have changed, so practices that may have been acceptable in 2015 could expose the employer to significant risk in 2016.

Employer Mandate Penalty: The Basics

An applicable large employer (generally, one who employed an average of at least 50 full-time and full-time equivalent employees in the prior calendar year) might be subject to the employer mandate penalty if the employer does not offer a sufficient level of affordable health coverage to each of its full-time employees. The penalty calculation will depend upon how many full-time employees have been offered health coverage. If the employer has offered health coverage to less than 95 percent of its full-time employees and their children, and if *just one* of the full-time employees obtains a federally subsidized insurance policy from an ACA Marketplace, the penalty will be equal to $180 multiplied by the employer's total number of full-time employees (minus the first 30) for each applicable month (the "A penalty"). If the employer has offered health coverage to at least 95 percent of its full-time employees and their children, the penalty will be equal to $270 multiplied by the number of full-time employees who have obtained a federally subsidized insurance policy from an ACA Marketplace for each applicable month (the "B penalty").

As the Affordable Care Act's penalty provisions have changed, employers who have not already done so should consider how their leave practices may create increased liability for an excise tax.

For example, Company A employs 100 full-time employees and offers health coverage to 95 of them. One of the full-time employees who was not offered coverage obtains a subsidized Marketplace policy for November and December. Company A's penalty would be equal to $270 x 1 employee x 2 months = $540.

By contrast, if one of the full-time employees in the example above was instead a part-time employee in November and December, Company A would have offered health coverage to only 94 of its 99 full-time employees in November and December. Therefore, it would have offered coverage to less than 95 percent of its full-time employees and Company A's penalty would be equal to $180 x (99-30) employees x 2 months = $24,840.

Full-Time Status of Employees on Leave

The employer mandate penalty applies for failure to offer affordable, minimum-value health coverage to full-time employees. Therefore, the ACA's impact on an employer's leave practices will depend upon whether coverage is terminated during the leave (other than for non-payment) and, if so, whether the employee is a full-time employee during the leave.

If an employer continues health coverage for the full length of a leave or terminates health coverage during the leave only for non-payment, the ACA usually will not have an impact on that employer's leave practices. The ACA comes into play only for an employer who terminates coverage during a leave for reasons other than non-payment or for an employer who is very close to the 95 percent threshold (see Impact of 2016 Changes, below).

Where coverage is terminated during a leave for reasons other than non-payment, an applicable large employer generally must offer COBRA continuation coverage to the employee. COBRA coverage is considered an offer of coverage under the ACA, but it generally is unaffordable. Therefore, this situation results the employer's failure to have offered affordable coverage to the employee. If the employer has otherwise offered coverage to at least 95 percent of its full-time employees, and if the employee remains a full-time employee while on leave, the employer could be subject to a B penalty for that employee if he or she obtains a federally subsidized insurance policy from an ACA Marketplace.

The key issue for such an employer, therefore, is whether an employee is considered a full-time employee during the leave. This determination will depend upon the type of leave involved and whether the employer is using the look-back method or monthly measurement method to identify full-time employees.

Look-back method. If an employer is using the look-back method, and if an employee has been employed for a full "measurement period," the employee's status as a full-time or part-time employee will remain the same for the full "stability period," even if he or she takes a leave of absence. For example, an employee works an average of at least 30 hours per week during the employer's measurement period and is therefore considered a full-time employee for all of 2016. That employee's leave of absence in 2016 does not change his or her status as a full-time employee in 2016, regardless of the reason for or length of the absence. However, if the employee has not yet been employed for a full measurement period, the monthly measurement method rules apply.

Monthly measurement method. If an employer is using the monthly measurement method, an employee will be considered a full-time employee for any month for which he or she is credited with an average of at least 30 hours of service. An employee generally is credited with hours of service under this method only for hours worked and for paid leave. For example, a full-time employee takes a paid leave of absence from November 1 through December 31. Because the employee's absence is paid, he or she continues to be credited with hours of service during the leave and continues to be a full-time employee. If the leave were unpaid, the employee would be credited with zero hours of service for November and December and therefore would not be a full-time employee for those months.

Impact of 2016 Changes

In 2015, application of the A penalty versus the B penalty depended upon whether an employer offered health coverage to at least 70 percent (not 95 percent) of its full-time employees and their children. Because the offer threshold was so low, many employers felt comfortable with their leave practices.

Because the threshold is now 95 percent, employers need to carefully confirm whether a leave could cause an employee to lose full-time status and therefore cause the employer to move from the B penalty to the A penalty. In the example above, one of Company A's employees moved from full-time to part-time status, causing the potential penalty to be almost 50 times greater than it otherwise would have been. Employers should understand the ACA rules and thoroughly consider whether their leave practices and/or full-time employee identification methods should be changed to avoid a significant increase in risk.

Please contact Kim Wilcoxon with any questions.

Equal Employment Opportunity Commission

EEOC Rolls Out Electronic Charge System

By Allison M. Kendall & Heather M. Muzumdar

Employers may now receive notice that a charge of discrimination has been filed with the Equal Employment Opportunity Commission (EEOC) via email rather than by regular mail. The EEOC is also requesting that employers, and their counsel, submit the position statement and supporting exhibits in response to the charge electronically through the EEOC's online portal.

A second, and even more important, procedural change to be aware of is that the EEOC now releases a copy of the employer's position statement and non-confidential exhibits to the charging party upon request during the charge investigation.

Electronic Notice of Charges & Submission of Position Statements

As of January 1, 2016, Phase I of the EEOC's Digital Charge System took effect in all 53 EEOC offices. The EEOC intends to use the Digital Charge System as its primary means of serving charge documents on employers, though during this transition period some EEOC charges may still be served by mail. Under the new Digital Charge System, when a charge of discrimination is filed, the EEOC sets up a unique Digital Charge System account for the charge, uploads the charge documents, and notifies the employer (also referred to as the respondent) with an email containing the subject line "Notice of Charge of Discrimination." The notification email includes a unique password for the employer to use to access the charge documents. Employers can also submit requests for extensions of time to respond to the charge through the Digital Charge System.

If an employer has not logged on to the Digital Charge System within 10 days of the initial notification email, a representative from the local EEOC office attempts to re-serve notice of the charge. Employers can then submit the designation of legal representative form, mediation forms, position statements and attachments, and responses to requests for additional information electronically via the online portal.

The EEOC intends to no longer mail hard copies of notices of charge, though some EEOC district offices continue to mail notices during this transition period. Given the incomplete switch to the Digital Charge System, employer representatives should be on the lookout for **both** mailed notices of charge and emails from the EEOC with the subject line "Notice of Charge of Discrimination," as the EEOC considers email notification proper service of a charge.

In 2016, the EEOC plans to implement Phase II of the Digital Charge System to add a secure portal for individuals who file a charge of employment discrimination, and to enhance the communications and documents transmitted through the system for both charging parties and respondents.

EEOC May Share Position Statement With Charging Party

Under new procedures effective February 18, 2016, the EEOC now discloses the employer's position statement and non-confidential exhibits to the charging party if he or she requests a copy. Then the EEOC gives the employee 20 days to submit a response to the EEOC addressing the facts and arguments raised in the employer's position statement. Notably, the EEOC will not share the charging party's response with the employer. If an employer wants to see the employee's response, the employer must file a request under the Freedom of Information Act (FOIA) after the EEOC has completed its investigation.

As a result of this procedural change, it is important to be strategic and consider what information to include in the position statement. Employers should seek counsel when they receive a charge to ensure their position statement provides enough information to facilitate the investigation and obtain a favorable finding without disclosing unnecessary or confidential information.

Considerations When Submitting Confidential Information to the EEOC

In light of these two procedural changes, it remains important to place confidential information in separate attachments and label them "Confidential" so that the EEOC does not release confidential information to the charging party. The EEOC defines "confidential information" to include:

- references to charges filed against the employer by other charging parties;
- sensitive medical information (except for information relating to the charging party);
- Social Security numbers;
- confidential commercial or financial information;
- trade secrets; and
- non-relevant, personally identifying information of witnesses, comparators and third parties (such as Social Security numbers, dates of birth in non-age cases, and personal addresses, phone numbers, and email addresses).

Moreover, given that confidential information is being submitted electronically via an online portal, employers should also consider data security risks when determining what confidential information is necessary for a proper investigation and dismissal of the charge.

Lastly, employers should note that these changes only affect the procedures of the EEOC. State administrative agencies that also investigate charges of discrimination maintain their own rules of practice and procedure.

Please contact Allison Kendall or Heather Muzumdar with any questions.

Thompson Hine Recognized by Corporate Counsel as Top Law Firm for Value

Named Among Top 22 Firms Nationally as Best at Alternative Fee Arrangements

Thompson Hine LLP was named as one of the top 22 law firms from 650 nationally as the best at developing and implementing alternative fee arrangements. The survey, ***BTI State of Alternative Fee Arrangements 2016***, presents an analysis of firms' efforts to help clients control costs based on in-depth telephone interviews with leading legal decision makers.

"We congratulate the 22 law firms named by corporate counsel – in an unprompted manner … These are the firms – out of the 650 core law firms serving large and Fortune 1000 clients – corporate counsel find best at making AFAs the successful cost control tool they were intended to be," notes the report. The report elaborates that these firms successfully bring improved client focus, budget predictability, a more streamlined approach to work and double-digit savings.

"Top legal decision makers identify Thompson Hine as a leading law firm at Alternative Fee Arrangements," said Michael B. Rynowecer, president of The BTI Consulting Group. "Corporate counsel note the firm's commitment to offering predictability and value to support their core goals."

Occupational Safety & Health Administration

OSHA Reports Its Year One Results for Revised Employer Reporting Obligations

By M. Scott Young

On March 17, 2016, OSHA reported its first full year of statistics after implementing its new obligations, effective January 1, 2015, requiring employers to report an injury that results in inpatient hospitalization, amputation or loss of an eye within 24 hours. OSHA's previous requirement that an employer report a workplace fatality within eight hours remained in force. Injuries may be reported directly to an OSHA field office, to the OSHA toll-free number or via an online form. Only fatalities occurring within 30 days of the work-related incident must be reported to OSHA. Further, for an inpatient hospitalization, amputation or loss of an eye, these incidents must be reported to OSHA only if they occur within 24 hours of the work-related incident.

Failure to comply with this reporting obligation can result in a citation and fine by OSHA against the employer, with OSHA issuing fines up to $70,000 against employers for violating this obligation in 2015. Effective on or about August 1, 2016, OSHA is increasing the fines that it can assess for violations of this OSHA standard and others to up to approximately $125,000 per citation.

OSHA's conclusion – based on several factors, including injury claim numbers provided by state workers' compensation programs – is that many severe injuries, perhaps 50 percent or more, are not being reported.

In 2015, and consistent with OSHA's new reporting obligations upon employers, employers reported 10,388 severe injuries, including 7,636 hospitalizations and 2,644 amputations. Foundation, structure and building exterior contractors had the largest number of reported severe injuries, with building equipment contractors second. OSHA responded to 62 percent of the 2015 reports, including 69 percent of the hospitalization reports. In a majority of those cases, OSHA reports that it responded by working with the employer to identify and eliminate hazards, rather than conducting a worksite inspection. OSHA often did not respond by sending an inspector to the scene to conduct an onsite investigation but rather requested employers to conduct their own incident investigations and propose their own remedies to prevent future injuries to OSHA. More than 6 percent of the severe injury reports involved a temporary worker. The employer who provides the day-to-day supervision of the worker must report to OSHA any work-related incident that results in a worker fatality, inpatient hospitalization, amputation or loss of an eye.

OSHA responded to about a third of all injury reports, and 58 percent of amputation reports, with an inspection by a compliance officer after determining that conditions described warranted one. Most employers were reportedly eager to cooperate and take whatever steps were necessary to prevent a similar incident from occuring in the future. However, that was not always the case. OSHA described a circumstance where a manufacturer tried to conceal an entire production line from OSHA when its inspector showed up after a staffing agency had reported the amputation of a worker's finger. Reportedly, when the inspector arrived, the employer had closed interior doors and parked forklifts in front of the doors, turned off lights and directed workers to be quiet when the OSHA inspector was present. Regardless, though, the OSHA inspector discovered the back room, which was reportedly full of machinery that exposed workers to amputation injuries.

Another example described by OSHA involved an employer who waited three days to report an incident involving an employee who fell through a roof, sustaining multiple fractures requiring inpatient hospitalization after not having been provided with the appropriate fall protection. OSHA found that the employer delayed those three days to report the incident so that it had time to purchase fall protection gear and coach other workers to claim that they had had this protection all along. This strategy, which is not recommended, did not work for the employer, as OSHA discovered the facts of the situation.

OSHA believes that 50 percent or more of employers are still not complying with their obligations to report fatalities, inpatient hospitalizations, amputations or losses of eyes in a timely fashion. OSHA indicates that it is even more likely to cite and fine employers for noncompliance with its reporting obligations in 2016 than in 2015.

We recommend that employers be vigilant about complying with OSHA's reporting requirements and all OSHA standards.

Compliance with OSHA's reporting requirements may trigger inspections by OSHA investigators that might not have occurred in the past. Employers should ensure that their personnel are prepared in advance for a potential OSHA inspection, ensure that their safety handbooks and training are up-to-date, and document enforcement of their safety procedures with employees. These steps, among others, should be taken by employers because they will reduce the likelihood of reportable incidents, and where they occur, decrease the chance of citation(s) and fine(s) against an employer.

For more information, please contact Scott Young or any member of our Labor & Employment group.

Other Recent Publications

An Employer's Guide to the Final EEOC Wellness Program Regulations

Final Overtime Rule Increases Exempt Salary to $47,476 Effective Dec. 1, 2016

New OSHA Reporting Requirements and Anti-Retaliation Remedy

Defend Trade Secrets Act Enacted – Implications for Employers & Trade Secret Litigation

DOL Reduces Overtime Threshold to $47,000

BWC Programs Promote Safer Workplaces, Save Costs

Department of Labor Pushes Forward With $50,000 Minimum for Exempt Employees

Changes to Practical Training for STEM Graduates

DOL Expands Employer Reporting of Union Persuader Agreements

EEOC/Obama Administration Propose Rule to Collect Pay Data From Employers

DOL Guidance: You Might Be a Joint Employer If...

Office of Federal Contract Compliance Programs

Putting Health & Families First: Executive Order 13706 & What it Means for Government Contractors

By Matthew R. Kissling & Nancy M. Barnes

Following the trend set by a growing number of states and municipalities, President Obama took executive action to implement a system of mandatory paid sick leave for the majority of government contractors. On September 7, 2015, the president signed Executive Order 13706, which guarantees that workers on covered government contracts will have access to a maximum of seven days of paid sick leave per year. The Executive Order's stated purpose is to "improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers," and is similar to paid sick leave recently enacted in the states of California, Connecticut, Massachusetts and Oregon, as well as in such cities as San Francisco, New York City, Washington, D.C. and Philadelphia.

The president directed the Department of Labor to implement regulations to enforce Executive Order 13706, and the agency followed suit by posting its Proposed Regulations in the Federal Register on February 25, 2016. As currently written, the paid sick leave requirement will apply to all new government contracts entered into on or after January 1, 2017, and which are covered by the Service Contract Act or Davis-Bacon Act, are concessions contracts with the federal government, or are service contracts in connection with federal property or lands. An employer who enters into a covered contract with the government must also ensure that any subcontractors utilized to fulfill the contract comply with the paid sick leave requirements.

A covered government contractor must provide paid sick leave to all employees who are working on the covered contract or subcontract. Employees will be eligible to accrue one hour of paid sick leave for every 30 hours worked, up to a maximum of 56 hours or seven days in a year. The paid sick leave may be used for three purposes: (1) for an employee's own illness or other health care needs, (2) to care for a family member or intimate partner who is ill or needs health care, or (3) for certain purposes if an employee, family member or intimate partner is the victim of domestic violence, sexual assault or stalking. Any unused paid sick leave may be carried over by an employee from year to year while they work for the same government contractor on covered contracts. In addition, an employee who stops working on a covered contract will be eligible to recover any unused sick leave if they return to work on a covered contract within one year.

While primarily focused on this mandatory paid sick leave, the Executive Order and Proposed Regulations also provide certain notice and anti-retaliation protections to eligible employees. Covered government contractors may not interfere with an employee's accrual or use of paid sick leave, nor may they discriminate or retaliate against an employee for using or requesting paid sick leave. A contractor will also need to inform employees of their currently accrued but unused leave on at least a monthly basis, as well as post a formal notice of employee rights provided by the Department of Labor. Additionally, contractors will be required to track and maintain records of an individual employee's use of paid sick leave for at least three years.

Fortunately for employers, the Proposed Regulations provide several exceptions for an employer's existing paid leave policies and procedures. Most importantly, a covered contractor is **not** required to provide additional paid sick leave if its existing paid time off (PTO) policy provides employees with at least the same rights, benefits and protections as required by Executive Order 13706. For example, if a contractor's current policy gives employees 14 days of PTO per calendar year that can be used for an employee's vacation, illness or any other necessary absences, and allows an employee to carry over accrued PTO from year to year, that policy will most likely comply with the requirements of the Executive Order and Proposed Regulations. As a result, the contractor will not be required to provide any additional paid sick leave to its employees. Additionally, the Proposed Regulations allow covered contractors to require employees to provide reasonable notice of a need for paid sick leave, as well as certification from a medical provider or other agency for absences of three or more consecutive workdays.

The notice and comment period for the Proposed Regulations closed on April 12, 2016, and the Department of Labor is expected to issue its Final Regulations prior to January 1, 2017. As a result, government contractors are

wise to take some immediate steps to ensure compliance with these new sick leave obligations.

Review existing government contracts. You should review your existing government contracts or subcontracts to determine whether they are subject to extension or renewal within the near future. Executive Order 13706 only applies to government contracts that are created, renewed, amended or extended on or after January 1, 2017. As a result, a government contract that is currently in effect on this date is not automatically subject to the new paid sick leave requirements. Instead, the new leave obligations will only apply when that existing contract is renewed, extended or modified.

Analyze leave & PTO policies. Since the proposed regulations create a safe harbor for an employer's existing leave practices, you should closely review your paid leave or PTO policies to determine whether additional steps need to be taken prior to January 1, 2017. The pending regulations specifically provide that a contractor's existing PTO policy will satisfy the new sick leave requirements if it provides employees with at least seven days of paid leave and that leave can be used for the same purposes set forth in Executive Order 13706. A contractor's existing policy will also need to allow employees to carry over unused PTO from year to year. For this reason, you should ensure that your existing leave policies permit employees to use paid leave for a broad array of personal reasons, whether vacation, illness or otherwise, and that employees are not required to forfeit unused leave at the end of the year. If your policy does not currently align with the proposed regulatory requirements, you should consider revising your paid leave practices to avoid incurring additional leave obligations on January 1, 2017.

Implement leave tracking system. While the proposed regulations are not yet final, you should begin making efforts to actively track the paid leave information for each of your employees. If covered, a government contractor will eventually be required to document and maintain information regarding an individual employee's requests to use paid sick leave, any denials of leave requests, and the dates and amounts of leave taken. This information could be maintained in your existing human resource information system, which may help streamline the process of updating leave information for your workforce and providing the necessary monthly notifications to employees of their current leave entitlement.

The new paid sick leave requirements of Executive Order 13706 are a further indication that government contractors will be the subject of ever-expanding regulation through the end of the Obama presidency. By taking steps now to review and, if necessary, modify existing paid leave policies and procedures, government contractors can ensure that they are fully meeting their obligations to employees when we say farewell to 2016 and welcome the New Year.

For more information about a government contractor's paid sick leave obligations, please contact Matthew Kissling or Nancy Barnes.

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