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The Law@Work

Summer 2015

Discrimination

Supreme Court Holds Motivation to Avoid Religious Accommodation May Violate Title VII

By M. Scott Young

In June 2015, the Supreme Court of the United States decided *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. ____ (2015), reversing the Tenth Circuit Court of Appeals, holding that an employer that acts with the motive of avoiding religious accommodation may violate Title VII even if the employer has no more than an unsubstantiated suspicion that a religious accommodation would be needed. The obligation to accommodate a religious practice is straightforward. According to the Court, an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in an employment decision.

This case arose when then-teenager Samantha Elauf, who wore a head scarf, or hijab, as part of her Muslim faith, applied for a job at an Abercrombie & Fitch store in her hometown in Oklahoma. She wore the head scarf out of devotion to the Muslim faith, though throughout her interview with the store's assistant manager, she never disclosed the reason that she wore the scarf. After the interview, the assistant manager determined that Elauf was qualified for the position but that the head scarf would be a violation of the retailer's Look Policy, which governed employees' dress and prohibited "caps" as too informal for Abercrombie's desired image.

The assistant manager sought the store manager's guidance on whether or not the head scarf would be a forbidden "cap" under the policy, which did not yield an answer. The assistant manager then turned to the district manager and informed him that she believed Elauf wore the head scarf because of her faith. The district manager told the assistant manager that Elauf's head scarf, as with all other head wear, religious or otherwise, would violate the Look Policy and directed that the assistant manager not hire Elauf.

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.

The EEOC sued Abercrombie on Elauf's behalf, claiming that its refusal to hire Elauf violated Title VII of the Civil Rights Act. Title VII of the Civil Rights Act, as amended, makes it unlawful for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or natural origin and (2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of such individual's race, color, religion, sex, or natural origin. 42 U.S.C. §2000e-2(a). Religion is defined to include all aspects of religious observance and practice, as well as belief. An employer must accommodate an employee's religion unless the employer demonstrates that it is unable to reasonably accommodate a religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. §2000e(j). The Court found it significant that §2000e-2(a)(1), under Title VII, does not impose a knowledge requirement. Conversely, the Americans with Disabilities Act defines discrimination to include an employer's failure to make reasonable accommodations to the known physical or mental limitations of an applicant. Title VII contains no such knowledge limitation.

According to the Court, Title VII prohibits certain motives regardless of the state of the actor's knowledge – motive and knowledge are separate concepts. An employer that has actual knowledge of a need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not the motive. Conversely, an employer that acts with the motive of avoiding accommodation may violate Title VII even if the employer has no more than an unsubstantiated suspicion that a religious accommodation would be needed.

The Court rejected Abercrombie's argument that a claim based upon a failure to accommodate an applicant's religious practice must be based upon a disparate impact claim and not a disparate treatment claim. A religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated, subject to whether or not there is otherwise undue hardship on the conduct of the employer's business. Here, according to the Court, while an employer is entitled to have a "no head wear" policy as an ordinary matter, where an applicant requires an accommodation as an aspect of religious practice, it is no response that the subsequent failure to hire is due to an otherwise neutral policy. Title VII requires otherwise neutral policies to give way to a need for a religious accommodation. The Supreme Court reversed the Tenth Circuit's decision that granted summary judgment for Abercrombie & Fitch and remanded the case for further consideration consistent with its opinion.

As a result of this ruling, employers should review their employment policies, including dress policies, to make sure there are no barriers to religious accommodation. Employers should be mindful that just because an employee does not request a religious accommodation relating to dress, work hours or work days, such an accommodation may be required for an employee. Further, an employer should not make a decision that is motivated by an employee's religion. An employee's religious practice must be accommodated unless an employer can demonstrate that the accommodation would cause undue hardship on the conduct of the employer's business.

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

Other Recent Publications

DOL: Most Workers Are Employees Under FLSA

The Silver Lining in the DOL's Proposed Changes to the FLSA Salary Basis Test

Analyzing *Obergefell v. Hodges* – Implications for Employers

Ohio Business Transfers May Result in Higher Workers' Compensation Premiums

Attracting & Retaining Talent: A Proactive Approach to Preventing Transgender Discrimination in the Workplace

By Heather M. Muzumdar

Employers know that the keys to preventing and defending claims of harassment and discrimination based on a person's gender, race, disability, age or other protected class include:

- An effective harassment/EEO policy;
- Regular training;
- Prompt and fair investigations, which in turn have the effect of encouraging reporting of complaints; and
- A corporate culture that embraces diversity in the workplace.

Legal incentives aside, more and more employers are recognizing how critical a culture of equal employment, tolerance and respect is to attracting and retaining talent in today's labor market.

For all of these same reasons, employers should educate their workforces about transgender discrimination and harassment, a form of gender stereotyping that is illegal under Title VII.

Awareness of this type of gender discrimination is growing. On June 6, 2015, the EEOC filed its third lawsuit in recent months alleging gender discrimination by an employer against an employee in transition, consistent with one of its national priorities to "address coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions." The recent EEOC lawsuits reveal a common thread of facts:

- Employee informs a supervisor that the employee is transitioning genders and/or begins to present at work as a different gender; and
- Employer refuses to allow employee to use restroom of employee's identified gender; coworkers and/or managers intentionally use the wrong name or pronouns when referring to the employee; or worse, employer fires the transgender employee for failing to adhere to the dress code, using the "wrong" restroom or simply because the employer doesn't agree with the transition.

While these are not the only examples of how an employer can harass or discriminate against a transgender employee, they illustrate how a supervisor or human resources professional can discriminate against a transgender employee due to prejudices or simply a lack of awareness of the issues that can arise and how to appropriately respond when an employee is transitioning at work.

Employers can eliminate some of the uncertainty and anxiety that can occur in the face of change by proactively establishing guidelines and providing transgender employees, and their supervisors, human resources personnel and coworkers with an overview of expectations and responsibilities for each of them, and a plan for when an employee is transitioning at work. Among other things, transition guidelines (and training) should:

- Emphasize that the company prohibits discrimination and harassment based on gender identity and stereotyping under its harassment and EEO policies, and that such protections are not limited to employees who undergo surgery;
- Provide specific examples of conduct that violate the harassment policy, such as intentional misuse of pronouns and inappropriate comments or jokes about gender identity or stereotypes;
- Explain that employees will be permitted to use the restroom facilities that correspond to their gender identity (which is also a best practice recommended by OSHA to comply with an employer's obligation to provide prompt access to appropriate sanitary facilities);

- Apply the dress code based on an employee's gender identity (better yet, consider adopting a gender-neutral dress code policy);
- Remind employees, especially supervisors, that discriminatory conduct is not excusable because a coworker is uncomfortable or due to customer preferences that conflict with an employer's legal obligations (just like customer preferences and coworker attitudes about race, national origin, religion and other protected classes are not excuses for discrimination at work);
- Provide supervisors with suggestions on how to handle conversations with the transitioning employee, coworkers and clients; and
- Explain that the company will work with the transitioning employee to develop a transition plan, which will address issues such as name changes; confidentiality; whether, when and by whom supervisors and coworkers will be informed of the transition; changes to licenses, benefits and administrative records; communications with customers (if applicable) and more.

Contact Heather Muzumdar or your Thompson Hine Labor & Employment attorney for assistance on developing transition guidelines and information on available training and materials regarding transgender harassment and discrimination.

Benefits Issues in the Headlines: 2015 Employee Benefits Briefings

Please join us for one of our employer briefings designed to keep employee benefits and human resources professionals up to date on the latest legal and regulatory developments that are impacting employee benefits.

Briefings will be held in Thompson Hine's Dayton, Cincinnati, Columbus and Cleveland* offices:

Dayton: September 9
Cincinnati: September 10
Columbus: September 10
Cleveland: November 3

Agenda:

8:00 to 8:30 a.m. – Networking & Continental Breakfast
8:30 to 9:15 a.m. – Retirement Plan Update
9:15 to 10:00 a.m. – Health Plan Update
10:00 to 10:45 a.m. – Employment Law Update

CLE credit has been requested for Indiana, Kentucky and Ohio. HR Certification Institute (HRCI) credit has also been requested.

Visit thompsonhine.com/events to register.

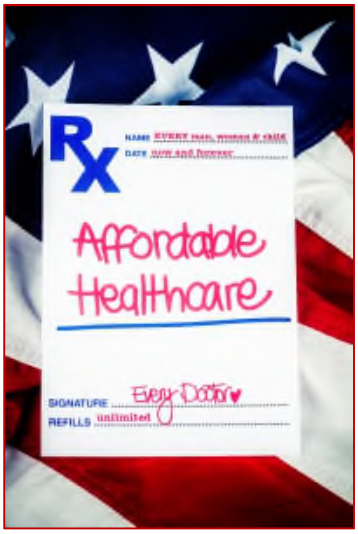
**The Cleveland update will be provided in conjunction with Thompson Hine's annual Labor & Employment seminar on Tuesday, November 3. We will send invitations and registration information for that program when we get closer to the date.*

Affordable Care Act

Supreme Court Preserves Affordable Care Act: Impact on Employer Health Plans

By Kim Wilcoxon

On June 25, 2015, the Supreme Court of the United States announced its decision in *King v. Burwell* and upheld the Internal Revenue Service's (IRS) interpretation that tax credits are available under the Affordable Care Act (ACA) for taxpayers in all states, regardless of whether a state's exchange was established by the state government or the federal.



What does the *King* decision mean in the short term for employer-sponsored group health plans?

King v. Burwell effectively upholds the employer mandate and does not change anything for employer-sponsored group health plans.

Prior to the *King* decision, employers understood they could be penalized for failure to offer affordable, minimum-value health coverage to all of their full-time employees. Liability for the penalty (and, in some cases, the amount of the penalty) would depend on whether a full-time employee received a tax credit to help pay for coverage obtained through an exchange. Relying on IRS regulations, employers understood that full-time employees in any state might be eligible for the tax credit.

Because the IRS regulations were upheld, employers' understanding of their liability for the penalty continues to be correct. All of the effort they have put into identifying full-time employees, extending health coverage and communicating to employees has not gone to waste. In the short term, they should continue their compliance efforts regarding the employer mandate. Depending on the employer's circumstances, these efforts may include:

- Ensuring that administrative systems are accurately tracking hours of service.
- Evaluating new hires to determine whether they would be considered variable hour employees.
- Updating summary plan descriptions and participant communications to address changes to the eligibility requirements and circumstances under which employees may lose eligibility for coverage.
- Preparing to report offers of coverage to full-time employees on Form 1095-C.

What does the *King* decision mean over the long term for employer-sponsored group health plans?

Although significant strides have been made to implement the ACA, employers still wait for guidance about how to comply with a number of provisions unrelated to the employer mandate, such as the nondiscrimination rules applicable to insured group health plans, automatic enrollment requirements for large employers and the excise tax on high cost health coverage (also known as the Cadillac Tax). Had *King* been decided another way, serious concerns about the continued viability of the ACA would remain. However, the *King* decision provides enough certainty about the ACA's future to allow the regulatory agencies to continue to work on guidance on these outstanding issues.

Employers should expect that they will be required to comply with the remaining provisions of the ACA as guidance is issued and becomes effective. However, whether and how these provisions become effective might be impacted by one or more events, including:

- **Repeal of the Cadillac Tax.** The Middle Class Health Benefits Tax Repeal Act of 2015 was introduced in the House of Representatives on April 28, 2015. If enacted, it would completely repeal the excise tax on high cost health coverage.
- **The 2016 Elections.** If the elections leave us with a Republican President and a Republican Congress, we may see legislation enacted to repeal and replace part or all of the ACA.
- **Future Lawsuits.** The *King* decision effectively upholds the employer mandate as described above, but the decision does not expressly affirm it. Therefore, plaintiffs may still bring judicial challenges to the employer mandate or any other ACA provisions.

- **Agency Guidance.** Guidance issued by the IRS, Department of Labor and/or the Department of Health and Human Services will impact when and how employers must comply with the ACA. Agencies have issued surprising and unexpected guidance (such as the guidance on reimbursement of individual insurance premiums and the guidance on embedded out-of-pocket maximums), so it is difficult to anticipate when and how employers will be required to comply with outstanding requirements such as automatic enrollment.

Employers should continue to monitor legal developments to confirm that their health plans are in compliance with the ACA.

For more information, please contact Kim Wilcoxon or any member of our Employee Benefits & Executive Compensation or Labor & Employment practice groups.

Save the Dates

Please mark your calendar for our annual seminars that are designed to provide the latest updates in the area of labor and employment law to in-house counsel and human resources professionals.

2015 Labor & Employment Seminar
Cleveland

November 3, 2015

8 a.m. to 4 p.m.

- A wide variety of topics will be covered
- We will request Continuing Legal Education (CLE) and HR Certification Institute (HRCI) credit
- Continental breakfast and lunch will be provided

2015 Lawyers' Continuing Education Seminar
Cincinnati

December 9, 2015

8:30 a.m. to 4:30 p.m.

- A wide variety of topics will be covered
- We will request Continuing Legal Education (CLE) and HR Certification Institute (HRCI) credit
- Continental breakfast and lunch will be provided
- The afternoon session will fulfill Ohio's "professional conduct" instruction requirement

"Clarification" About Out-of-Pocket Maximums Under Group Health Plans May Require Plan Design Changes and Increase Costs in 2016

By Laura A. Ryan

The Departments of Treasury, Labor and Health and Human Services released some recent guidance that may require changes to group health plans' out-of-pocket maximum provisions for 2016.

An *out-of-pocket maximum* is an annual limit on the amount of costs that a covered person is required to pay under a health plan. The Affordable Care Act (ACA) prescribes the out-of-pocket maximums that must apply to most group health plans. For 2016, for employee-only coverage, the out-of-pocket maximum cannot exceed $6,850. For all other tiers of coverage (e.g., employee plus one, employee plus children, family coverage, etc.), the out-of-pocket maximum for 2016 cannot exceed $13,700. All essential health benefits must be included in determining when the out-of-pocket maximum is reached.

Health plans typically apply one of two approaches to determine when the out-of-pocket maximum is reached:

1. Under one approach, a single out-of-pocket maximum applies to the entire covered family group. Once the out-of-pocket expenses for all covered family members together reach the out-of-pocket maximum limit, most covered services will be covered in full for all covered family members for the rest of the year.

2. Under an alternative approach, a separate out-of-pocket maximum (often called an *embedded* out-of-pocket maximum) also applies to each covered family member. Once the out-of-pocket expenses of a covered person reach the embedded maximum, most of that person's covered expenses will be covered in full for the rest of the year – even if the family as a whole has not reached the family out-of-pocket maximum.

For a few months, it was unclear whether the ACA's self-only out-of-pocket maximum applied only to small group and individual coverage. However, FAQs issued jointly by the Departments of Treasury, Labor and Health and Human Services confirmed that the requirement applies to each individual in any nongrandfathered group health plan, including self-insured and large group health plans.

Pursuant to the newly issued guidance, beginning with the plan year that starts on or after January 1, 2016, group health plans subject to the ACA's out-of-pocket maximum rules cannot apply an out-of-pocket maximum in excess of $6,850 with respect to any individual. Therefore, if the plan applies a family out-of-pocket maximum that exceeds $6,850, it **must** also apply an embedded out-of-pocket maximum. Such plans that don't currently use an embedded out-of-pocket maximum will need to be modified, and those modifications will likely result in an increase in the cost of the plan.

Health savings account (HSA)-compatible high deductible health plans are subject to an additional set of IRS rules related to the out-of-pocket maximum. For employee-only coverage under these types of plans for 2016, the out-of-pocket maximum cannot be more than $6,550. For all other tiers of coverage under these types of plans, the overall out-of-pocket maximum for 2016 cannot be more than $13,100.

Starting in 2016, HSA-compatible high deductible health plans will have to comply with both sets of rules. For high deductible health plans that currently apply a family out-of pocket maximum that exceeds $6,850 and do not apply an embedded out-of-pocket maximum, changes will be needed. These changes are likely to increase the cost of those plans.

In light of this recent guidance, we recommend that employers discuss (sooner rather than later) 2016 plan designs and premiums with their insurance carriers or third party administrators (TPAs). If applicable, they should inquire about the implementation of the embedded out-of-pocket maximum to ensure that their vendors will be able to accurately track incurred eligible health expenses in relation to two separate (i.e., individual and family) out-of-pocket maximums.For more information, please contactLaura Ryan or any member of our Employee Benefits & Executive Compensation or Labor & Employment practice groups.

Workers' Compensation

The Impact of *Obergefell* on Workers' Compensation

By Stephen Richey & Janis B. Rosenthal

Obergefell v. Hodges was decided by the Supreme Court of the United States on June 26, 2015. The Court held that states must recognize same-sex marriages that were lawfully performed in other states. Further, it ordered states to license marriages between same-sex couples. This landmark decision may impact employers by requiring them to pay death benefits to the same-sex spouse of an employee who dies as a result of an industrial injury or occupational disease. A surviving spouse can also receive any workers' compensation benefits accrued and due to the decedent at the time of death. Proof of marriage is generally required in order to obtain these benefits; usually, the marriage certificate must accompany the application for death benefits and benefits that have accrued at the time of death.

Obergefell may influence workers' compensation benefits in other less obvious ways depending on state law. For example, some states may provide paid caregivers to injured workers. In some of those states, family members such as spouses are eligible to be paid for caregiving while in others, only non-family member caregivers are eligible. Employers should investigate whether spouses have a right to receive payment for providing caregiver services in their state.

For more information, please contact Stephen Richey, Janis Rosenthal or any member of our Employee Benefits & Executive Compensation or Labor & Employment practice groups.

The Legal 500 U.S. Recognizes Several Thompson Hine Practices, Lawyers

Thompson Hine LLP is pleased to announce its inclusion in the 2015 edition of *The Legal 500 United States*, a directory of client- and peer-recommended firms, practices and lawyers used by clients throughout the country to guide their selection of lawyers and law firms. Published for more than 20 years, *The Legal 500* series provides information and opinions about firms and lawyers across the globe based on interviews with lawyers and representatives from client companies.

Praise for the firm's Employee Benefits & Executive Compensation practice indicates that the team offers "great value and expertise" regarding qualified retirement plans, health and welfare, executive compensation, ERISA litigation and fiduciary matters. Partner **Timothy R. Brown** is called "exceptional" and Practice Group Leader **Laura A. Ryan** is also singled out.