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EEOC/Sexual Orientation

Appellate Decision Sets the Stage for a Supreme Court Determination on Sexual Orientation Discrimination
By Deborah S. Brenneman

A federal appeals court has rejected the position taken by the Equal Employment Opportunity Commission (EEOC) and determined – for now – that sexual orientation discrimination is **not** prohibited under Title VII. The July 28th decision by the Seventh Circuit Court of Appeals was the first on this issue by a federal circuit court since the EEOC held in a 2015 administrative ruling that bias based on sexual orientation is prohibited by Title VII. Absent intervening action by Congress, this appellate decision may well set the stage for the United States Supreme Court to take up the issue.

The EEOC's 2015 ruling found that sexual orientation discrimination is based upon gender, and therefore covered by this statute. As we reported in the Spring 2016 edition of *The Law@Work*, the EEOC had filed its first two lawsuits against employers on the basis of sexual orientation. Those suits remain pending.

In the Seventh Circuit's decision in *Hively v. Ivy Tech Comty. Coll.*, the court of appeals said it was bound by the circuit's precedent rejecting recognition of sexual-orientation bias claims under Title VII, as well as repeated congressional inaction on efforts to amend federal civil rights law to include bias protections for gay workers. The court therefore affirmed a district court's decision dismissing the claims of a gay college instructor that she was passed over for a full-time position and promotions because of her sexual orientation.

Despite its holding, the court noted the inherent flaws in the precedent underlying its decision. Controlling case law offers protections under Title VII to gay employees who experience discrimination for failing to conform to stereotypical gender norms, but refuses to provide the same protection to employees who are discriminated against simply based upon the fact that they are gay. The court reasoned that no public policy

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rationale justified this distinction, explaining that "Title VII leaves us with a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing makeup—but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman. We are left with a body of law that values the wearing of pants and earrings over marriage."

The court noted that the writing may be on the wall with regard to the evolution of sexual orientation claims, but was unwilling to break new ground, stating, "writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent."

Absent congressional action, it is now likely that this issue will land with the Supreme Court. Despite the Seventh Circuit's decision, employers should still update their EEO policies to specifically state that discrimination and harassment based on sexual orientation and gender identity and expression are prohibited. The EEOC strongly disagrees with the Seventh Circuit's decision, and is firm in its position that sexual orientation discrimination is, by definition, discrimination based on sex for a variety of reasons. Additionally, many states and municipalities have statutes prohibiting sexual orientation discrimination in the workplace. Therefore, while it remains unclear whether the Supreme Court, Congress, or some other federal court will be the first to formally define a similar right under federal law, it **is** clear that this issue remains on the front burner and should not be ignored by employers in either their policies or their harassment and diversity trainings.

For more information, please contact Debbie Brenneman.

Other Recent Publications

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Government Contracting

Are You Covered? Navigating the Illusive Definition and Ever-Expanding Consequences of Coverage as a "Government Subcontractor"

By Matthew R. Kissling & Nancy M. Barnes

For the majority of private employers in the United States, the Equal Employment Opportunity Commission (EEOC) may be the only federal civil rights agency that rings a bell. The EEOC is charged with enforcing the full array of federal laws prohibiting discrimination in the private workplace and is a household name to most corporate human resources and in-house legal professionals. Yet lurking in the shadows is a much less known, but arguably more powerful, government agency – the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

The OFCCP, which has been described as the agency that no one has ever heard of that gives employers heartburn, is responsible for enforcing the comprehensive set of equal opportunity and affirmative action obligations applicable to government contractors. On its face, the OFCCP's jurisdiction seems very limited and many employers assume that they fall outside of the agency's reach because they "don't do business with the government." This belief is partially correct in that directly contracting with the government (i.e., having a "prime contract") is the most obvious way of becoming subject to the OFCCP's enforcement powers. At the same time, however, this assumption ignores the much broader and significantly less obvious source of the OFCCP's jurisdiction – the government "subcontractor" relationship.

The equal opportunity and affirmative action regulations enforced by the OFCCP equally apply to government prime contractors and government subcontractors. The regulations define a covered "subcontract" to be **any** agreement between two parties:

1. that is for the purchase, sale or use of personal property or services which is "necessary to the performance of" a government contract or subcontract, or
2. under which any portion of another government prime contractor or government subcontractor's obligations is "performed, undertaken or assumed."

While the regulations do not provide any further clarification as to the scope of either definition, the OFCCP's enforcement practices seemingly apply both categories to their broadest extent, often resulting in a presumption of subcontractor coverage.

Importantly, an employer can obtain government contractor status even if it does not deal directly with a prime contractor or perform work directly related to a government contract. Instead, an agreement can be a covered subcontract regardless of the tier in which the contract sits in a contracting relationship. For example, a second- or third-tier subcontract (i.e., the agreement is to provide goods or services to the next higher-tiered subcontractor) may be covered if it satisfies either of the broad regulatory requirements for a government subcontract. This flow-down coverage applies regardless of how many levels removed an employer's contract may be from an entity that contracts directly with the government.

As a result, it is very likely that a number of U.S. employers unknowingly qualify as covered government subcontractors by virtue of their various contractual agreements to provide goods or services to other organizations. The consequences of coverage are both significant and far-reaching. Depending on the value of a covered subcontract, an employer may be required to take affirmative action to promote the hiring and retention of employees in protected race, ethnic and gender classes, as well as protected veterans and individuals with disabilities. These obligations include annual preparation of written affirmative action plans, collection and retention of specific data from applicants and employees, and achievement of certain utilization goals and hiring benchmarks. A covered employer may also be subject to new minimum wage and paid sick leave obligations, and may soon be required to report certain labor law violations to the Department of Labor on a semi-annual basis.

More critically, an unknowing employer may also become a target of the OFCCP's enforcement machinery. To ensure compliance with the affirmative action requirements, the OFCCP conducts a series of contractor audits on an annual basis. Contractors are selected for audit on a randomized basis and are typically required to submit documentary proof of their compliance to the OFCCP. The agency also possesses the power to conduct onsite investigations at a contractor's facility, where a representative reviews additional documents and interviews selected employees. If the OFCCP determines that violations exist, or an employer refuses to cooperate during the audit process, consequences can include monetary fines, hiring requirements for certain protected classes, and even cancellation of a contract or disqualification from further work related to a government contract.

Unfortunately, this threat of an audit is not limited to the location where an employer actually performs the work covered by a government subcontract. Instead, if a covered employer operates multiple facilities, each and every location is subject to the OFCCP's myriad of regulatory requirements and obligations, regardless of where the government contract-related work is actually performed. More importantly, if an employer qualifies as a government subcontractor, there is a high likelihood that any affiliated companies or business units are also covered and subject to the various affirmative action requirements. While the OFCCP provides a five-factor test to determine the extent of affiliate coverage, the agency typically presumes that **all** affiliated companies of a government subcontractor are also covered, and leaves it to the employer to prove otherwise. As a result, an employer's unknowing status as a government subcontractor can open up a Pandora's box of compliance issues and audit exposure across all facets of the employer's business.

In light of these potentially broad-sweeping regulatory obligations, as well as the threat of a random government investigation, employers are wise to ask several critical questions to determine whether they may qualify as a government subcontractor.

Who am I contracting with? You should review your existing contracts and purchase orders to determine whether any of these agreements may constitute a covered government subcontract. As a first step, you should determine whether any of your existing relationships are with an organization that has been designated as a prime contractor with the government. If you do business directly with a government prime contractor, this is a tell-tale sign that you may qualify as a government subcontractor and be subject to an array of regulatory obligations enforced by the OFCCP. Fortunately, the federal government provides some helpful assistance in making this inquiry by way of the General Services Administration (GSA) Federal Acquisition Service Contractor List, which provides information on current prime contractors and government contract awards.

What does my subcontract say? Even if you determine that you do not do business with a prime contractor, the inquiry should not stop there. Instead, you should review your existing contracts to determine whether you provide products or services to a government subcontractor. Under the regulatory flow-down provisions, an employer can become a covered subcontractor by doing business with a higher-tiered government subcontractor. While such coverage may not be obvious in the day-to-day performance of your contractual obligations, the key initial evidence lies in the language of your subcontract. Every covered subcontractor is required to include certain references to the equal employment opportunity and affirmative action regulations in their own contracts with other businesses. For example, a covered subcontract may state that "this contractor and subcontractor shall abide by the requirements of 41 CFR 60-1.4(a)." Alternatively, a contract may refer to "the Equal Employment Opportunity and Affirmative Action clauses." If the subcontracts that you enter into with another organization contain this type of language, then you are most likely doing business with a government subcontractor and may be subject to the OFCCP's jurisdiction by virtue of that relationship.

What are my products or services being used for? Fortunately, your business relationship with a covered prime contractor or subcontractor does **not** automatically mean that you are also a government subcontractor. To the contrary, that business relationship must involve either (i) the provision of goods or services "necessary to the performance" of a government contract or subcontract, or (ii) the performance of the other contracting party's obligations that resulted in its covered contractor status. Any employer that does business with a government contractor or subcontractor should therefore analyze specifically how its products or services are being used by that covered entity. The results of that analysis will provide a much clearer picture as to whether your business qualifies as a government subcontractor subject to the OFCCP's regulatory oversight. For example, suppose that Company A contracts with Company B to provide plastic storage bins. Company B is an office supply company that sells its supplies directly to a government agency. When shipping those supplies to the agency, Company B uses cardboard boxes that it obtains from another supplier, and does not use the plastic storage bins provided by Company A. In this situation, Company A's contract would most likely **not** be considered a government subcontract because the plastic bins were not "necessary to" Company B's performance of its contract with the government, nor did it fulfill any portion of that contract.

The regulatory equal opportunity and affirmative action obligations of government contractors have continuously expanded throughout the Obama presidency, and the OFCCP is expected to release several additional requirements prior to January 20, 2017. The OFCCP has proven time and again that the price of non-compliance, even if unintentional, can be steep. By taking steps now to review and analyze existing business and contractual relationships, employers can ensure that they have a clear understanding of their current legal status and potential compliance obligations should the OFCCP show up at the doorstep.

For more information about the issues associated with coverage as a government contractor, please contact Matthew Kissling or Nancy Barnes.

Occupational Safety & Health Administration

Tell Us How You Really Feel: OSHA's Reinforced Criticism of Safety Incentive Programs

By M. Scott Young and Candice S. Thomas

When OSHA issued its new recordkeeping and anti-retaliation rule, codified within 29 CFR 1904, et seq. on May 12, 2016, many highlighted the electronic recordkeeping requirements and effects of the rule on post-accident drug testing. We also commented upon those aspects of the rule in a previous *Labor & Employment @lert*. Lurking behind the headlines, however, is an important warning employers should not fail to note: OSHA is deeply dissatisfied with safety incentive programs. The new rule provides OSHA with a mechanism to issue citations to employers whose incentive programs deter employees from reporting injuries or illnesses.

OSHA explained that while it does not intend to categorically ban all incentive programs, it will focus on the effect that incentive programs may have on inaccurate recordkeeping by causing under-reporting, and thus, under-recording of injuries and illnesses. With OSHA's delayed enforcement of the anti-retaliation rule affecting employers starting on November 1, 2016, employers should revisit their safety incentive plans to determine whether their programs discourage employees from reporting injuries and illnesses. Employers seeking to avoid citations under this anti-retaliation rule, especially in light of the increased penalties implemented on August 1, should ensure that their incentive programs focus on motivation and conduct rather than results.

OSHA's position on incentive plans is nothing new; it is the same stance from years ago wrapped in a new rule. In 2010, OSHA issued a directive that instructed inspectors to look at safety incentive programs tied to the number of recordable injuries and illnesses. In March 2012, OSHA publicized the "Fairfax Memo" penned by the former Deputy Assistant Secretary of Labor Richard Fairfax, which explained that practices discouraging employees from reporting injuries and illnesses could constitute potential retaliation. In May, OSHA incorporated its criticism of incentive programs into the anti-retaliation provision of its new rule. Specifically, OSHA states in its preamble to the new rule:

> Such programs might be well-intentioned efforts by employers to encourage their workers to use safe practices. However, if the programs are not structured carefully, they have the potential to discourage reporting of work-related injuries and illnesses without improving workplace safety … [T]o the extent incentive programs cause under-reporting, they can result in under-recording of injuries and illnesses, which may lead to employer liability for inaccurate recordkeeping. The latter concern is what is being addressed by this final rule's prohibition on employers using incentive programs in a way that impairs accurate recordkeeping.

Clear violations include the use of an incentive program to deny benefits—including disqualifying an employee for a monetary bonus—because an employee reports a work-related injury or illness. Conversely, OSHA has decided that incentive programs that make a reward contingent on whether employees correctly follow legitimate safety rules rather than whether they report an injury or illness do not violate the provision. Incentive programs that promote worker participation in safety-related activities, including identifying hazards or investigating incidents, are also deemed favorable by OSHA. In determining on which end of the spectrum their incentive programs fall, employers should ask themselves:

- Does my incentive program discourage employees from reporting injuries or illnesses?
- Would my employees consider *not* reporting injuries or illnesses for the benefits provided?
- Does my incentive program focus on the reporting of injuries or illnesses, or does it focus on the activities and conduct that may lead to injuries or illnesses?

The answers to these questions will help employers structure their incentive programs in such a way as to encourage safety while avoiding challenges under the anti-retaliation provision of OSHA's new rule. Employers, when reviewing their programs, should bear in mind that under this new rule, OSHA does not need an employee to make a claim to OSHA that (s)he has been retaliated against through an incentive program (or other related employer process or procedure) before OSHA may find unlawful retaliation, order remedial action, and issue citations and penalties to an employer.

For more information or for assistance with compliance with this new rule, please contact Scott Young, Candice Thomas or any member of our Labor & Employment group.

Employee Benefits

The Final Fiduciary Rule – Employer Considerations

By Edward C. Redder

Does your company offer retirement benefits to its employees through a 401(k) or other retirement plan? A recently issued Department of Labor regulation (the "Final Rule") will dramatically expand the retirement plan service providers considered fiduciaries when it becomes applicable on April 10, 2017, which in turn will limit how those service providers may be paid for their services without violating the law.

Your company (or one or more of its employees) generally serves in a fiduciary capacity to its retirement plan and must, among other things, protect plan participants and beneficiaries by ensuring that plan service provider engagements are reasonable. Because the Final Rule will cause plan service providers to re-examine their services and compensation and possibly seek to alter their arrangements with your retirement plan, your company must take steps to understand the implications of the Final Rule so that it can properly discharge its duties. Failure to do so may create significant risk of liability and penalties for your company and the individuals making decisions for the retirement plan.

This article provides a high-level overview of issues your company should consider.

Regulatory Background

The Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (the "Code")—the two primary regulatory regimes governing employer-sponsored retirement plans—impose on the company maintaining a retirement plan for its employees (the "Plan Sponsor") a fiduciary obligation to prudently select and monitor service providers for the plan. Additionally, failure to ensure that services supplied by a plan service provider are necessary and obtained for no more than reasonable compensation constitutes a prohibited transaction which may result in personal liability and stiff penalties.

The Plan Sponsor may also be subject to fiduciary liability for the acts or omissions of **other** plan fiduciaries in certain circumstances. For example, the Plan Sponsor may be subject to liability if it, through its own noncompliance with its fiduciary responsibilities, enables another fiduciary to commit a fiduciary breach.

The Final Rule

Under ERISA and the Code, a person who, for a fee, provides investment advice regarding assets of a retirement plan is a fiduciary. The Final Rule redefines the types of communications considered investment advice, expanding the definition to include recommendations concerning plan distributions, rollovers, and other service providers who will provide investment advice to the plan or its participants and beneficiaries. At the same time, the Final Rule makes it easier for recommendations to be considered investment advice by eliminating certain formal requirements. For instance, the Final Rule eliminates the requirement that the parties mutually agree that recommendations will serve as the primary basis for investment decisions. Instead, recommendations directed to a specific party may be covered investment advice, even in the absence of a mutual agreement.

As a result of these changes, many services providers will, for the first time, become fiduciaries if they do not alter their current practices. As fiduciaries, these service providers will be subject to the high ERISA fiduciary standards (including the prudent expert standard) and be required to avoid financial conflicts of interest. Because many service providers are currently compensated in ways that create conflicts of interest (for example, if an adviser receives more money if you invest in one investment instead of another, the adviser has a financial incentive to push you into the investment for which it receives more money), they will be forced to (1) change their current practices to avoid fiduciary status, (2) change their practices to comply with the fiduciary standards, or (3) potentially subject themselves (and your company) to significant penalties and liability.

Direct Impact on Plan Sponsors

Plan Sponsors generally are fiduciaries and, as a result, the Final Rule will not change that status. However, the Final Rule provides some welcome relief to Plan Sponsors from inadvertently expanding their fiduciary roles. First, the Final Rule excepts from the definition of investment advice investment education. This exception will permit Plan Sponsors (and others) to provide certain general educational services and information to plan participants and beneficiaries without becoming investment advice fiduciaries. Second, the Final Rule also does not consider certain communications between employees of the Plan

Sponsor and (1) the responsible plan fiduciary (i.e., the individuals at the company who make investment and service provider decisions for the company) or (2) plan participants and beneficiaries, to be investment advice. To avoid expanding their fiduciary roles, Plan Sponsors should:

- review or seek guidance on potential sources of relief;
- consider drafting and implementing policies and procedures to utilize available relief;
- provide training, as necessary, to assure compliance with the policies and procedures; and
- establish a process to monitor compliance with the policies and procedures.

Service Provider Selection and Monitoring Implications

In addition to the potential direct impact of the Final Rule, Plan Sponsors must also prudently select, monitor and retain their retirement plan service providers. To do so, Plan Sponsors should:

- inventory current plan service provider arrangements (including the services provided and compensation related to those services)
- analyze the potential impact of the Final Rule on their plan service providers, including whether the Final Rule would confer fiduciary status on a plan service provider based on its current services to the plan (i.e., whether the Final Rule creates fiduciary status when none currently exists)
    - if so, understand whether fiduciary status will require changes to the service arrangement which might include limiting the scope of services provided, modifying the compensation structure, or complying with the requirements for relief from prohibited transactions
    - if relief from prohibited conflicts of interest is necessary, understand the requirements of the relief and how the plan fiduciary will monitor compliance with necessary relief
- carefully review any proposed changes to service agreements to confirm compliance with the Final Rule or applicable relief

Common Arrangements for Further Scrutiny

The following common arrangements should be on your short list for review and consideration.

Record Keepers

Virtually all ERISA retirement plans engage financial institutions to serve as record keepers. Many record keepers serve as platform providers: they make available a universe of investment alternatives the plan may choose to make available to plan participants and beneficiaries. They quite often also provide certain educational services, provide periodic investment reviews to the Plan Sponsor, and recommend IRA rollover solutions to plan participants and beneficiaries. Each of these services should be examined to determine whether the record keepers' activities trigger application of the Final Rule.

Investment Advisers and Consultants

Many plans also engage the services of professional investment advisers to assist in the selection and monitoring of investment alternatives for plan participants and beneficiaries. While many of these arrangements already constitute fiduciary engagements, some of the currently available relief utilized to address conflicts of interest has been modified and may require adherence to additional requirements. Plan Sponsors should confirm that these requirements will be satisfied by their service providers.

Conclusion

Plan Sponsors must continue to be vigilant in protecting the participants and beneficiaries of their retirement plans. The Final Rule will likely prompt changes to the services provided and fees charged by their retirement plan service providers. Plan Sponsors should take time to understand the changing landscape and be prepared to ensure that both existing and future service arrangements comply with the Final Regulation. As with all fiduciary obligations, an ounce of prevention is worth a pound of cure.

With any questions, please contact Ed Redder or any member of our Employee Benefits practice group.

Workers' Compensation

Extraterritorial Coverage in Workers' Comp

By Janis B. Rosenthal

If your company is located in state A and has employees who are required to work in state B for any period of time, you need to consider the issue of extraterritorial coverage. You, as the employer, are responsible for knowing the workers' compensation requirements of all jurisdictions where your employees perform work.

Each state has its own unique coverage requirements. Many states limit the amount of time an employee can work in another state while others do not impose a limit. Limits range from one day to unlimited days. Some state workers' compensation programs provide coverage for employees who temporarily travel out of their home state; employees are often required to file claims in the home state. Some states have insurance policies available which cover out-of-state exposures. Some states require the out-of-state employer to obtain workers' compensation coverage from the jurisdiction where the work is being performed, no matter how little time its employee performs labor in that jurisdiction. Some states provide extraterritorial coverage only if the other state involved has a reciprocal provision recognizing the other state's workers' compensation program. In addition, some industries, such as construction, have specialized requirements for workers' compensation coverage.

If an employer is not in compliance with the laws of the state where its employees are working, penalties or fines can be imposed, or the employer may be considered uninsured and thus required to pay all costs of a claim. We suggest that employers contact their state industrial commissions or boards, legal counsel and insurance agents to evaluate their companies' coverages when employees perform work outside of their home states.

For more information, please contact Janis Rosenthal.