Employment Law Update

(what’s new; how it relates to you)

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## EEO Laws: Federal vs. State

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Back to the Basics: Who’s an Employee?

- Volunteer or Employee?
  - Control, not salary determines: Bryson v. Middlefield Volunteer Fire Department (Title VII case)
  - In evaluating the degree of control, employers must look at all of the following factors:
    - The skill required
    - The source of the instrumentalities and tools
    - The location of the work
    - The duration of the relationship between the parties
    - Whether the hiring party has the right to assign additional projects to the hired party
    - The extent of the hired party’s discretion over when and how long to work
    - The method of payment
    - The hired party’s role in hiring and paying assistants
    - Whether the work is part of the regular business of the hiring party
    - Whether the hiring party is in business
    - The provision of employee benefits
    - The tax treatment of the hired party
Volunteers get paid? Might be an employee

- Compensation = Gross wages include every form of remuneration paid to an employee either directly or indirectly, including salary (sick leave pay, vacation pay, holiday pay, back pay awards), commissions, bonuses, and the cash value of all compensation in any medium other than cash as actually paid or otherwise distributed to the employee during the reported quarter. Payments in kind for personal service such as meals, board, or lodging received by a worker from his employing unit in addition to or in lieu of (rather than as deduction from) money are deemed to be remuneration. (Source: Department of Labor and Workforce Development.)

- Cash, gifts, gift certificates

Can employees volunteer? Nope.

Unpaid Interns: work must have an educational
In Glatt v. Fox Searchlight Pictures, Inc., the Second Circuit vacated the SDNY order which found that unpaid interns were employees under the FLSA and NYLL. In Glatt, the Second Circuit focused on the 3-part primary beneficiary test which focuses on:

- what the intern receives in exchange for his work. See Portland Terminal, 330 U.S. at 152, 67 S. Ct. 639 (focusing on the trainee's interests).
- the economic reality between the intern and the employer. See Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 141-42 (2d Cir.2008) (employment for FLSA purposes is "a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances").
- The intern’s expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job).

In the context of unpaid internships, we think a non-exhaustive set of considerations should include:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.
Test applied to Wang v. The Hearst Corporation, Second Circuit, docket no. Docket No. 16-3302, December 8, 2017:

- The unpaid interns claimed the work they did was boring, repetitive, contained little formal training, and of such little educational value that it did not contribute to their professional advancement. These points, they contended, outweighed their receipt of college credit.

- The “heart of the dispute on appeal” was whether the interns received “training that would be similar to that which would be given in an educational environment.”
  - The plaintiffs argued that, in order for this factor to weigh in favor of non-employee status, the internships would have to provide “education that resembles university pedagogy to the exclusion of tasks that apply specific skills to the professional environment.”

- Court disagreed, holding “The [plaintiffs’] tacit assumption is that professions, trades, and arts are or should be just like school; but many useful internships are designed to correct that impression…. [P]ractical skill may entail practice, and an intern gains familiarity with an industry by day to day professional experience.”
Sex Harassment: Where are We Now?

Dating at work: What happens when a “consensual” relationship goes bad?
I was treated worse because I’m different:

- Similarly-situated comparators: General rule had recognized the relevance of evidence showing better treatment afforded similarly-situated employee not of your protected category.

Same harasser, different victims:

- Rule has been expanded so that a “plaintiff may use evidence that other women in the workplace were sexually harassed” where that female employee is pursuing a hostile-work-environment claim based on gender. Cf. Lehmann v. Toys R. Us, Inc., 132 N.J. 587, 611 (1993).

Different discriminator, different victims:

- In 2008: the Supreme Court heard the employer’s appeal of decision allowing a 51 year-old plaintiff, terminated in a company-wide RIF, to introduce testimony from 5 other former Sprint employees who felt they, too, had been discriminated against because of their age. None of these proposed witnesses worked in the same department as plaintiff or had the same supervisor as plaintiff.
  - Trial court: other folks’ claims not relevant.
  - 10th Circuit Court of Appeals: trial court should have considered; send it back.
  - Supreme Court: Trial court must apply a balancing test under FRE 403, which looks at factors such as relevance, likelihood confusion or prejudice, in deciding whether evidence is admissible.

On remand, the district court held firm, providing a detailed analysis of why the allegedly discriminatory actions taken against other co-employees (which the court characterized as “anecdotal, subjective claims of age discrimination , [and] discrimination on the basis of age, sex and disability”) was not admissible. Mendelsohn v. Sprint/United Mgt. Co., 587 F. Supp.2d 1201, 1218 (D. Kan. 2008).

Sword and shield: Ansell v. Green Acres Contracting Co., 347 F.3d 515, 524 (3d Cir. 2003) (“an employer’s favorable treatment of other members of a protected class can create an inference that the employer lacks discriminatory intent”).
Women at Work: What’s Going On in NJ?

- **NJLAD Expansion**
  - The New Jersey Law Against Discrimination (LAD) prohibits discrimination against women affected by pregnancy, childbirth, or related medical conditions. As of January 8, 2018, the law also specifically expanded anti-discrimination protections to women who are breastfeeding.

- **Equal Pay law**
  - Phil Murphy's first official action as New Jersey governor was to sign an executive order January 16, 2018 to support equal pay for women by barring managers in state government from asking job applicants about their previous salary.

  - The order is in support of equal pay for women and stretches across all public jobs, Murphy said. The Democrat argued the measure will help close the pay gap between men and women in the state.
Who Enforces EEO Laws?

- The Equal Employment Opportunity Commission ("the EEOC") was established by Congress in 1965 to enforce Title VII of the Civil Rights Act.
- Many states, including New Jersey, have enacted and enforce laws similar to the federal EEO laws.
- State laws may offer employees more protection, but cannot offer less protection from employment discrimination than the federal laws.
What Does the EEOC Do?

- Investigates Employee Charges
- Issues Regulations to Define or Explain Terms in EEO Laws
- Provides Guidance on How to Comply with Laws
- Mediates Discrimination Charges
- Sues Private Employers
EEOC Investigates, Then What?

- Finds No probable cause;
- Finds Probable cause;
- Initiates Conciliation, Settlement, or Mediation;
- Issues “Right to sue” letters; or
- Brings Lawsuit on behalf of an individual or class.
Many small and nonprofit employers are constrained in their ability to pay competitive salaries. This can prompt disruptions in the form of turnover and resulting lack of continuity in business practices, low employee morale and productivity and lawsuits.
Prohibits sex discrimination in pay.

- The Equal Pay Act ("the "EPA") states: "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment . . . less than . . . he pays . . . to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ."

- The EPA makes exceptions for pay differences caused by: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. 206(d)
EEO Law: The Changing Landscape of Equal Pay Laws

- The Ledbetter Fair Pay Act of 2009:
  - as long as the plaintiff files her claim within 180 days of the last act of discrimination, claims regarding early pay are incorporated into the claim.

- So, how does an employee find out she is being paid less?
  - THEN (signed 2014, effective 2016): Fair Pay and Safe Workplaces Executive Order 13673, which required employers of 100 or more employees to report their employees’ salaries with a breakdown by race, and gender.
  - NOW (2017): Executive Order 13782 revoked the Fair Pay and Safe Workplaces Order, as well as subsequent amendments set forth in Section 3 of EO 13683 and EO 13738.
The PDA says Title VII prohibition of discrimination “because of sex” includes actions an employer takes because of or on the basis of:
- pregnancy, childbirth, or related medical conditions; and

Requires that such women be treated the same as non-pregnant persons who are similar in their ability (or inability) to work for all employment-related purposes.
EEO Law: the PDA in court

The facts:

- UPS’s light duty policy is available to employees with physical limitations caused by workplace injuries, but was not available to pregnant women.
  - UPS says its policy is lawful and neutral because it doesn’t apply to anyone without a workplace injury.

What do you think?
The Supreme Court said:

- A pregnant employee can establish a *prima facie* case of discrimination under the PDA if she shows that:
  - (1) she belongs to a protected class;
  - (2) she sought an accommodation;
  - (3) the employer did not accommodate her; and
  - (4) the employer accommodated others "similar in their ability or inability to work."

Young v. UPS, 135 S. Ct. 1338, 1354 (2015)

- Note: a “prima facie” case survives an early motion to dismiss. ($$$ So employee’s lawsuit moves forward. $$$$)
Accommodations may include:

- Bathroom breaks
- Breaks for increased water intake
- Periodic rest
- Assistance with manual labor
- Job restructuring
- Modified work schedules
- Temporary transfer to less strenuous/hazardous work

Employee must request the accommodation based on the advice of her physician

Accommodation cannot pose an undue hardship on the business
The term “sex” in Title VII means biological differences between men and women and “gender” addresses distinctions between the societal and/or cultural roles assigned to men and women.

- Sex – male and female
- Gender – masculine and feminine

Where does sexual orientation fit in?
Male employee harassed for having a high voice, walking in effeminate manner, for being well-groomed, filing his nails, and “sitting like a woman.”

Harassment was based on “gender” because he was perceived as not conforming to the stereotypical male identity on the shop floor.
Discrimination on the basis of sexual orientation is premised on sex-based preferences, expectations, stereotypes or norms...sexual orientation discrimination involves sex-based considerations.

Sexual orientation discrimination is sex discrimination because it involves “treating an employee less favorably because of the employee’s sex.”
Plaintiff was terminated by Altitude Express and he sued in federal court, alleging discrimination based on sexual orientation under Title VII.

District Court held that discrimination based on sexual orientation was not sex discrimination and, therefore, did not fall within the protection afforded by Title VII.

The Second Circuit ruled Monday that discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964, handing a win to the estate of a deceased skydiving instructor who was allegedly fired for telling a client he was gay.
EEO Law: Supreme Court to Decide!

The Zarda case will decide whether sexual orientation is included in Title VII’s prohibition against sex discrimination.

But why? There’s already a NY State law, so why need Title VII protection?

“But for” vs. “Motivating Factor”:

The district court held that the state law claim had required that a sexual orientation claim be established by “but-for” causation.

Under Title VII, the standard of proof would be a lesser one where Zarda would have to prove only that his sexual orientation was a motivating factor in his termination.
Terminology:

- “Transgender” is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to the sex assigned at birth.
- “Gender identity” refers to a person’s self-designation of being male or female.
- “Gender expression” refers to how a person communicates gender identity through behavior, clothing, hairstyles, voice or body characteristics.
Lusardi, a transgender woman, discussed her gender identity and began the process of transitioning prior to transition surgery, she agreed to use a “single shot rest room” rather than the common women’s restroom. Ultimately, Lusardi did not undergo a surgical procedure. Accordingly, the U.S. Army did not allow Lusardi to use the women’s restroom.

- EEOC reasoned that:
  - a person who is assigned the sex of male at birth but who identifies as female – female
  - gender reassignment surgery is not a fundamental element of a transition

- EEOC found that the denial of the women’s restroom to a transgender woman constitutes sex discrimination.
In December 2014:
  > The attorney general at the time, Eric H. Holder Jr., ordered the Justice Department to view “sex” as encompassing gender identity, extending protections to transgender people.

In June 2015:
  > OSHA issued a guidance stating:
    • “Restricting employees to using only restrooms that are not consistent with their gender identity or requiring them to use gender-neutral restrooms, singles those employees out and may make them fear for their physical safety.”

2015 Executive Order:
  > Federal contractors subject to Executive Order 11246 required to provide restrooms consistent with employee’s gender identity.

2017 DOJ Memo:
  > In a memo to all federal prosecutors, Attorney General Jeff Sessions states that “Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status.”

What's Next?
The Americans with Disabilities Act ("Act"):  
- generally prohibits inquiries about employees’ disabilities.  
- requires employers to provide a reasonable accommodation of a disability  
  - E.g., accessible work facilities, modified work schedules, equipment and training modifications, and provide readers or interpreters as needed.  
- requires all employee medical information to be kept confidential and separate.

Defenses under the ADA:  
- Undue hardship  
- Not qualified  
- Direct threat
Genetic Information Nondiscrimination Act ("GINA") of 2008:

- Prohibits employers with 15 or more employees from acquiring, disclosing or discriminating based on genetic information.
- Employees can disclose genetic information voluntarily.
- Violations may trigger administrative claims/lawsuits of discrimination, and/or HIPAA fines.
EEO Law: Forms of Workplace Discrimination

- Disparate Impact
  - *Neutral law, biased outcome*

- Disparate Treatment
  - *Treated worse because different*

- Harassment
  - *Severe or chronic mistreatment*

- Retaliation/Reprisal
  - *Getting back at one’s accuser*
Disparate Treatment means treating someone differently “because of”...

› Race
› Color
› Religion
› Sex
› National Origin
› etc., etc., etc.
What you can say:

- "Tell me what happened and anything else that might be relevant to the termination of this employee."
- "What documentation do you have with respect to this employee?"
- "Are there any potential inconsistencies in how this employee has or will be treated as compared to other similarly-situated employees?"
- "Tell me about the internal procedures/policies that you have followed."
- What else should I know?

What NOT to say:

- "What you want to do is illegal."
- "We cannot do this because of discrimination."
- "I think you would be in violation of the law if you proceeded with this termination."

Your role in HR is NOT to:

- Give a legal opinion
- Give legal advice
- Tell your manager that he/she has just discriminated against someone by their actions
HR’s role with Management is to be:
- Objective
- An investigator
- A fact finder
- A risk assessor
- A decision-maker as to when to consult with legal counsel
EEO Law: After HR gathers all the facts . . .

- Talk with your attorney regarding the next steps.
- Discuss risks – what might be evidence of discrimination?
- What are the benefits of any outcomes and do they outweigh the negatives?
- Tell your manager that “it has been discussed with counsel, and this is how we will proceed…” (This may mean creating or safeguarding documents and emails)
- Do NOT discuss with managers your conversation with the attorney – the conversation may lose its “privilege”.
EEO Law: When on notice of a claim . . .

Maintain all relevant documents

- Relevant documents and emails must be preserved in a “litigation hold” when management is on notice of a claim.
- In most cases, legal counsel will issue a “litigation hold” to all relevant parties.
- Whether employer is on “notice of claim” should generally call for legal conclusion.

Counsel managers on retaliation
The EEOC FY 2017 statistics show that retaliation comprised 48.8% of all EEOC claims more than any other type of claim. That’s up from 42.6% of all claims in 2016.

NJ: Retaliation comprises 42.9% of NJ claims, which is up from 38.7% in FY 2016.
EEO Law: Retaliation, and how to avoid it!

- An employer who takes an adverse employment action against someone “because of” a protected activity is liable for retaliatory discharge. A protected activity can be:
  - Filing a charge to the EEOC
  - An internal company complaint alleging job discrimination or harassment

- “Because of” means that employer’s decision was motivated, in part, by the employee’s engaging in protected activity.
Factors to Consider Regarding a Retaliation Claim:

- Did the decision-maker know of the claim?
- What was the timing of the adverse action?
- Did the employer follow its internal procedures and do so consistently?
- Are there good reasons for adverse action?

Does the employer have a defense?

- Yes, if the employer can show that its decision had no relation to employee’s complaint, i.e.; a non-retaliatory justification.
Set standards! Consistently apply job qualification and performance standards.

Document work performance and decisions. Ensure there are reasonable and

Hiring? Reach out! Leverage social media and other venues with broad impact to publicize your message and mission to prospective employees.

Monitor hiring, compensation and performance appraisals. Check for patterns of discrimination or discriminatory practices.

Train managers. Give your staff opportunities for growth and advancement. Provide ongoing training at all levels about your company's equal employment opportunity values, policies and procedures.

Investigate complaints thoroughly and promptly.

Be consistent. Be transparent. Be communicative.
Questions?

Thank You