



SEPTEMBER 9, 2021

Hot Topics in National Employment Law

Shook, Hardy & Bacon L.L.P.



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Introductions + Overview

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Overview

1. Diversity, Equity & Inclusion
2. Starting or Building Out a Diversity, Equity & Inclusion Program
3. Emerging Employment Litigation Trends
4. Pay Equity
5. EEOC Focus Points
6. Recent Missouri and Kansas Developments



1.

Diversity, Equity & Inclusion

New Pathways and Processes

Adriana Paris

Company Disclosures

- Since November 9, 2020, the SEC has required publicly traded companies to disclose their “human capital measures or objectives”
- “Human capital” left undefined
- Publicly traded companies essentially didn’t disclose much in 2021.
 - An analysis of 427 S&P 500 companies’ 10-k disclosures in 2021 revealed that while 424 companies mentioned diversity & inclusion, only 16 companies provided a detailed breakdown of the people who make up their workforce.





Additional Requirements Expected

SEC Chair Gary Gensler plans to require more specific “human capital” disclosures, including metrics such as “workforce diversity, part-time versus full-time workers, and employee turnover.”

Nasdaq will require every company listed on its platform to have at least two diverse directors or provide written explanation as to why it does not meet that requirement.



- Even if your company is not publicly traded (yet!), your stakeholders very much care about diversity, equity & inclusion.
- A 2020 study conducted by McKinsey found that “[i]n the case of ethnic and cultural diversity . . . top-quartile companies outperformed those in the fourth one by 36% in profitability” in the prior year.

2.

Starting or Building Out a Diversity, Equity & Inclusion Program

Adriana Paris



1.

Prioritize

- **Identify your data & potential issues**
 - Be honest about the makeup of your workforce and how current programs are serving employees.
 - “Every system is perfectly designed to get the results it gets.”
- **Set specific & measurable goals**
 - Avoid overly broad goals like, “We plan on hiring more women.”
- **Get help from employees**
 - Anonymous employee surveys are a wonderful (and often underutilized) way to assess priorities.
 - What does your workforce care about in terms of DEI?

2.

Obtain Buy - In

- **Tone at the top**
 - It starts with leadership.
 - Make it everyone's goal to achieve more complete DEI figures—not just the people usually tasked with overseeing DEI, like Chief HR Officer or Chief of Diversity.
 - Example: company-wide cost cutting measures would not solely fall on the CFO/Accounting Department.
- **Training**
 - If leadership is not aligned on program, consider executive briefings or implicit bias training.
- **Compensation**
 - Some companies tie executive pay with achieving certain DEI metrics.

3.

Measure Progress

- **What gets measured gets done**
 - Use the same tools you already have that track profitability, sales or other financial metrics to track progress on DEI objectives.
- **Continue surveying**
 - Conduct periodic anonymous surveys to assess how your employees feel about the DEI initiatives, progress made and anything else that may be missing.
 - Take advantage of exit interviews or memos—what are employees signaling to you when they leave?

4.

Reassess and Reframe

- If your company is making solid progress on its initial DEI priorities, perhaps there is room to add new ones.
- If the initial priorities are shifting as your workforce changes, then there may be a need to rethink those priorities and ask if they are still serving the company.
- Check in with leaders, employees, other in-house counsel and outside counsel to stay current.



Food for
Thought

“

*Diversity is a fact, but
inclusion is a choice we
make every day.*

3.

Emerging Employment Litigation Trends

Carrie McAtee



**Emerging
Wage
and Hour
Litigation
Trends**

- “Hours Worked”
- Health Screenings
- Remote Work
- Regular Rate Calculation
 - Signing, Retention, Referral, Safety, Attendance and Similar Bonuses
 - Vaccine Incentives



The ADA: New Angles on the Horizon

- **Fundamental Rule**: Provide accommodation unless there is undue hardship or direct threat.
 - Compliance typically evaluated on whether the employer engaged in the **interactive process** and/or there are **reasonable accommodations** that could be made to enable the employee to perform the essential job functions.
 - Reasonable accommodation = modifications or adjustments to the work environment, or to the manner or circumstances in which the job is performed.
 - Extremely high burden to show “undue hardship” or “direct threat.”



The ADA: New Angles on the Horizon

- ADA does not prevent an employer from mandating **vaccination**, subject to reasonable accommodation provisions.
 - Absent direct threat, ADA requires reasonable accommodation of employees who do not get vaccinated due to a disability, unless accommodation would pose an undue hardship.
 - Potential reasonable accommodations.
 - Interactive process.
 - Voluntary employer vaccination programs.
 - Confidentiality.
- The post-pandemic workplace: **telework** as a reasonable accommodation.



Retaliation Claims: An Ever Expanding Playing Field

- **Retaliation-Protected Activities May Include:**
 - Requesting accommodations for a disability or a religious practice.
 - Requesting and/or taking leave.
 - Complaining about not receiving proper pay.
 - Reporting safety and health violations.
 - Acting as a whistleblower.

4.

Pay Equity

Yara Rashad



What Is Pay Equity?

- Pay equity is a method of eliminating gender and race discrimination when establishing and maintaining wages.
- The growing platform for pay equity aims to resolve wage disparities across a range of sociopolitical identity markers.



Pay Equity: Gender

- There remains a disparity in how men and women are paid, even when all compensable factors are controlled, meaning that **women are still being paid less than men due to no attributable reason other than gender.**
- The gender pay gap is wider for women of color, women at higher job levels and women in certain occupations and industries.



Pay Equity: Gender

- **The Uncontrolled Gender Pay Gap/
Opportunity Pay Gap**
 - The ratio of median earnings of women to men without controlling for various compensable factors.
 - In 2021, women make only 82 cents for every dollar a man makes.
 - The opportunity pay gap measures the barriers women face in attaining the higher-paying positions of power that men often hold in society.



Pay Equity: Gender

- **The Controlled Gender Pay Gap:**
 - Controls for job title, years of experience, education, industry, location and other compensable factors.
 - Women in the controlled group make 98 cents for every \$1.00 a man makes, meaning that women are still making less than men even when doing the exact same job.
 - When looking at the top 20 jobs with the highest gender pay gap, the controlled gender pay gap increases to as much as 78 cents for positions such as waiters and waitresses, showing that the gender pay gap is very real and larger for women in certain occupations.

Uncontrolled gender pay gap

This "opportunity pay gap" measures median salary for all men and all women.



Controlled gender pay gap

This measures median salary for men and women with the same job and qualifications.



Source: <https://www.payscale.com/data/gender-pay-gap>



Glass Ceilings + Sticky Floors

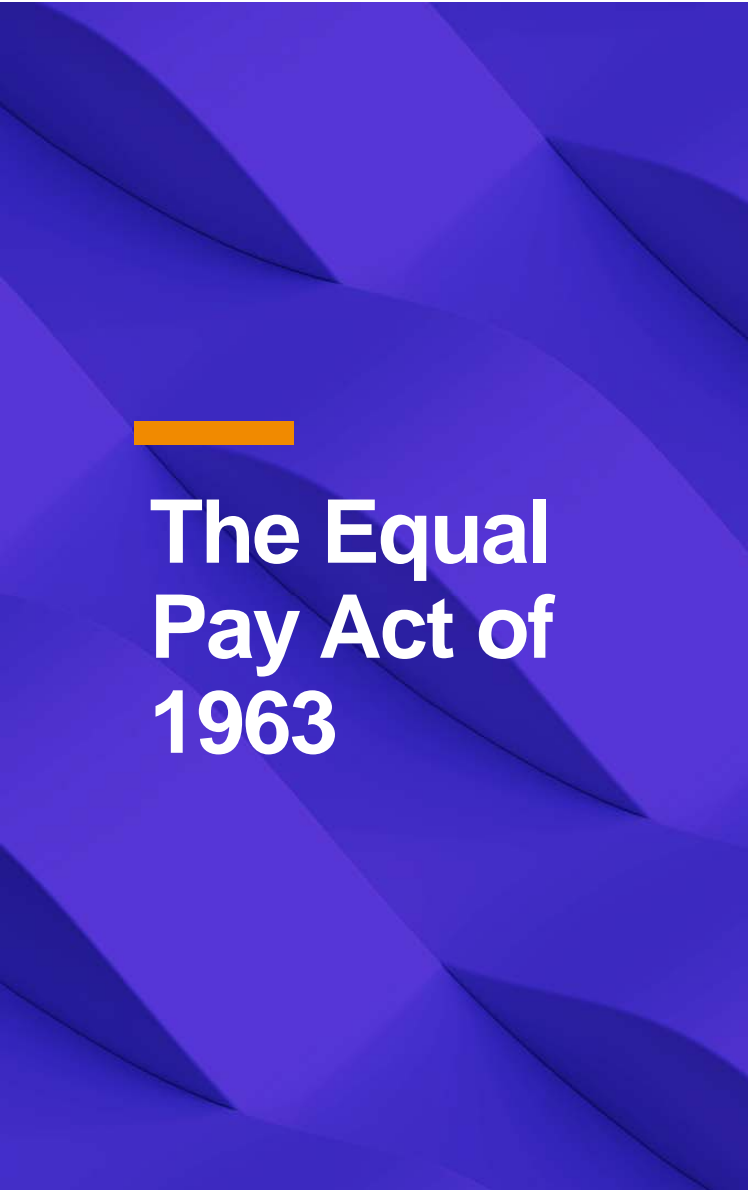
In the vast majority of jobs, a pay discrepancy based on gender probably has multiple explanations, many of which fall into one of two categories.

- **Glass Ceilings:**

- Refer to obstacles that stand in the way of women advancing their careers. An example might include a woman choosing not to apply for a promotion because she knows she needs to work part-time for caregiving responsibilities.

- **Sticky Floors:**


- Disadvantages women consistently face. For instance, a boss assumes that women are less competent or qualified in a position, and decides to offer a lower salary when making a job offer.
- Recent data suggests 60% of a gender pay gap is the result of a glass ceiling while 40% comes from a sticky floor.



The Equal Pay Act of 1963


29 U.S.C. Section 206

- (1) No employer...shall discriminate...between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages 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, except where such payment is made pursuant to (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: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
- (2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.
- (3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.




The Equal Pay Act of 1963

- The EPA provides that employers may not pay unequal wages to men and women who perform substantially equal jobs and work at the same establishment.
- “Substantially equal jobs” has been interpreted to mean jobs that require similar skill (experience, ability, education and training), effort (physical and mental) and responsibility, and are performed under similar working conditions.
- An employer’s work establishment is generally understood to mean a distinct physical place of business rather than an entire business or enterprise consisting of several places of business.



The Equal Pay Act of 1963

- An individual alleging a violation of the EPA may go directly to court and is not required to file an EEOC charge beforehand.
- At the outset of a case, the employee has to establish a *prima facie* case of gender-based wage discrimination under the EPA by showing that different wages are paid to employees of the opposite sex who work in jobs that require substantially equal skill, effort and responsibility, and are performed under similar working conditions in the same establishment.



The Equal Pay Act of 1963

- Once a *prima facie* case is established, an employer may defend the wage disparity and avoid liability by proving that wages are set pursuant to:
 1. A seniority system;
 2. A merit system;
 3. A system which measures earnings by quantity or quality of production; or
 4. Any factor other than sex.



Pay Equity: Race

Uncontrolled Racial Wage Gap:

- Women of all races and ethnicities earn less than white men. Men of color generally earn less than white men, but all men out earn the women within their racial ethnic group.
- American Indian and Alaska Natives see the largest uncontrolled pay gaps relative to white men; women in this group earn 69 cents and men 86 cents for every dollar earned by a white man. Possibly influenced by COVID-19, this pay gap has worsened by 6 cents from last year for women.

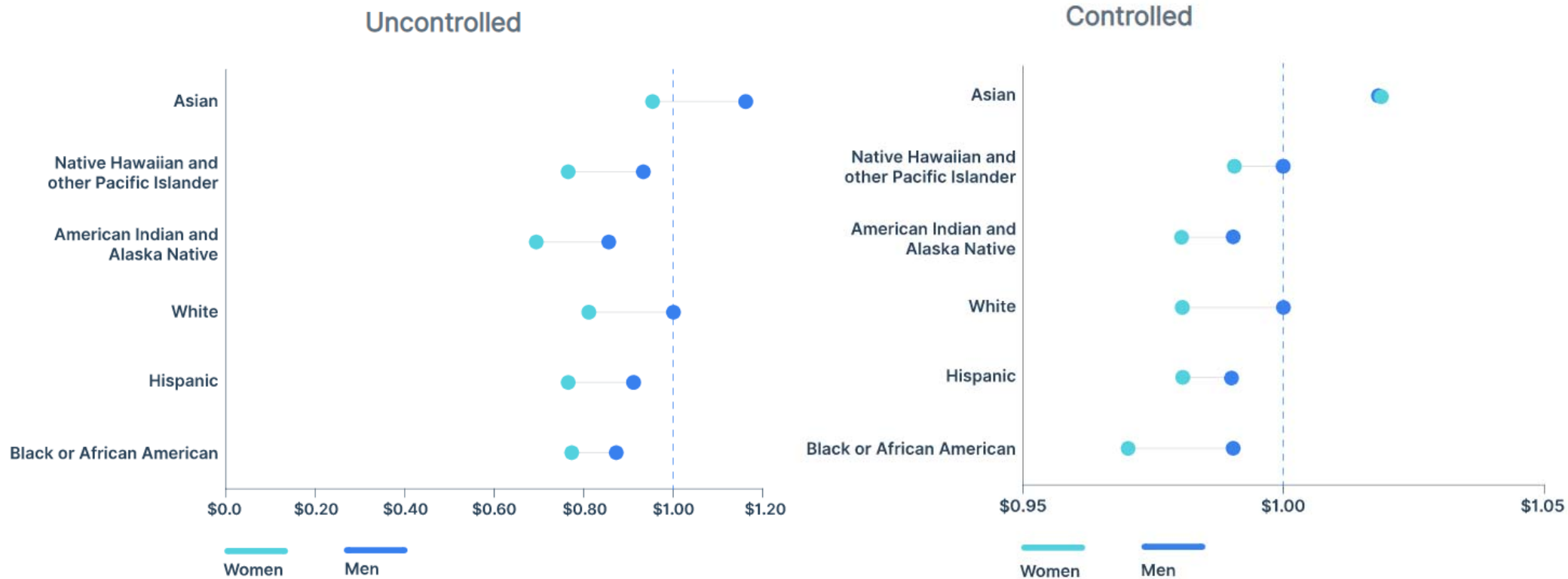


Pay Equity: Race

Controlled Racial Wage Gap:

- When we control for education, years of experience, occupation and other compensable factors, most men and women of color still earn less than white men.
- Among the controlled group, Black men and women have some of the lowest earnings compared to white men. Black women earn **97 cents** for every dollar earned by a white man with the same job and qualifications. Black men see a controlled pay gap of **99 cents**.
- The data on the racial wage gap suggests a **\$2,000** pay disparity for a Black woman and a **\$1,100** pay disparity for a Black man.
- These differences in annual earnings can amount to hundreds of thousands or even millions of dollars less for people of color over the course of their careers.

The Racial Wage Gap



Source: <https://www.payscale.com/data/gender-pay-gap>




Legal Protections

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer to discriminate based on race.

Exceptions:

1. When the lack of a protected characteristic is a bona fide occupational qualification (BFOQ) for a particular job.
 2. An employer that institutes a policy alleged to have a disparate impact may defend itself on the grounds that the policy is important for job performance or is a business necessity.
- Title VII also prohibits harassment based on the victim's membership in a protected class. Harassment must be unwelcome and either severe or pervasive to be actionable.
 - Failure to give an employer notice can adversely affect a discrimination claim.



**Pending federal
legislation:
The Paycheck
Fairness Act
(H.R. 7)**

- Limits an employer's defense that a pay differential is based on a factor other than sex to only bona fide job-related factors in wage discrimination claims, enhances non-retaliation prohibitions and makes it unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing information about the employee's wages. The bill also increases civil penalties for violations of equal pay provisions.
- Directs the DOL to (1) establish and carry out a grant program to provide training in negotiation skills related to compensation and equitable working conditions, (2) conduct studies to eliminate gender pay disparities, and (3) make available information on wage discrimination.
- Establishes the National Award for Pay Equity in the Workplace for an employer who has made a substantial effort to eliminate pay disparities between men and women.
- Requires the EEOC to issue regulations for collecting from employers compensation and other employment data according to the sex, race and national origin of employees.



Other Pending Federal Legislation

1. Equal Pay for Team USA Act of 2021 (S.2333):

- Would require all athletes representing the U.S. in global athletic competitions to receive equal compensation, benefits, medical care, travel and reimbursement of expenses, regardless of gender.

2. Equal Pay for Servicewomen Act (H.R. 2502):

- Would direct the DOD to ensure gender equity in the cost of military uniforms.

3. Wage Equality Act of 2021 (H.R. 2491):

- Would provide a safe harbor against litigation for those employers that conduct internal audits of their pay practices and make reasonable progress towards eliminating unlawful differentials revealed by such audits.

4. Fair Pay Act of 2021 (H.R. 2243):

- Would impose compensatory and punitive damages on employers who violate the equal pay act.

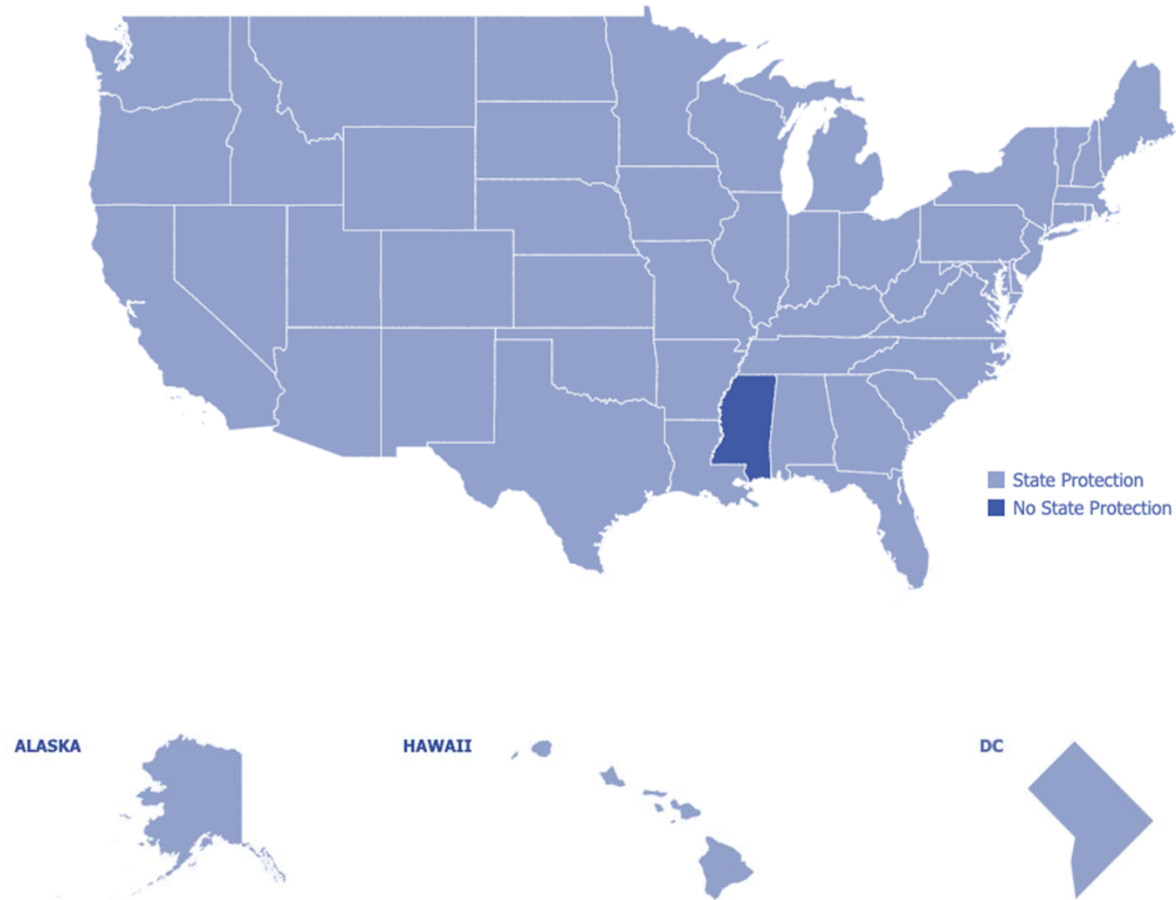
5. Pay Equality for All Act of 2021 (H.R. 2242):

- Would prohibit employers from asking job applicants for their salary history before making a job or salary offer.

Equal Pay and Pay Transparency Protections

Hover over the map for information on available state protections.

- ⊙ Equal Pay
- Pay Transparency



Source:
https://public.tableau.com/app/profile/women.subureau.department.of.labor/viz/EqualPayandPayTransparencyStateProtections/Map_2021/Final

5.

EEOC Focus Points

Timia Skelton and Terri Parker



EEOC's EXCEL Conference

- The EEOC Annually Hosts the Examining Conflicts in Employment Laws (EXCEL) Training Conference.
- Virtually held June 15-17, 2021.
- Premier training conference for equal employment opportunity and HR professionals, employment law attorneys and ADR professionals in both the private and public sector.
- EEOC senior leaders offered nearly 40 live and on-demand workshops for participants.
- During the conference, the EEOC's Acting Legal Counsel Carol Miaskoff shed light on key trends and significant, recent EEOC court cases.

1. Eliminating Discrimination and Harassment Against LGBTQ+ People

- Supreme Court decided key Title VII decision – ***Bostock v. Clayton County (2020)***
 - Recent celebration of one-year anniversary
 - An employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.
 - Discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat employees differently because of their sex – the very practice prohibited by Title VII.
- EEOC is working to ensure that complaints made by LGBTQ individuals are investigated timely and fully.
- Courts are now applying *Bostock* to discrimination decisions and are trying to answer questions the Supreme Court left unanswered in *Bostock*.

Recent Court Decisions Applying *Bostock*

- ***Jimenez v. Laborer's Welfare Fund, 2020 WL 5979653 (N.D. Ill. 2020):***
 - Claim that union discriminated against worker based on her sex when it refused to enroll her wife in health insurance coverage that it granted to opposite-sex couples.
 - Court applied the *Bostock* analysis when it ruled for the employee.
 - “She did not receive this coverage because she was a woman seeking coverage for her wife.” *Id.* at *2.
- ***Doe v. Triangle Doughnuts, 2020 WL 4013409 (E.D. Pa. 2020):***
 - Transgender female’s coworkers and supervisors intentionally referred to her using male pronouns.
 - Court held that it naturally flowed from *Bostock* that discrimination based on gender stereotyping falls within Title VII’s prohibition. *Id.* at *129.

Topics *Bostock* Left Unanswered

- Related potential discrimination issues covered by Title VII:
 - Dress codes;
 - Bathroom access; or
 - Locker room access.
- Pronoun policies
- First Amendment considerations:
 - Free speech considerations
 - Religious liberty considerations



First Amendment Considerations

- ***Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021):**
 - Court sided with college professor who brought claims against college for violating his free speech and free exercise rights after he received written reprimand for failing to refer to transgender students by pronouns that reflected their self-asserted gender identity.
 - The professor plausibly alleged that the college’s interpretation and application of its gender-pronoun policy was not religiously neutral. *Id.* at 511.
 - When state actors “apply an otherwise-neutral law with religious hostility, they violate the Free Exercise Clause.” *Id.*
 - Title VII’s “requirement that an employer not fire an employee for expressing a transgender identity is a far cry from what we have here – a requirement that a professor affirmatively change his speech to recognize a person’s transgender identity.” *Id.* at 516.



EEOC's Recent Lawsuit

- **Suit against Missouri-based dairy producer and distributor filed on May 13, 2021.**
 - Accused of violating the Americans with Disabilities Act.
 - Refused to hire a man to work in its plant because he was vision impaired.
 - The company was aware of the vision impairment before it offered plaintiff plant worker position.
 - Doctor responsible for pre-employment medical exam deemed plaintiff a “safety concern” without first examining him.
 - The company failed to consider whether any assistive devices or other reasonable accommodations could mitigate any potential safety concerns, and instead withdrew the job offer.
- *Investigated by the St. Louis office

2. Pregnancy- Related Accommodations

- Courts are addressing the nuances of pregnancy accommodation claims.
- Employers must treat pregnant women the same as other workers who are limited in their ability to work.
- ***LaBarbera v. NYU Winthrop Hosp.*, 2021 WL 980873 (E.D.N.Y. 2021)**
 - Pregnant-worker was denied requested exemption from employer's mandatory flu vaccination policy.
 - Plaintiff's claim ultimately failed because she did not identify others similar in their ability or inability to work were treated differently.
 - But, court reasoned that a pregnant woman's ability or inability to work can reflect a temporary disability under the ADA – but it doesn't have to. *Id.* at *14.
 - Analysis for accommodating a pregnancy-related condition is slightly different than analysis regarding a disability covered by the ADA.

3. Disparate Impact and Race Discrimination

- ***Mandala v. NTT Data*, 975 F.3d 202 (2nd Cir. 2020):**
 - Employer revoked job offers to two Black workers when it learned of their past criminal convictions.
 - Plaintiffs pointed to national statistics that showed Black men were arrested and incarcerated at higher rates than white men among the general population.
 - Plaintiffs’ disparate impact claim failed – failed to link national disparities to discrimination in employer’s actual labor pool.
 - Court stated that plaintiffs could have explained why national statistics were probative or highlighted other publicly available national statistics.
 - “If a Title VII plaintiff intends to rely on national statistics to plead a disparate impact claim, she must explain why those statistics can plausibly be expected to hold true for the qualified applicant pool in question.” *Id.* at 212.



Food for Thought

- Employers should stay abreast of the EEOC's guidance and resources regarding the *Bostock* decision and make sure EEO policies are compliant.
- Properly engage with pregnant employees when accommodations are requested due to pregnancy-related conditions.
- Pay attention to neutral policies that may disparately impact minority groups, as courts are addressing disparate impact claims and have provided claimants with a clearer roadmap.

6.

Recent Missouri and Kansas Developments

Charlie Rosebrough and Emily Pedersen



Recent Missouri Legislation



Victims Economic Safety and Security Act

- Requires employers with more than 20 employees to provide leave and reasonable safety accommodations to employees who experience domestic violence.
- If 20-49 employees – 1 week of unpaid leave; >50 employees – 2 week of unpaid leave
- Leave is unavailable if exceeds unpaid leave allowed under FMLA



VESSA:
**Reasonably
Accommodate**

- Adjustment to job structure, workplace facility or work requirement.
- A transfer or reassignment.
- A modified schedule.
- Leave from work.
- A changed telephone number or seating assignment.
- Installation of lock or implementation of a safety procedure.
- Assistance in documenting domestic violence that occurs at the workplace.




Recent Missouri Decisions



Lampley
v. MCHR,
570 S.W.3d
16 (Mo. 2019)

Holding that an adverse employment decision based on sex-based stereotypical attitudes of how a member of the employee's sex should act could support an inference of unlawful sex discrimination.



Li Lin v. Ellis,
594 S.W.3d
238 (Mo. 2020)

- Holding that merely requesting an accommodation is insufficient to support a claim of retaliation under the plain language of the MHRA because such a request, standing alone, does not constitute opposition to a practice prohibited by the MHRA, nor does it constitute the filing of a complaint, testifying, assisting or participating in any investigation, proceeding or hearing conducted under the MHRA.
- Contrary to federal law under the ADA.



Recent Kansas Legislation



Unemployment Compensation Modernization

- Creates an Unemployment Modernization Council of 13 members
- The Council is tasked with auditing and updating the application and payment process
- The bill transfers \$250 million from special revenue funds to the Employment Security Fund and \$250 million to the Legislature Employment Security Fund (LESF)




COVID-19; Extension of Provisions

- Amends the COVID-19 Response and Reopening for Business Liability Protection Act (Act) to extend the expiration date until March 31, 2022.
- Urges the Governor to end participation in federal pandemic-related unemployment benefits programs.
- Extends certain entities' ability to grant certification under emergency conditions (e.g., Board of Barbering, Board of Nursing, etc.)



**Recent Kansas
Decisions**



***Woessner
v. Lab. Max
Staffing, 312
Kan. 36, 471
P.3d 1 (2020)***

- Employee died after falling 15 feet from a job site catwalk for no apparent reason. His widow was awarded death benefits under the Kansas Workers Compensation Act. Drug testing found marijuana in his system.
- For certain THC levels, K.S.A. 2019 Supp. 44-501(b)(1)(C) and (D) contain a “conclusive presumption” of impairment and a rebuttable presumption the impairment contributed to the accident.
- The Kansas Supreme Court applied the presumption scheme, but held the Workers Compensation Board had sufficient evidence to find the widow overcame the presumption.

Thank you.



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