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# 2018 Employment Law Update

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A wider lens on workplace law

# Introduction

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1. Federal agency news and developments
2. Notable case law
3. Changes in the Show Me State



## NLRB and You

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- Reversal of the joint employer standard, which was then itself reversed.
- Protected concerted activity revisions.
- Ambush elections under scrutiny.
- Enforceability of arbitration agreements is before the Supreme Court.

# NLRB General Counsel Memo

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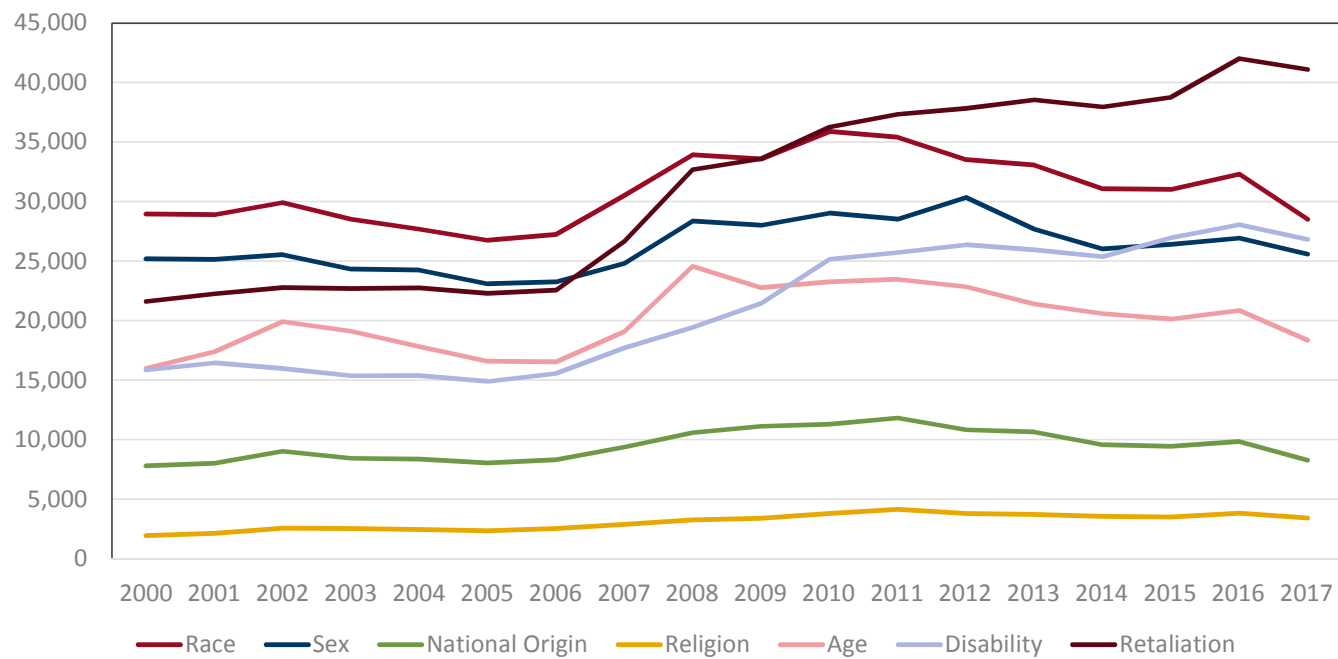


- Mandatory review of many Obama-era NLRB decisions, including those involving:
  - Handbook policies
  - Protected concerted activity
  - Conflicts with Title VII and other statutes
  - Joint employment, where only indirect or potential control

# EEOC Charges Filed – FY 2000 - 2017



By Substantive Area



# EEOC 2018 – 2022 Strategic Enforcement Plan

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- Combat and prevent employment discrimination through the strategic application of EEOC's law enforcement authorities.
- Prevent employment discrimination and promote inclusive workplaces through education and outreach.
- Achieve organizational excellence.

# EEOC Regulations on Wellness Programs Invalidated



# EEOC: No Compensation Data on EEO-1 Reports





## Activity at U.S. Department of Labor



- Withdrew some Obama-era guidance
- Issued request for information on salary level test for overtime exemptions
- OFCCP rolled back Fair Pay and Safe Workplaces Rule
- Announced Payroll Audit Independent Determination (PAID) Program

# Title VII of the Civil Rights Act of 1964

## **Discrimination**

The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individuality, excluding or restricting members of one category on the grounds of race, sex, or age.



## Post *Young v. UPS* – Pregnancy accommodations

- Problem arises when **employer accommodates others “similar in their ability or inability to work.”**
- Employer may articulate a non-discriminatory business reason, but plaintiff can still prevail if:
  - Policy significantly burdens pregnant workers; and
  - Employer’s business reason is not strong enough to justify the burden.
- Key: **What are you doing for others?**



# Reverse Pregnancy Discrimination

## ***EEOC v. Estee Lauder Companies, Inc.:***

- Alleged gender discrimination against men because the company's parental leave policy provided unequal leave identified as bonding time to mothers and fathers.
- Tentative settlement reached.



## What would YOU DO?

Sally slipped and fell walking across a conveyor instead of using the designated walkway thirty feet away. She's been out for 10 weeks for a soft tissue back injury and presents to return to work at MMI with a set of restrictions on bending, twisting, lifting, and overtime. She announces she found out she is pregnant 3 weeks ago.

Discuss what policies would be helpful here and how you should address this situation.



# Making a “False” Harassment Complaint



## *Villa v. CavaMezze Grill, LLC:*

- Company terminated supervisor for making “false” report of sexual harassment.
- Fourth Circuit upheld dismissal on summary judgment; mistaken belief that supervisor made false report is legitimate, non-retaliatory basis.

# Sexual Orientation and Gender Identity



# Does Title VII Protect LGBTQ Rights?

It depends:

- On where you live.
  - Sexual orientation is protected in the Second and Seventh Circuits.
  - But not in Eleventh Circuit.
- On who you ask.
  - EEOC – Protected under Title VII.
  - DOJ – October 2017 memo to the contrary.





## Reverse LGBTQ Discrimination

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### *O'Daniel v. Industrial Service Solutions* (M.D. La.):

Unreasonable to assume discrimination based on plaintiff's status as married, heterosexual female gives rise to a claim for sex discrimination.

# Religious Objections and Transgender Bias Claims

## ***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.:***

- District court dismissed claims, ruling the Religious Freedom Restoration Act protected the funeral home owner from enforcement action by the federal government.
- Sixth Circuit reversed, ruling that the funeral home violated Title VII and was not entitled to a defense under RFRA.



## RMA v. Blue Springs School District (2017):

- Court found female student transitioning to male was not protected under MHRA; transgender not covered by MHRA.
- Public accommodation case.
- On appeal to Missouri Supreme Court.



# What to do about #MeToo

- Key legal issues:
  - Harassment
  - Compensation
  - Investigating complaints
- Key non-legal issues:
  - Policies
  - Culture
- The best offense is a good defense



## What would YOU do?

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Sally is a mid-level manager who has been with the company for 3 years. Sally tells you that the company's owner, Charlie, has made sexual comments to her and sexts her after hours. Sally also tells you that she believes she is being paid \$10,000 less than Sam, who holds the same position.

What are you going to do?



## Religion – Faith and the Flu Shot



### *Fallon v. Mercy Catholic Medical Ctr. of S. Pa. (3<sup>rd</sup> Cir.):*

- Refusal of mandatory flu shot, citing religious reasons.
- Submitted 22-page memo describing “sincerely held” beliefs – which was actually a complaint about the health effects and vaccine’s efficiency.
- Third Circuit rejected plaintiff’s claim.

## Religion – Intra-faith Discrimination



### ***Smith v. City of Philadelphia (E.D. Pa.):***

- Plaintiff, a Catholic, alleges supervisor did not consider him the “right kind” of Catholic and complained about co-worker asking him to pray daily.
- Denied employment at end of probationary period.
- Court denied employer’s motion for summary judgment.

# Family and Medical Leave Act





# FMLA – Timing is Everything

## ***Diamond v. American Family Mutual Insurance Co.:***

- Court in Western District of Missouri recognized that employers may generally terminate employees on FMLA leave for legitimate business reasons
- . . . but denied summary judgment based upon timing of investigation.



## FMLA – Notice Protocol

### ***Pollard v. New York Methodist Hospital of Brooklyn:***

- Second Circuit vacated district court's order dismissing claims on summary judgment.
- Remanded case to state court to determine, among other things, whether employee was required to provide 30 days' notice of need for leave.



## What would YOU do?

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Jamie is a R.N. and has been taking FMLA leave on an intermittent basis for migraines. She called in this morning apparently 10 minutes prior to her shift and said she had a flair up and would not be at work. Later that day an employee helpfully brought you a copy of Jamie's Facebook page showing her sitting by the pool where she posted, "Sitting by the pool chillaxing!"

What, if anything, should you do?



# What would YOU do?

Coaching



Verbal Counseling



Written Warning or Probation



Final Written Warning or Suspension



Termination

## What would YOU do?

For the last six months, your employees' productivity and attendance have been declining on a department-wide basis. Business was slow for a while, but it's now becoming an issue. What should you do?

- A. Make object lessons: Write up a female, Hispanic, pregnant employee who recently made a complaint.
- B. Hold a group meeting and provide written communications to the group. If the issue persists, meet with employees individually and hold each accountable.



## FMLA – Non-FMLA Covered Leave

### ***Bertig v. Julia Ribaud Healthcare Group, LLC:***

- Employer approved FMLA leave for bladder cancer and asthma; and then terminated employee under points-based attendance policy for absences related to foot pain and common cold.
- Pennsylvania federal court agreed that attendance violations were unrelated to employee's need for FMLA leave.



# Americans with Disabilities Act



# ADA – Leave as an Accommodation



- Might be a reasonable accommodation, regardless of FMLA eligibility, policies, or practices
- But remember:
  - Indefinite leave is not a reasonable accommodation
  - Leave request must give some indication employee will be able to perform essential job functions in the future
  - Accommodations other than leave might be effective



# Long-term Leave as Accommodation



## ***Severson v. Heartland Woodcraft, Inc.:***

- Employee claimed failure to accommodate when he wasn't given several more months of leave after exhausting FMLA leave.
- Seventh Circuit rejected the claim, required case-by-case assessment.
- Contradicting EEOC's position and enforcement activity.

## What would YOU do?

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Harold has been out because of a terrible automobile accident with personal injuries and complications for 12 weeks of FMLA leave and 8 weeks of non-FMLA leave. He still can't come to work. If he is terminated he will lose health insurance because he can't make COBRA payments. He has a child with chronic health conditions.

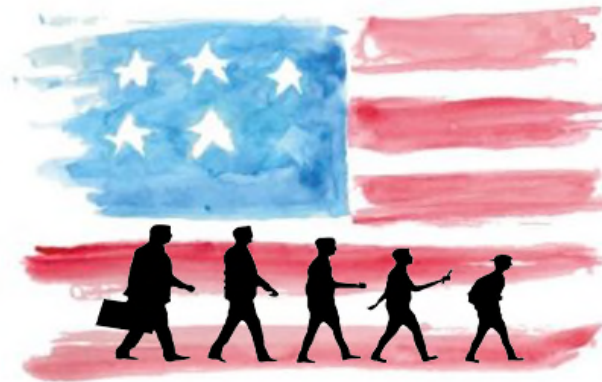
What are you going to do?



# Age Discrimination in Employment Act of 1967

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## AGE DISCRIMINATION in EMPLOYMENT



# Medical Marijuana



## Medical Marijuana – Duty to Accommodate

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- Historically, no legal obligation to accommodate legal marijuana use, even with a prescription.
- Now, three courts have held that federal law does **not** override state anti-discrimination laws.
  - *Barbuto v. Advantage Sales & Marketing, LLC* (MA)
  - *Callaghan v. Darlington Fabrics Co.* (R.I.)
  - *Noffsinger v. SSC Niantic Operating Co.* (U.S.D.C. for Conn)

# Medical Marijuana



- Update job descriptions to include “safety sensitive position” and “ability to work in a constant state of alertness and safe manner” as an essential job function.
- Update policies to comply with state laws.
- Require pre-duty disclosure of impairing effects and treat all impairing medications equally.
- Engage in the interactive process.
- Call your attorney.

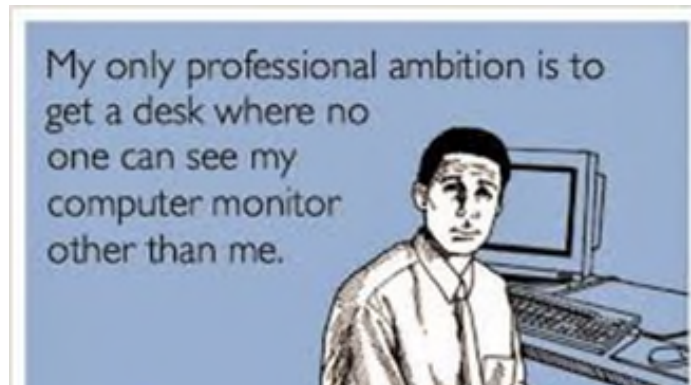
# Missouri Updates

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- Greitens' agenda:
  - Right to Work? Done. Maybe.
  - Local Minimum Wage limits? Done.
  - Missouri Human Rights Act reform? Done.
- Kansas City is banning the box effective June 2018.

# The Digital Age

1. Pre-employment digital dilemmas
2. Digital dilemmas of current employees
3. Post-employment (and litigation-related) dilemmas





## What would YOU do?

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Buddy is a data analyst for your healthcare company. Buddy asks to work remotely 3 days per week. You don't have anyone else who works remotely, don't have a policy on it, and deny his request. A week later, Buddy brings you a doctor's note saying he has lumbar pain and needs an accommodation of working from home 3 days per week. The same day, Ellen complains to you that Buddy is cyber stalking her.

What are you going to do?



**On the Horizon ...**

**Workflex in the 21<sup>st</sup> Century Act**

**Future of arbitration agreements**

**Sexual orientation and gender identity**

**Paid parental leave**

## Questions?

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