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Fighting Back Against Intermittent Abuse of FMLA

By Taylor Knight

One day, you receive notice from an employee that a circumstance has arisen that will require him to take time off work for medical appointments and the like over the next several months. Your first concern is how you will be able to meet the demands of your business while the employee is out. However, your fears are quickly alleviated when the employee informs you he will not be taking leave for an extended period of time. Rather, he will need to take time off on an intermittent basis. He then provides you with a doctor's certification requesting intermittent leave pursuant to the Family Medical Leave Act (FMLA). You know FMLA is a federal law that requires you to allow employees who met certain qualifying criteria to take a specified amount of time off, so you assure the employee his request will be accommodated. Truth be told, you are somewhat relieved because it would cause a serious disruption to your business needs if the employee was going to be absent for several weeks or months since you are limited in your ability to replace him due to the FMLA regulations. Initially, the employee informs you he needs a few, periodic days off and you adjust your business accordingly. However, you eventually begin to notice a pattern. First, you notice a lot of his absences occur on Fridays. Then, his absences are exclusively on Fridays and some Mondays. Eventually, he is absent every Friday and Monday, giving him what appears to be a four day weekend. You start to wonder if your employee is being truthful, or if he is abusing his intermittent FMLA leave. Once you suspect he is abusing his intermittent FMLA leave, you aren't really sure what to do because you

know you the FMLA has specific rules about disciplining/terminating employees who are on FMLA leave and you don't want to be subjected to a lawsuit or fine. You feel very frustrated, taken advantage of and disrespected by the employee. Because you are not sure what to do, you end up doing nothing and hope the time the employee is permitted to take off under the FMLA goes by quickly and does not cause a significant interruption in the daily operations of your business. You also wonder what you can do to prevent this from happening in the future.

While it is difficult to deal with an employee you suspect is abusing intermittent FMLA leave, there are several things you can do to prevent abuses before they occur:

1. Understand the FMLA regulations. The FMLA provides several tools for employers to limit the abuse of intermittent absences. Employers should evaluate and understand the regulations, closely monitor FMLA leave for patterns, develop a policy within the guidelines for the regulations, take action when necessary and hold the employee accountable for complying with the specifications in their certification.

2. Ensure eligibility and do not give leave prematurely. Make sure the employee requesting FMLA leave meets the qualifying requirements, specifically, that the employee is within 75 miles of a worksite with at least 50 employees. Additionally, the employee must have worked at least 1,200 hours in the last 12 months. If not, they are not eligible and the request can be denied.

3. Establish customary notification requirements for requesting leave. Employers should establish clear attendance and call-in policies for all employees' absences. Absent extenuating circumstances, if an employee fails to follow these policies, an employer is permitted to delay or deny the FMLA request. Employers can also request employees schedule medical treatments, if able to be planned in advance, so that business disruptions are minimized. If you choose to do so, be sure to inform employees of the preferred timing of scheduled appointments, including the day and time, based on business needs.

4. Require medical certifications and do not accept vague certifications. A policy should be developed requiring the use of certifications to approve FMLA leave. If the certification is incomplete or insufficient, provide the employee with a written list of the unanswered or incomplete questions, with a deadline of at least seven calendar days to remedy the deficiencies.

5. Hold the employee accountable to the terms of the certification. While recertification can be required every six months, more frequent certifications are permissible if the circumstances of the original certification have changed, including frequency of absences, reason to doubt the validity of the absence - such as a pattern, or if the employee requests an extension of the leave.

6. Provide the healthcare provider with a list of essential job functions. Providing a list will allow the healthcare provider to review and determine whether the employee is able to engage in his/her essential job functions. Additionally, if the leave is being requested for the employee's own medical needs, the certification must provide facts indicating the employee is unable to perform his/her essential job functions.

7. Require employees use paid time first and dock their pay when they have reached their limit. Employers are permitted to compel the use of paid leave first, so employees have to use all their vacation/sick time before any unpaid FMLA leave. Additionally, FMLA leave is always unpaid. Thus, even for exempt employees, employers are permitted to make deductions from their wages without converting them to overtime-eligible non-exempt employees.

While most employees use intermittent FMLA leave legitimately, knowing the FMLA requirements and approaching all FMLA leave requests in a systematic manner that has been clearly communicated to all employees is the key to curbing intermittent FMLA leave abuse.

The Interplay Between the ADA and the FMLA

By Stephanie Hathaway

Introduction

The Family and Medical Leave Act ("FMLA")[1] and the Americans with Disabilities Act ("ADA")[2] both require a covered employer to grant unpaid medical leave to an employee in certain circumstances. However, when presented with a request for medical leave, many employers think solely about the FMLA, and fail to consider the ADA. Thinking just in terms of the FMLA and failing to consider the ADA's reasonable accommodation requirements with respect to and medical leave is a critical error. It can lead to mistakes regarding reinstatement or reassignment, or even improper termination after an employee takes 12-weeks of FMLA leave and remains unable to return to work. Similarly, enforcement of no-fault attendance policies or maximum leave policies often violate the ADA or FMLA. Employers must pay careful attention to the many issues arising due to the interplay between the FMLA and the ADA.

Coverage And Protections Under The ADA And The FMLA

The FMLA requires covered employers, (defined as private employers[3] with 50 or more employees within 75 miles of the job site in the current or preceding calendar

year), to provide eligible employees (defined as an individual who worked for at least twelve months and for at least 1,250 hours during the previous 12–month period) with up to 12 weeks of unpaid, job-protected leave for a "serious medical condition." While the FMLA limits coverage to employees with 50 or more employees, the ADA applies to private employers[4] with 15 or more employees, protects qualified individuals from discrimination on the basis of disability and requires that employers provide a reasonable accommodation for qualified individuals with a disability.

Under the ADA, individuals with a current disability, those with a history of a disability, and those who are regarded by others as having a disability are protected by the ADA if they are "qualified individuals." A qualified individual is a person with "the requisite skill, experience, education and other job-related requirements" that would enable them to perform "the essential functions" of the job.[5] The regulations define "essential functions" as those that the applicant or employee must be able to perform unaided or with the assistance of a "reasonable accommodation."

Under the FMLA, employees are covered if they have a "serious health condition." A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.[6]

Notable Differences Between The ADA And FMLA

While similar in some ways, there are significant differences between the ADA and the FMLA. The ADA covers all qualified applicants and employees with disabilities, while the FMLA does not apply to applicants, or even newer employees, as an employee must have been employed for one year and worked at least 1,250 hours during the preceding year.[7]

Additionally, the FMLA's "serious health condition has a broader scope than the definition of "disability" under the ADA. Many serious medical conditions under the FMLA may rise to the level of a disability under the ADA, for example, cancer. This is particularly true after Congress passed the ADA Amendments Act ("ADAAA"), which broadened the number of people who are "disabled" under the ADA. However, other "serious health conditions" do not rise to the level of ADA disabilities, for example, routine pregnancy or a routine broken leg.

Next, unlike the FMLA[8], the ADA does not require a covered employer to give an employee time off to care for a spouse, son, daughter, or parent. Only the employee's own disability is covered by the ADA. Moreover, unlike the ADA, the FMLA does not include an "undue hardship" defense – if an eligible employee needs medical leave, the employer must provide medical leave, regardless how difficult providing that leave would be. Conversely, under the ADA, an employer may refuse an accommodation, including medical leave, if it is an undue hardship.[9]

Finally, under the FMLA, an employee is entitled to 12 weeks medical leave, regardless of whether the employee would be able to work with modified job duties or other accommodation. However, under the ADA, the employee's request for medical leave as a reasonable accommodation does not have to be granted if the employer offers another reasonable accommodation, such as an opportunity to work reduced hours or a temporary assignment to another job, and that accommodation is effective.

Medical Leave Under The FMLA And The ADA

When an employee requests medical leave, generally employers think of to the FMLA and whether the employee is eligible for medical leave under that statute. However, under the ADA, medical leave may be a reasonable accommodation for a disability. As the Equal Employment Opportunity Commission ("EEOC") has explained:

> Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability.[10] An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.[11]

Many employers fail to recognize that medical leave can be requested and provided under the ADA as well as (or even in place of) the FMLA. Medical leave under the ADA applies to more individuals, and does not have a 12-week limit as does the FMLA.

For example, where an employee is ineligible for FMLA leave because the employer has less than 50 employees, or because the employee has not worked for the employer for 1 year and worked 1,250 hours over the last year, the FMLA does not apply. However, that does not mean that the employer does not legally have to provide medical leave.

Similarly, where the employee exhausted his or her 12 weeks of FMLA leave and is still unable to return to work, all rights have been provided under the FMLA. Again, however, that does not mean that the employer does not legally have to provide additional medical leave.

Under both of these situations, the ADA requires the employer to consider whether the "serious health condition" rises to the level of a disability and, if so, grant medical leave as a reasonable accommodation unless to do so is an undue burden.

> If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's "disability" and FMLA's "serious health condition" are different concepts, and must be

analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12–month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.[12]

Therefore, when an employee request medical leave, the appropriate analysis is under the FMLA **and** the ADA. Even where the first twelve weeks of leave is FMLA-protected, if it also involves the ADA, it affects the employee's return to work.

An analysis of whether medical leave is covered by both the FMLA and the ADA matters for practical reasons. For example, under the FMLA, an employee must be returned to an equivalent condition after returning from medical leave[13]. However, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position under the ADA, despite the fact it is not required to do so under the FMLA[14].

Similarly, if upon the expiration of 12-weeks FMLA leave, the employee is able to return to work, but is no longer able to perform the essential functions of his or her position, under the FMLA, the employer could terminate his employment.[15] However, under the ADA, the employer must first consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.[16]

The Struggle With No-Fault Attendance Policies and Maximum Leave Policies

Attendance and leave policies also lead to pitfalls for employers under the ADA and the FMLA.

No-Fault Attendance Policies

A no-fault attendance policy assigns points for each occurrence when an employee is absent, with automatic discipline imposed after a certain number of occurrences. However, if the FMLA or ADA protects an employee's absence from work, assigning points under the no-fault attendance policy violates the statute.[17]

A no-fault attendance policy generally violates the ADA or FMLA if it does not include an employer's obligation to engage in an interactive process and provide a reasonable accommodation – such as additional leave or additional points under the no-fault attendance policy – to employees whose absences are the result of a disability or serious medical condition.

Maximum Leave Policies

A maximum leave policy is a policy under which employees are automatically terminated after they have been on leave for a certain period of time. Such a policy also violates the ADA or FMLA. The EEOC explains:

> Q: May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?
> A: No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.[18]

Employers should note that the EEOC takes this position regardless of the length that the maximum leave policy provides. For example, a maximum leave policy that allows one year of medical leave (*i.e.* four times the FMLA leave allotment) is just as impermissible on its face as one that permits a maximum of 12 weeks of leave. Regardless of how much time is provided under the maximum leave policy, the EEOC requires the employer to engage in the interactive process and show an undue hardship for additional leave.

Employers should not treat this as just a theoretical analysis. The EEOC has long concluded that under the ADA, a reasonable accommodation includes additional leave. Federal courts have likewise held that a medical leave of absence can constitute a reasonable accommodation under the ADA [19]. Practically speaking, the EEOC has made attendance policies and leave one of its target enforcement areas. In recent years, the EEOC has sued numerous employers who have terminated employees pursuant to no-fault attendance or maximum leave policies. The EEOC has stated that it has received over $34 million to resolve lawsuits the EEOC has brought concerning leave and attendance policies. The EEOC has also publicized several high verdicts against employers concerning both no-fault and maximum leave policies, including $6.2 million against Sears Roebuck for more than 250 claimants who had been separated under Sears' 12-month leave policy;[20] a $1.3 million consent decree against Denny's covering 33 claimants who were separated pursuant to Denny's maximum leave policy;[21] a $3.2 million consent decree against Supervalu/Jewel-Osco covering more than 100 claimants who had been separated under Supervalu's 12-month leave policy;[22] and an astonishing $20 million consent decree against Verizon

covering 800 claimants who were disciplined or terminated under Verizon's no-fault attendance policy.[23]

Conclusion

While the statutes are very different, there is an interplay between the ADA and FMLA of which employers must remain cautious. When an employee requires medical leave, the request does not just involve the FMLA, but may also involve the ADA. The employee may be entitled to medical leave even if he or she is not eligible for FMLA leave, and may be entitled to medical leave beyond the FMLA 12-weeks leave. In such cases, the employer must first analyze the employee's serious health condition to determine whether it rises to the level of a disability under the ADA. If the medical condition implicates both the FMLA and the ADA, it affects the employee's reinstatement and reassignment. Thus, employers must understand and appreciate the interplay between the ADA and FMLA.

Additionally, no-fault attendance policies and maximum leave policies may both violate the ADA and FMLA. Thus, employers are encouraged to review their leave policies with an eye on the ADA and FMLA. Employers should also annually train not only HR managers, but also the supervisors who manage attendance policies and absences on a day-to-day basis to enable them to recognize the interplay between the FMLA and the ADA.

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[1]29 U.S.C. §§ 2601 *et seq.*
[2]42 U.S.C. §§ 12101 *et seq.*
[3]State and local governments are eligible employers, no matter how many employees they employ.
[4]Like the FMLA, state and local governments are eligible employers, no matter how many employees they employ.
[5]42 U.S.C. § 12111(8).
[6]29 U.S.C.A. § 2611(11).
[7]29 U.S.C.A. § 2611(2).
[8]29 U.S.C.A. § 2612(a)(1)(C); 29 C.F.R. § 825.112(a)(3).
[9]29 C.F.R. § 1630.15(d).
[10]29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). *Cehrs v. Northeast Ohio Alzheimer's*, 155 F.3d 775, 782 (6th Cir. 1998).
[11]http://www.eeoc.gov/policy/docs/accommodation.html.
[12]29 C.F.R. § 825.702(b).
[13]29 C.F.R. §§ 825.214, 825.215(a) (1997).
[14]Question 21, Example B, and Question 16, http://www.eeoc.gov/policy/docs/accommodation.html.
[15]29 C.F.R. § 825.702(c)(4) (1997).
[16]Question 21, Example C, http://www.eeoc.gov/policy/docs/accommodation.html.
[17]Wage and Hour Fact Sheet #77B: Protection for Individuals under the FMLA;
[18]http://www.eeoc.gov/policy/docs/accommodation.html; 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997); *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1521 (2002).
[19]*Cehrs v. Northeast Ohio Alzheimers Research Center* ("medical leave of absence can constitute a reasonable accommodation under ADA in appropriate circumstances."); B*ernhard v. Brown & Brown of Lehigh Valley, Inc.* ("leave of absence for medical treatment could constitute a reasonable accommodation under ADA"); *Valdex v. McGill* ("a leave of absence may be a reasonable accommodation as long as the employee's request states the expected duration of the impairment"); *Walsh v. United Parcel Service* (additional leave was not reasonable in this case because the employer had already given substantial leave and the additional leave was of a significant duration with no clear prospects for recovery); *Cleveland v. Federal Express Corp* ("fact issues as to whether medical leave of six months would have been a reasonable accommodation for employee who was pregnant and had condition of systemic lupus, and whether reasonable accommodation would have presented undue hardship for employer who filled employee's position, precluded summary judgment as to employee's ADA claim").
[20]http://www.eeoc.gov/eeoc/newsroom/release/9-29-09.cfm
[21]http://www.eeoc.gov/eeoc/newsroom/release/6-27-11b.cfm
[22]http://www.eeoc.gov/eeoc/newsroom/release/1-5-11a.cfm
[23]http://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm

Sexual Orientation and Gender Identity Discrimination in the Workplace

By Joseph W. Borchelt & Ian D. Mitchell

Recently, state and federal judges have been treading more and more into the murky waters of sexual orientation and the law. As a result, several have declared voter-enacted bans on same-sex marriage unconstitutional under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. Indeed, the legal winds of change seem to be shifting towards more widespread acceptance and accommodation of same-sex lifestyles. However, in the arena of employment law, change is moving at a slower pace. In fact, many state and federal courts, as well as the Equal Employment Opportunity Commission (EEOC), have been somewhat cautious to expand traditional workplace protections to gay, lesbian, bisexual, and transgender/transsexual (GLBT) employees alleging discriminatory employment practices on the basis of sexual orientation and/or gender identity. Yet, under certain circumstances, both Title VII and the state anti-discrimination statutes have been used to protect employees from "sex-stereotyping" and gender-norming, two modes of workplace conduct that often encompass sexual orientation and gender identity discrimination.

The following article provides an overview of strategies frequently advanced in the employment litigation context in regard to sexual orientation and gender identity discrimination claims. Employers and attorneys practicing in the employment law field should be aware of these trends in order to better understand the ramifications of certain employment policy decisions. Additionally, the article attempts to provide a guide for employers and counsel to better understand the boundaries of discrimination protection afforded under Title VII and state legislation in Ohio, Indiana, and Kentucky, as they relate to both sexual orientation and gender identity.

On a final note, lawyers owe duties to their clients of zealous representation and to ensure that a client's risk is managed in the most efficient manner possible. However, in the representation of clients, lawyers cannot turn a blind eye to changing social norms and mores. Lawyers are also "counselors" to their clients, and therefore often times a lawyer's duty can extend beyond merely informing a client about the most zealous path to legal protection

under current law.

The Legal Framework for Protection Against Sexual Orientation Discrimination

Four tiers of law and policy substantially form the structure of legal protection from illegal workplace discrimination. At the federal level, certain types of workplace discrimination are prohibited under Title VII, which is supplemented by Executive Orders of the President of the United States. At the second level, many states have enacted legislation that parallels Title VII and created civil rights commissions that enforce rights under both the state statutes and Title VII. Some states have created additional protections against workplace discrimination that specifically identify sexual orientation as a protected characteristic. At the third level, local ordinances may further restrict employers from discriminating against individuals based upon characteristics identified as protected categories in that locality. At the fourth level, some employers, particularly larger companies that transcend state and national boundaries, have rolled out anti-discrimination policies that may protect even more persons than would fall under the protected categories of Title VII or the state and local laws. Under this regime, employees can hold employers accountable for sexual orientation discrimination by claiming that the company has failed to adhere to its own written policies.

Title VII of the federal Civil Rights Act of 1964 prohibits workplace discrimination in both the public and private sector on the basis of race, color, sex or national origin.[1] The language of Title VII, however, does not explicitly provide employees protection from discrimination on the basis of sexual orientation or gender identity. The EEOC, which is responsible for enforcing federal workplace anti-discrimination laws including Title VII, mediates and adjudicates workplace discrimination suits and also renders enforcement guidances on various employment discrimination topics. Additionally, Executive Orders of the President have articulated federal policy on anti-discrimination efforts.[2] In fact, on July 21, 2014, President Obama amended Executive Orders 11478 and 11246 to clarify that federal employers and government contractors are prohibited from discriminating against their employees on the basis of sexual orientation or gender identity.[3]

Almost half of the states have now passed some form of anti-discrimination law that prohibits employment discrimination on the basis of sexual orientation or gender identity.[4] Currently, however, Ohio, Indiana, and Kentucky are not among those states. Yet, all three states do have active commissions that investigate discrimination claims on a regular basis and interpret Title VII and their states' laws in a manner more-or-less consistent with federal decisions in civil rights cases.

Important Decisions Involving Discrimination on the Basis of Sexual Orientation

The seminal case used to support most sexual orientation discrimination claims under Title VII is *Price Waterhouse v. Hopkins* in 1989. In that case, the U.S. Supreme Court established that Title VII prohibited employers from discriminating against employees or prospective employees on the basis that they did not conform to traditional notions of what is appropriate for one's gender.[5] The Court labeled this prohibited practice as illegal "sex-stereotyping."[6] However, *Price Waterhouse* did not involve a claim that the plaintiff was discriminated against because of her sexual orientation, merely the fact that her employer denied her a partnership position on the grounds that she was too "macho" and "aggressive" for a female candidate.[7]

In 2011, the U.S. Court of Appeals for the Sixth Circuit considered the workplace discrimination claim of a theater professional named Marty Gilbert.[8] Gilbert claimed he had been subjected to illegal sex discrimination in the workplace when his union hiring hall refused to provide him with work on account of his open homosexuality.[9] Gilbert further claimed that this refusal occurred immediately after he raised a complaint to the union regarding violent threats he received from a co-worker related to his sexual orientation. Gilbert's complaint invoked the phrasing from *Price Waterhouse,* specifically that the violent threats were based on the fact that "Gilbert and homosexual males did not conform to [his co-workers] male stereotypes." The Sixth Circuit, however, construed Gilbert's claim as being based solely on sexual orientation discrimination, rather than for sex-stereotyping. Citing Sixth Circuit precedent in *Vickers v. Fairfield Med. Ctr.*, the Court dismissed Gilbert's discrimination claim on the grounds that "sexual orientation is not a prohibited basis for discriminatory acts" under Title VII.[10] In particular, the Court held that Gilbert could not "bootstrap" his sexual orientation discrimination into an actionable claim merely by reciting the elements of sex-stereotyping.[11]

Very recently, however, the U.S. District Court for the District of Columbia reached an opposite holding from that of the Sixth Circuit in *Gilbert*. In *TerVeer v. Billington*, the district court reviewed the claim of a former librarian with the Library of Congress, who alleged that he had been constructively discharged and subjected to substantially adverse changes in his work responsibilities, immediately after his supervisor discovered TerVeer was gay.[12] Similar to the claim brought in Gilbert, TerVeer alleged that he was discriminated against by his employer on account of the fact that he did not conform to gender stereotypes because "he is 'a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles.'"[13] However, in this case, the district court determined that the threshold on a motion to dismiss in employment discrimination is very low and the plaintiff had sufficiently alleged a discrimination claim under *Price Waterhouse*'s standard for illegal sex-stereotyping.[14]

Although these cases are difficult to reconcile, as they appear directly

opposed to one another, it is entirely possible that the *TerVeer* case represents part of a wider trend towards recognition of sexual orientation as a protected classification under Title VII.[15] It is also possible, however, that courts will view the existence of an employer's sexual orientation discrimination as merely evidence of sex-stereotyping, though not decisive in and of itself. In those cases, it is still unclear what further evidence plaintiffs will have to present in order to demonstrate that the employer has "acted on the basis of gender."[16] Yet, regardless of a court's interpretation of *Price Waterhouse*'s limitations, what does appear evident is that sexual orientation workplace discrimination claims are most likely to be brought under Title VII's moniker of sex-based discrimination. In light of the fact that many courts still repeat the mantra that Title VII does not provide protection from discrimination on the basis of sexual orientation,[17] the U.S. Supreme Court's holding in *Price Waterhouse* remains the most accessible inroad to Title VII for sexual orientation discrimination plaintiffs.

Important Decision Involving Discrimination on the Basis of Gender Identity

Claims for discrimination on the basis of gender identity received a powerful precedent in 2012 in the EEOC's decision in *Macy v. Holder*.[18] In that administrative decision, the Commission "clarified" that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition."[19] The complainant in *Macy* alleged that she was denied employment at a Phoenix, Arizona crime laboratory when the hiring manager discovered she was transitioning her gender from male to female. In concluding that 'gender identity" is a protected class under Title VII, the Commission cited *Price Waterhouse* and other U.S. Court of Appeals' precedents to find that "Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex."[20] The Commission went on to state that, because an employer may not take into account a person's gender during the hiring process, "we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."[21]

In light of the EEOC's strong position in *Macy* that Title VII prohibits discrimination in the workplace on the basis of gender identity, as well as its citation to substantial U.S. Court of Appeals' precedent, employers should be cognizant that any discriminatory practices or conduct based on an employee's transgender status will likely be evaluated under the Title VII framework. As such, any resistance to application of Title VII that is otherwise present in sexual orientation discrimination cases (*i.e.*, as in *Gilbert*) will in all probability be substantially less in cases involving discrimination based on transgender status.

Conclusion

Employers and attorneys practicing in employment law must anticipate that jurisprudential trends indicate the courts' and the EEOC's increased willingness to include sexual orientation and gender identity workplace discrimination claims under the Title VII rubric. As such, one option an employer could consider is re-writing current employment non-discrimination policies to include clauses explicitly prohibiting discrimination against employees and prospective employees on the basis of sexual orientation or gender identity. However, such employers must be acutely aware that such an approach might waive traditional legal protections that were not otherwise available. Nevertheless, taking a proactive posture to these developments will likely ease the transition to new employment law regimes that appear virtually inevitable in the near future. There is no dispute that defenses remain in some jurisdictions to refute employer liability for workplace discrimination under Title VII on the basis that said classes of employees are not explicitly enumerated for protection under the statute, as in *Gilbert*. However employment law attorneys would be well-served to consider that judges are increasingly likely to evaluate these types of claims under the "sex-stereotyping" analysis used in *Price Waterhouse*. Finally, there is nothing preventing attorneys from "counseling" their clients on ways to ensure that the work-force operates as a cohesive unit and that every individual employee is treated with respect.

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[1] 42 U.S.C. § 2000e *et seq.* (2009).
[2] See Exec. Order Nos. 11478 and 11246 (as amended by President Obama on July 21, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen.
[3] *See President Calls for a Ban on Job Bias Against Gays,* NYTIMES (July 21, 2014), http://www.nytimes.com/2014/07/22/us/politics/obama-job-discrimination-gays-executive-order.html?_r=0.
[4] *Non-Discrimination Laws: State by State Information – Map*, ACLU.ORG, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited Aug. 28, 2014).
[5] *Price Waterhouse v. Hopkins,* 460 U.S. 228, 235, 109 S. Ct. 1775, 104 L. Ed. 268 (1989).
[6] *Id.* at 250-51.
[7] *Id.* at 235.
[8] *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516 (6th Cir. 2011).
[9] *Id.* at 518.
[10] *Id.* at 519 (citing *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006)).
[11] *Id.*
[12] *TerVeer v. Billington*, No.12-1290, 2014 WL 1280301 (D.D.C. Mar. 31, 2014).
[13] *Id.* at *9.
[14] *Id.*
[15] The authors of this article note that, although *TerVeer* has not yet been cited by another court, it has been cited in the prominent Appellee Brief in *Bostic v. Rainey,* Case Nos. 14-1167, 14-1169, and 1176, presently before the U.S. Court of Appeals for the Fourth Circuit (David Boies and Ted Olsen, among others, on brief).
[16] *See Price Waterhouse*, 490 U.S at 250.
[17] *See, e.g., Vickers*, 453 F.3d at 762; *Gilbert,* 432 F. App'x at 519.
[18] EEOC Decision No. 012012821, 2012 WL 1435995 (Apr. 20, 2012).
[19] *Id.* at *4.
[20] *Id.* at *5 (citing *Schwenk v. Hartford,* 204 F.3d 1187, 1202 (9th Cir. 2000); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)).
[21] *Id.* at * 11.

NLRB "Recess" Appointments Checked By Supreme Court

By Jonathan Krol

Introduction

On June 26, 2014, the U. S. Supreme Court, in a much-anticipated decision captioned *NLRB v. Noel Canning*,[1] struck down President Obama's controversial January 4, 2012 recess appointments to the National Labor Relations Board ("NLRB" or "Board"). In so doing, the Court effectively nullified many NLRB rulings because the NLRB was operating without a required three-member quorum. The decision has far-reaching consequences for employers, even those not directly involved in NLRB proceedings, because the decision limits the precedential value of Board opinions issued from January 2012 to August 2013 and may affect the Board's ability to prosecute future unfair labor charges and enforce remedies in the future.

The NLRB and Recess Appointments: A Brief Overview

The NLRB is an administrative agency charged with enforcing the National Labor Relations Act ("NLRA"), which largely governs labor relations. Although the NLRB is typically associated with organized labor and unionization, almost all employers are subject to the NLRA. The Board is empowered "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a).

After the filing of an unfair labor charge and an initial investigation, the Board's General Counsel decides whether to bring a formal complaint. If it does, a hearing is held before an Administrative Law Judge ("ALJ"), who issues a decision containing "findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations as to what disposition of the case should be made." NLRB Rules § 102.45(a). The guiding principle for NLRB sanctions is to provide "a reasonable, non-punitive measure that would recreate the conditions and relationships that would have been had there been no unfair labor practice." *NCR v. NLRB*, 466 F.2d 945, 968 (6th Cir. 1972) (quotation omitted).

The parties have 28 days to file exceptions to the ALJ decision or any other part of the record, at which time the case is transferred from the ALJ to the Board for review. See NLRB Rules § 102.46(a). Upon transfer, the Board has discretion to handle the proceeding as it sees fit. It may decide the matter on the record, or it may permit oral argument. NLRB Rules § 102.45(b). After the Board's decision, a party can appeal to a federal circuit court of appeal and can ultimately petition the U.S. Supreme Court for review.[2]

Board members, like various other federal officials, are appointed by the president with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. However, the U.S. Constitution permits the president to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Id. art. II, § 2, cl. 3. Simply put, this "Recess Appointments Clause" allows the president to fill an existing vacancy during a congressional recess that would otherwise be subject to Senate confirmation.

The *Noel Canning* Decision

The legal question at issue before the Supreme Court in *Noel Canning* arose from President Obama's attempt to use the recess appointment power in 2012 to fill three vacancies on the five-member Board. At that time, the Senate was holding *pro forma* sessions to avoid a "recess" and thus prevent the President from making recess appointments. Even so, President Obama made the appointments because he decided, notwithstanding the *pro forma* sessions, that the Senate was in recess.

After the recess appointments were made, a three-member Board panel comprised of two recess-appointed members found that Noel Canning, a Pepsi-Cola distributor, engaged in an unfair labor practice by refusing to enter into a collective bargaining agreement. The company appealed the decision on various grounds, including lack of quorum. In January 2013, the D.C. Circuit Court found that the appointments were invalid, and thus the NLRB decision was not made with a required three-member quorum. On review, the Supreme Court agreed, finding that, for purposes of the Recess Appointments Clause, the Senate is in session when it says that it is, as long as it has the ability, under its rules, to conduct Senate business. The recess appointment power can be used during inter- and intra-session recesses, but only during a recess of sufficient length. (Note: a concurring opinion drafted by Justice Scalia, and joined in by three other justices, agreed that the Board appointments were invalid but sought to limit the power further, i.e., to inter-session recesses exclusively.)

The Aftermath

Although still a viable option, the recess appointment power has been narrowed (and clarified) by the Supreme Court. The result of *Noel Canning* is the invalidation of many aggressive and controversial NLRB decisions during the affected timeframe, including decisions relating to use of social media, class-action waivers in arbitration, and investigations of workplace misconduct. Ultimately, hundreds of Board opinions could be vacated. Although these opinions may be revisited (and re-issued) by a properly-constituted Board, at least for now they are no longer enforceable. This is important because of the NLRB's adjudicative and enforcement structure. There are a few important characteristics of the NLRB process that makes the *Noel Canning* decision particularly important. First, the NLRB and its ALJs are bound

by Board law and U.S. Supreme Court precedent alone. They need not adhere to decisions rendered by other courts. This means that an ALJ may disregard judicial precedent, regardless of how pertinent, on point, or emphatic.[3] Thus, *Noel Canning* is important if for no other reason than that it eliminates otherwise binding precedent and allows for ALJs to render decisions without being constrained by invalidated decisions.

Second, although enforcement of Board sanctions and remedies are generally stayed during the administrative process (i.e., while cases work their way up through the NLRB), the same is not true once the Board issues its decision: commencement of an appeal to a circuit court "shall not, unless specifically ordered by the court, operate as a stay of the Board's order." 29 U.S.C. § 160(g). Thus, an employer may have to undertake costly and disruptive remedial measures while appealing a Board decision through the federal court system. Because the *Noel Canning* decision invalidates NLRB decisions, affected employers may discontinue remedial measures—and likely win appellate proceedings[4] —until a properly-constituted Board issues a decision on the matter.

Conclusion

Over time, the properly-constituted Board will re-visit and issue binding decisions, and thus the relevance of the *Noel Canning* decision will fade. However, for the reasons discussed above, the *Noel Canning* ruling can and will be used by employers as an effective defense to challenge Board decisions for the foreseeable future.

[1] *NLRB v. Noel Canning*, -- U.S. --, No. 12-1281, 2014 WL 2882090 (June 26, 2014), aff'g *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

The appeal of a Board decision is governed by 29 U.S.C. § 160(f):

> . . . Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

[3] Needless to say, most Board decisions never make it to the Supreme Court, and those that do take many years. In fact, even where a Board decision is reversed on appeal by a circuit court, the Board—and its ALJs—may still apply the reversed Board decision unless and until it is ultimately overturned by Supreme Court.

[4] There are dozens if not hundreds of cases on appeal that will be affected by the *Noel Canning* decision.

Why Specific Identification of Trade Secrets Early on in a Dispute is Critical

By Pat Kasson & Tyler Tarney

Introduction

No matter what side of a trade secret dispute your company finds itself in, specific identification of the trade secrets—beyond mere general allegations—will be a critical issue from the outset. To put your company in the best position, it is essential to be thoroughly prepared for this issue, understand why it is important, be familiar with common tactics, know how courts are treating it, and to be aware of the best practices. Thoroughly preparing for this issue may require more up front work for trade secret plaintiffs. But it can put them a step ahead of their adversaries, better situate themselves for the fast-moving injunction phases, and eliminate or reduce the costly scenario of realizing holes in trade secret claims late in litigation. From the opposite perspective, defending trade secret disputes—while intimately familiar with the issuing surrounding specific trade secret identification—can help to expose meritless claims earlier, narrow the issues, avoid unnecessary costs, build better-informed defenses, and eliminate or reduce burdensome and expensive discovery.

This issue isn't going away either. The recent uptick in trade secret litigation, which shows no signs of slowing, makes it even more important: businesses are creating, analyzing, and storing more data and intellectual property than ever before; the volume is increasing at exponential rates; our society is becoming increasingly reliant on technology; and this is all becoming more accessible and mobile every day. In short, trade secrets are more important to businesses today than ever before.

The Trade Secret Identification Problem and Common Tactics by Both Sides

> "The term 'trade secret' is one of the most elusive and difficult concepts in the law to define."
> —*Lear Siegler, Inc. v. Ark-Ell Springs, Inc.,* 569 F.2d 286, 288 (5th Cir. 1978)

Trade secrets are an exceptionally unique creature of intellectual property. Unlike many other intellectual property rights, like patents and trademarks, they don't need to be expressly defined or put on paper beforehand for the rights associated with them to attach. Like most states, Ohio adopted the Uniform Trade Secrets Act (UTSA), which defines a "trade secret" as:

1. Information that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

2. Information that is the subject of reasonable efforts to maintain its secrecy.

This broad statutory standard accounts for trade secrets of all shapes and sizes.

Ultimately, the unique aspect of trade secrets—that they don't need to be expressly defined beforehand to establish the rights attached to them—coupled with the fluid statutory standard creates a natural incentive for those claiming trade secret protection to keep the descriptions of their trade secrets as vague as possible for as long as possible. Delaying this can provide more time and room to redefine or recast the description over the course of a dispute and create a tactical litigation advantage by inhibiting the opposing party's ability to build their defenses.

But trade secret defendants often push for specific identification early on to eliminate the tactical advantages that might otherwise result. The main reason is that a plaintiff's beliefs

about what it thinks its trade secrets are, as well as how they were used or misappropriated, are inherently subjective. Unable to read the plaintiff's mind, defendants argue that they need this information to adequately analyze the allegations, build their defenses, prepare their witnesses, and narrow the issues. Without it, defendants can't compare the alleged trade secrets to what is available in the public domain or scrutinize the steps taken to maintain their secrecy. And, of course, the party claiming the protection is going to have to provide this information at some point before the rights associated with them can be enforced. Additionally, defendants demand specific identification of trade secrets early on to expose meritless claims, avoid unnecessary costs, and eliminate or reduce burdensome and expensive discovery. This issue becomes even more important when defendants believe that vague, meritless trade secret claims are improperly aimed to serve as a court-created non-compete. Finally, from a compliance perspective, it is essential to know the scope and boundaries of the alleged trade secrets to make sure that they are not inadvertently used or disclosed.

What a Trade Secret Dispute Looks Like

Trade secret disputes usually begin when an employee either resigns to join a competitor or leaves to form a competing business. The misappropriation or use is frequently discovered internally at the former company and—especially when highly sensitive information is involved—tends to move rapidly: in-house counsel, HR, or an employee learns that valuable company information may have been taken or electronically copied in connection with a former employee's departure; the appropriate persons are promptly notified; more information and evidence is collected; and an evaluation is made about whether or how to move forward. If the issue is pursued, the new employer and the former employee may be contacted informally and told to preserve potentially relevant evidence. If pre-suit discussions either fail or are not attempted, the old employer may prepare and file a complaint in court. The complaint usually only contains generalities about the nature of the alleged trade secrets and does not identify them with much particularity.

When suit is filed, trade secret plaintiffs often seek broad, emergency injunctive relief for a temporary period to prevent the information from being disclosed or used. This generally occurs through a request for a Temporary Restraining Order (TRO) which, if granted, may impose temporary restrictions designed to prevent use or disclosure before the matter can be more thoroughly addressed. The standard here is not particularly high, and requires courts to evaluate whether: (1) there is a likelihood of success on the merits; (2) irreparable harm would result in the absence of an injunction; (3) an injunction would harm third parties; and (4) an injunction would serve the public interest. Expedited discovery may follow. Often this is governed by a strict protective order that seeks to preserve the alleged confidentiality of the information by narrowly limiting those who have access to the information as well as the things they can do with it. Sensitive documents may be assigned an "Attorneys' Eyes Only" designation, which presents its own unique and potentially expensive set of challenges. Following the TRO phase, the case might then proceed to the Preliminary Injunction phase where the plaintiff asks for preliminary relief for the duration of the case until the issues are decided on their merits.

How Courts Are Treating This Issue

Despite the importance of early trade secret identification, Ohio courts and federal courts in the Sixth Circuit Court of Appeals unfortunately have not given this issue significant attention. But this is not uncommon: courts across the country have not yet articulated a set of guidelines or standards governing the timing or specificity required for trade secret identification. In fact, courts have issued rulings on the same issues and arrived at diametrically opposite results. A majority of these decisions tend to require more specific identification and at earlier stages of these disputes, which appears to be the prevailing trend, but many courts allow plaintiffs to proceed with general and conclusory descriptions.

Fortunately, intellectual property battlegrounds like California and the Ninth Circuit Court of Appeals have dealt with the issues surrounding trade secret identification much more frequently and provide helpful guidance. In these jurisdictions, whether by statute or court practice, trade secrets must be identified with reasonable particularity early on—often in the form of detailed lists—at the outset of the case, before granting injunctive relief, or before permitting discovery. Although Ohio courts as well as courts in most other states do not impose formal requirements, they are increasingly facing this issue and are issuing decisions requiring more specific and earlier identification.

How Early Trade Secret Identification Can Benefit Both Sides

Demanding that trade secrets be specifically identified early on—or, alternatively, being thoroughly prepared to respond to a demand to do this—can simultaneously benefit both sides. When this happens early in a dispute it helps to narrow the issues because both sides have a better understanding of where the trade secret falls in relation to the governing standard. In turn, this facilitates earlier resolutions of trade secret disputes which unfortunately can be extremely expensive, high-stakes, and be so emotionally charged that they feel like heated "business divorces." Although delaying this process might give plaintiffs more time to explore, define, and recast their claims over the course of the dispute, being prepared to deal with this issue early on helps eliminate situations where plaintiffs find themselves months or years into a dispute—having already invested exorbitant amounts of time, money, and resources—and suddenly realize their claims aren't as strong as they initially thought. The narrowing of the issues also helps to avoid or reduce the ever-increasing costs of E-discovery. This is critical because trade secret cases, particularly during the high-speed injunction phases, often require high up front costs for forensic analyses, document reviews, detailed protective orders, and experts.

Most of all, it simply makes sense. The identity of a trade secret is often the most basic issue in these types of cases and at some point in the process—before trade secret rights are enforced—it will be necessary. If a company claims that a trade secret is truly a valuable part of its success and that using or disclosing it would cause substantial harm, then it is reasonable to require that it be identified with particularly. Thus, it is not surprising that courts faced with this issue are increasingly reaching this conclusion. For these reasons, being thoroughly prepared for this issue—regardless of what side of the dispute you are on—can be especially beneficial.

Best Practices

A. Pre-dispute protection of trade secrets

The most crucial thing an employer can do when attempting to enforce its trade secrets is show that it took active steps to maintain the secrecy of the information. To best protect your company's valuable investment in the development and maintenance of trade secrets—and to be in the best position if a dispute arises—here are some practical steps that can be taken:

- Label trade secret information as "CONFIDENTIAL;"

- Secure and isolate trade secret information from employees and anyone else who does not *require* access to it;

• Inform employees in writing that the information is confidential and must not be disseminated to the public;

• Carefully construct computer and records policies so that they (1) reinforce the confidentiality of trade secret information and (2) provide barriers, such as through passwords or tiered access to databases, eliminating general access to trade secret information;

• Actively and consistently discipline employees who violate policies related to trade secret information;

• Utilize carefully constructed non-disclosure, non-compete, and confidentiality agreements with not only employees, but also customers and suppliers who have access to trade secret information;

• Periodically require employees to reaffirm in writing that they (1) acknowledge they are exposed to trade secrets and (2) understand that the information must be kept confidential during their employment and after they leave; and

• Audit relevant trade-secret-related policies, agreements, and practices on a regular basis.

B. Best trade secret identification practices for plaintiffs

Once a trade secret dispute arises, trade secret plaintiffs should consider the following practices and strategies:

• Conduct a thorough and reliable examination of the information believed to be taken with multiple layers of review;

• Carefully examine how the information fits under the trade secret standard, including the measures taken to maintain secrecy and the availability of the information in the public domain. Have the employees most familiar with the information assist in defining the scope, parameters, characteristics, and valuable nature of the information. When possible, have this process supervised or thoroughly reviewed by in-house counsel or an outside attorney who can be trusted to provide a candid, well-informed opinion on this issue;

• Be capable of thoroughly articulating the precise definition, scope, and parameters of the trade secret in a simple, organized manner that a lay jury member—with no background about your business—could understand;

• Cautiously scrutinize the breadth of the information claimed to be entitled to trade secret protection. The broader the protection sought the more labor-intensive, expensive, and costly it can be to litigate, as well as the harder it might be for a lay person to understand;

• At the earliest stages of a trade secret dispute, as well as after each significant event, thoroughly analyze the costs and benefits;

• Be prepared to provide a detailed description of the trade secrets claimed from the outset of the dispute. When required to do so, provide this information based on all available facts and knowledge while reserving room in the description for expert opinion, if applicable; and

• Present damage reports and estimations so that the effect of each instance of use or misappropriation is broken down individually for each trade secret. This can become essential if it is determined that some—but not all—is entitled to protection. Otherwise, the jury could be left with insufficient evidence from which to determine damages, even on the meritorious portions of the claim.

C. Best practices for trade secret defendants

Trade secret defendants must be intimately familiar with the issues surrounding trade secret identification from the outset of a dispute and should consider the following practical measures:

• Issue an informal demand for specific trade secret identification;

• Serve targeted contention Interrogatories demanding detailed descriptions of the information, documents, and purported harm at issue to force the plaintiff to gather and reveal this information from every available source;

• If vague, generic, or otherwise insufficient responses to these requests are received—such as the evasive tactic that the information can be derived from reviewing certain documents or business records—firmly push for more specific identification, bring any deficiencies to the court's attention, and seek court intervention if necessary;

• Resist discovery in areas that do not directly pertain to the defined trade secrets. Decline to respond to discovery regarding vaguely defined trade secrets until an adequate description is provided, and limit responses to a level or volume proportional to the identification or information provided by the plaintiff; and

• If a rebuttal damage analysis is necessary, break down the effect of the purported trade secrets for each instance of the alleged use or misappropriation.

Reminder: Daylight Savings Time Reminder – Watch That Overtime!

Daylight Savings Time ended on Sunday, November 2, 2014 this year, and the clocks "fell back" one hour at 2:00 a.m. All hourly, non-exempt employees who worked the graveyard shift and were at work at 2:00 a.m. would have worked an extra hour that day, and must be paid for it. If the extra hour resulted in the employee working over 40 hours that workweek, the employee must likewise have been paid overtime under the Fair Labor Standards Act. This requirement does not apply to exempt employees.

The opposite is true in the Spring when Daylight Savings Time begins and the clocks "spring forward" – employees schedule for an 8-hour shift (say, midnight to 8 a.m.) will only have worked 7 hours, and can be paid accordingly.

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Our Employment Practices Defense Group not only includes regular practice with the Equal Employment Opportunity Commission, the Ohio Civil Rights Commission and OSHA, but frequently defending jury trials in both Federal and State Courts. This not only includes practice in all areas of discrimination law, such as gender discrimination, racial discrimination, age discrimination, religious discrimination, and sexual harassment cases (to name only some of the issues contemplated by both federal and state statute), but also the myriad of common-law and statutory claims that the courts have recognized. Our extensive jury trial practice in this area allows us to evaluate potential jury exposure at an early phase.

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