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The EEOC's Push to Expand Employees' Rights Under Title VII to Include Protection from Workplace Discrimination on the Basis of Sexual Orientation

By Ian Mitchell and Joseph Borchelt



Over the last five years, members of the LGBTQ community have had much to

celebrate as traditional barriers to equality have been knocked down one-by-one by the federal government. In 2010, the Patient Protection and Affordable Care Act provided equal access to health care for all Americans, regardless of an individual's gender identification or sexual orientation.¹ In 2013, the United States Supreme Court decided

United States v. Windsor, a case which held that Section 3 of the Defense of Marriage Act was unconstitutional because it purported to enact a federal definition of marriage that conflicted with marital rights already conferred on same-sex couples by certain states.² In March 2015, the U.S. Department of Labor revised the regulatory definition of



“spouse” under the Family Medical Leave Act (“FMLA”) so that eligible employees in legal same-sex marriages could take FMLA leave to care for their same-sex spouse or family member.³ Of course, just last year, the U.S. Supreme Court decided *Obergefell v. Hodges*, which established the right to marry as a fundamental civil liberty, protected by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, which may not be denied to persons on the basis of their sexual orientation.⁴

These victories for equality in the civil rights context have also worked their way into the employment law setting, primarily through the efforts and policy initiatives of the Equal Employment Opportunity Commission (“EEOC”). Even though the EEOC has had a policy of protecting employees from sexual orientation discrimination in the workplace though its administrative decisions dating back to 2012, the agency only this year filed its first cases in the federal district courts to argue that Title VII’s prohibitions against “sex discrimination” also encompass discrimination premised upon an individual’s sexual orientation. This article provides an analysis of those two cases and asks employers to consider the trajectory of recent developments in Title VII litigation. Furthermore, as a consequence of these cases, employers are encouraged to evaluate their internal policies and procedures to ensure that their current plans are adequate to protect against the risk of sexual orientation discrimination claims in the workplace.

Framework of EEOC’s Stance Against Sexual Orientation Discrimination

By way of background, the EEOC is authorized by Title VII to bring claims against private employers to redress instances of unlawful workplace discrimination when a conciliation of the matter cannot otherwise be achieved.⁵ Prior to a civil action being commenced, however, employees must file a charge of discrimination with the EEOC, which the commission then investigates and renders a decision pertaining to whether reasonable cause exists to show an unlawful employment practice.⁶ The particular types of employment practices prohibited by

Title VII include discrimination based upon an employee’s race, color, religion, sex, or national origin.⁷ Notably, the text of the statute does not explicitly include the terms “sexual identity” or “sexual orientation” as prohibited forms of discrimination.

However, in 2012, the EEOC decided *Macy v. Holder*, which for the first time stated the agency’s position that “claims of discrimination based on transgender status, also referred to as claims of discrimination based upon gender identity, are cognizable under Title VII’s sex discrimination.”⁸ The commission based its decision, primarily, on the U.S. Supreme Court’s case of *Price Waterhouse v. Hopkins*, which held that an employer engages in discrimination on the basis of sex when it takes adverse actions against employees for failing to conform to traditional notions of what is appropriate for one’s gender.⁹ Thus, even though the *Price Waterhouse* prohibition on so-called “sex-stereotyping” fell short of reading Title VII to expressly prohibit sexual identity discrimination, it *did* provide a sufficient framework for the EEOC to conclude in *Macy* that such a prohibition was a logical implication. The EEOC eventually extended this logic even further, in 2015, when it decided *Baldwin v. Dep’t of Transportation*, and concluded that discrimination based upon an employee’s sexual orientation necessarily involves “sex-based considerations,” and therefore constitutes unlawful sex discrimination under Title VII.¹⁰

Although the above-mentioned administrative decisions clearly indicated the EEOC’s position that sexual orientation discrimination falls within the types of conduct prohibited by Title VII as unlawful employment practices, that theory has not always been successful in cases brought by private plaintiffs in federal court.¹¹ As alluded to, however, the EEOC recently elected to take up the banner itself by filing two cases against employers in the United States’ district courts.

EEOC v. Pallet Companies dba IFCO Systems NA, Inc.

In this case, filed in the U.S. District Court for the District of Maryland, a female

former-forklift operator alleges that she was harassed by a supervisor on account of openly associating as a lesbian.¹² The complaint in that action claims that the employee was subjected to repeated derogatory statements from her supervisor, such as: “I want you to turn back into a woman;” “I want you to like men again;” “You would look good in a dress;” “Are you a girl or a man?” and “You don’t have any breasts.” The claimant complained to the company’s general manager and later contacted human resources about the treatment through the company’s employee hotline. Nonetheless, the EEOC alleges that upper management, including the company’s regional director, demanded that claimant resign from her job, which she ultimately refused to do. The company then fired her and called the police to escort her from the building. The EEOC’s complaint argues that the harassment and discharge constitute unlawful workplace discrimination based on sex, and therefore in violation of Title VII, because the claimant was treated less favorably “by virtue of her sexual orientation, [which] did not conform to sex stereotypes and norms about females to which [the supervisor] subscribed.”

EEOC v. Scott Medical Health Center, P.C.

In this case, filed with the U.S. District Court for the Western District of Pennsylvania, a male former-telemarketer was allegedly harassed by his manager on account of being openly gay.¹³ The EEOC’s complaint claims that the manager routinely made offensive comments to the claimant, anywhere from three to four times per week, specifically calling him “f-g,” “f-ggot,” “f-cking f-ggot,” and “queer.” The claimant purportedly complained to the company’s president about the treatment but was allegedly told nothing would be done to address the harassment. As a result, the EEOC argues that the claimant had no choice but to resign, *i.e.*, a constructive discharge. As in the Pallet Companies case, the EEOC has argued that the harassment and discharge constitute unlawful workplace discrimination based on sex, and therefore violate Title VII, because sexual orientation discrimination amounts to unlawful sex-stereotyping.

What Employers Need to Know

These two federal cases filed by the EEOC manifest the legal framework upon which the commission's strategy for advancing sexual orientation discrimination claims lies. Its theory is deeply rooted in the U.S. Supreme Court's 1989 *Price Waterhouse* decision and necessarily dependent upon the logical conclusions the commission reached in both *Macy* and *Baldwin*. Yet, the commission faces somewhat of an uphill challenge in this regard, as some of the U.S. Circuit Courts of Appeals, including the Sixth Circuit, have rejected such claims on the grounds that "sexual orientation discrimination" is not specifically enumerated among the types of employment practices made unlawful by Title VII and therefore not actionable.¹⁴

However, the most critical takeaway for employers is that the EEOC is no longer content to simply limit its policy regarding sexual orientation discrimination claims to its own agency investigations and adjudications. Instead, the *Pallet Companies* and *Scott Medical Health Center* cases demonstrate that the agency is now willing to pursue these claims by way of a civil action in federal court. Furthermore, in light of recent developments, specifically as to the U.S. Supreme Court's recognition of civil

rights for the LGBTQ community, there is every reason to believe the EEOC may very well succeed in its efforts to expand the protection available to employees under Title VII as well. As a result, it would be prudent for employers to begin evaluating their potential liability under Title VII to include these types of sexual orientation discrimination claims and take appropriate action to protect themselves. This could include amendments to employee handbooks or even EEOC training for supervisors and management. Employers should also ensure that any and all workplace postings required by the EEOC are up-to-date and accurately reflect the current state of federal employment law.

Finally, and notably, it is a dangerous proposition for employers to simply assume that ultimately the federal Circuit Courts of Appeals are going to reject the EEOC's position. Even if this is true on some level, employers could nevertheless face substantial costs and attorney fees via EEOC charges, investigations and potentially litigation. What is the better business decision: paying thousands to attorneys to defend antiquated employment policies; or revising policies to provide equal rights to individuals regardless of sexual orientation?

If you have any questions regarding the

cases cited above or would like to discuss strategies for avoiding sexual orientation discrimination in the workplace, please contact our employment law practice group.

¹ 26 U.S.C. §5000a (2010).

² *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, at syllabus (2013).

³ 29 CFR §§ 825.102; 825.122(b) (2015).

⁴ *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, at syllabus (2015).

⁵ 42 U.S.C. §2000e-5(f).

⁶ 42 U.S.C. §2000e-5(b).

⁷ 42 U.S.C. §2000e-2(a).

⁸ *Macy v. Holder*, EEOC Decision No. 012012821, 2012 WL 1435995 (Apr. 20, 2012).

⁹ *Price Waterhouse v. Hopkins*, 460 U.S. 228, 235, 109 S. Ct. 1775, 104 L. Ed. 268 (1989).

¹⁰ *Baldwin v. Anthony Foxx, Secretary, Dep't of Transp. (FAA), Agency*, EEOC Appeal No. 0120133080, 2015 WL 4397640, at *5 (July 15, 2015) ("Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms."):

¹¹ See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006), *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516 (6th Cir. 2011), compare with *TerVeer v. Billington*, No. 12-1290, 2014 WL 1280301 (D.D.C. Mar. 31, 2014).

¹² Complaint at ¶15, *EEOC v. Pallet Companies*, No. 1:16-cv-00595 (D. Md. Mar. 1, 2016).

¹³ Complaint at ¶11, *EEOC v. Scott Medical Health Center, P.C.*, No. 2:16-cv-00225 (W.D. Pa. March 1, 2016).

¹⁴ See *Vickers* and *Gilbert*, *supra*.

Legalization of Medical Marijuana -- Now What?

By James O'Connor and Taylor Knight



Generally speaking, state marijuana laws fall into three categories: (1) legalization (laws that make the possession or use of marijuana legal); (2) marijuana decriminalization (laws that reduce criminal penalties for possession and use of small amounts of marijuana to civil

penalties; and (3) medical marijuana (laws that allow individuals to defend themselves against criminal charges for marijuana possession if they can prove a medical need for marijuana under state law).

In June 2016, Ohio Governor John Kasich signed House Bill 523, a new law that legalizes medical marijuana effective September 6, 2016. The law creates a regulatory program that will be controlled by the Department of Commerce, the State Pharmacy Board, the State Medical Board and a yet to be appointed bipartisan advisory committee. Ohio's medical marijuana law was precipitated by a poll showing that 90% of Ohioans are in favor of medical marijuana. Thus, lawmakers purportedly acted to head off a threatened ballot issue that promised more-relaxed access to medical marijuana than the current law provides.

Federal v. State

Despite the nationwide push toward the legalization of marijuana, it remains a Schedule I drug under the federal Controlled Substances Act. A Schedule I controlled substance is defined as: a drug or other substance that: (a) has a high potential for abuse; (b) has no currently accepted medical use in the United States; and (c) there is a lack of accepted safety for use of the drug or other substance under medical supervision. Other Schedule I drugs include opium and its derivatives (e.g., heroin and morphine), LSD, peyote and PCP.

In October 2009, the Obama Administration encouraged federal prosecutors to stop

prosecuting people who distribute marijuana for medical purposes in accordance with state law. Similarly, in August 2013, the U.S. Department of Justice updated its marijuana enforcement policy, stating it expects states with marijuana legalization laws to create “strong, state-based enforcement efforts ... and will defer the right to challenge their legalization law at this time.” More recently, the U.S. Drug Enforcement Administration announced it will make a decision on whether to reschedule marijuana’s classification under the Controlled Substances Act. In short, while marijuana remains an illegal drug under federal law, under the current Administration, policing is being left to state authorities.

Impact on Employers

With Ohio’s legalization of medical marijuana, in conjunction with marijuana’s continued status as a Schedule I controlled substance, employers are now forced to identify how these laws impact the workplace. In doing so, the following should be considered:

1. Only patients with qualifying conditions are protected under the medical marijuana law. The law sets forth twenty qualifying medical conditions for which an individual can obtain medical marijuana: Amyotrophic lateral sclerosis (ALS); cancer; chronic traumatic encephalopathy (CTE); Crohn’s disease; epilepsy or another seizure disorder; fibromyalgia; glaucoma; hepatitis C; inflammatory bowel disease; multiple sclerosis; pain that is chronic, severe, and intractable; Parkinson’s disease; post-traumatic stress disorder; sickle cell anemia; spinal cord disease or injury; Tourette’s

syndrome; traumatic brain injury; and ulcerative colitis. In addition, an individual can petition the state medical board to add conditions.

2. Employees can be fired for marijuana use despite meeting the criteria under the medical marijuana law. Nothing in the medical marijuana law bans an employer from prohibiting the use, possession or distribution of marijuana in the workplace. In fact, the law specifically permits the termination of an employee for marijuana use even if it was recommended by a physician if the employer has drug-free workplace or zero-tolerance drug policies in place. Further, the law prohibits an employee from suing an employer for adverse employment action related to medical marijuana.

3. Employees terminated for marijuana use are not eligible for unemployment compensation. With respect to unemployment compensation, the medical marijuana law specifically states that an employer has “just cause” to fire an employee for his or her use of medical marijuana so long as the use violated the employer’s drug-free workplace or zero-tolerance drug policies.

4. Employers are not obligated to accommodate an employee’s medical marijuana use under the Americans with Disabilities Act (“ADA”). As mentioned, marijuana remains a Schedule I controlled substance, meaning it is an illegal drug under the federal Controlled Substances Act. Thus, an employee who engages in the illegal use of drugs is not a qualified individual with a disability for purposes of the ADA, and employers are not required

to accommodate an employee’s use of medical marijuana.

5. Intoxication remains a defense to a Workers’ Compensation claim. Currently, intoxication is a defense to a workers’ compensation claim. The medical marijuana law does not alter this defense in any way and explicitly permits any employer to utilize a positive, post-accident drug screen for marijuana to defend against a worker’s compensation claim.

6. Smoking marijuana is prohibited. The medical marijuana law prohibits the smoking of medical marijuana and the home growing of pot. It permits vaping products, patches and certain edibles. While seemingly benign, permitting the use of marijuana via methods other than smoking creates the substantial risk that employees could use medical marijuana on the job and go unnoticed. As such, anti-smoking policies are insufficient to curtail the use of marijuana in the workplace.

In light of Ohio’s legalization of medical marijuana, employers are strongly encouraged to immediately assess and update their current drug policy to include a prohibition against the use of medical marijuana, as the law takes effect in September 2016. In addition, any updated or new drug policy should be distributed to employees, who should be required to sign an acknowledgment of their receipt and understanding. Remember that for employers, the key to obtaining protections under the law is having a clear drug-free (or zero-tolerance drug) policy that has been disseminated to all employees.

Minimize the Legal Risks of Layoffs by Careful Consideration of Federal Layoff Laws

By Carrie Masters Starts and Nathan Lennon



Layoff decisions can be difficult for employers for a number of reasons and it is important for any business to be fully informed when making such decisions. When a company makes a determination

that layoffs are necessary, the company should be mindful of a number of potentially applicable federal statutes related to layoffs. Careful consideration of the applicability and impact of relevant

federal statutes may minimize the risk of legal challenges to the company's layoffs.

Worker Adjustment and Retraining Notification (WARN) Act

The WARN Act requires that notice of forthcoming layoffs be provided to employees under certain conditions. Employers required to comply with the WARN Act include: (1) those with at least 100 full-time employees, meaning an individual employed for at least six of the twelve months before notice is required and who works at least 20 hours per week; or (2) those with 100 or more employees who work at least 4,000 combined hours per week.

Covered employers must give at least 60 days' notice before conducting layoffs in certain scenarios, including: (1) where 50 or more employees will lose their jobs and the number of employees to be laid off comprises one-third of the employer's workforce; (2) at least 500 employees at a single job site will lose their jobs; or (3) a single employment site, operating unit, or facility will be closed, resulting in 50 or more employees losing their jobs.

Notice under the WARN Act is not required in instances of natural disasters, unforeseeable business circumstances, or, in the event of a plant closing, where a company is seeking new capital or business which would allow it to avoid or postpone the plant closing, and notice of layoffs would have precluded the opportunity for new capital or business. Even when acting under one of these WARN Act exceptions, covered employers must still give as much notice as possible.

WARN Act notices must be in writing and delivered in a reasonable method designed to ensure receipt of the notice 60 days before a closing or layoff. The notice should specify the anticipated date layoffs will begin, whether the layoffs are expected to be permanent, and when the employee will receive a termination letter. If the date of a layoff changes after a WARN notice has been issued, additional notice may also be required.

Older Workers Benefit Protection Act (OWBPA)

In 1990, Congress amended the ADEA by adding the Older Workers Benefit Protection Act (OWBPA) to clarify the prohibitions against discrimination on the basis of age. OWBPA establishes specific requirements for a "knowing and voluntary" release of ADEA claims to guarantee that an employee has every opportunity to make an informed choice whether or not to sign the waiver. There are additional disclosure requirements under the statute when waivers are requested from a group or class of employees.

As such, the OWBPA provides certain protections to employees over the age of 40. In order for an employee over the age of 40 to effectively release claims against their employer under the Age Discrimination in Employment Act (ADEA), the employer must provide the employee at least 45 days to consider the release agreement, in the event of a termination of two or more employees in a group or class age 40 and older. The employer must provide the employee with at least 21 days to consider the agreement in the event of an individual termination. The employee must also be provided a seven day window of opportunity after signing the agreement to revoke it, and this provision must be specifically included in the release.

In addition to the requirements above, the release must specifically refer to rights or claims under the ADEA, must not waive rights or claims arising after the date the waiver is executed, must state that the individual waives rights or claims only in exchange for consideration in addition to anything to which the employee is already entitled, and must state that the individual has been advised in writing to consult with an attorney prior to executing the release.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

In the event a business employs individuals who have been reemployed after return from military active duty or reservist

leave, such employees are protected from termination for one year if they served on military duty for more than 180 days, and are protected from termination for 180 days if they served on military duty for 31 to 180 days. Nevertheless, a reemployed military employee may be discharged for cause regardless of military service.

Additionally, military service members have certain employment reinstatement rights upon return from military service pursuant to USERRA. To the extent a company's layoffs would impact an employee on military leave, the employer must demonstrate that the employee would have been laid off if he or she had remained at work. An employer may not rely on or consider the employee's military leave as a factor affecting the decision whether that employee will be laid off.

Disparate Impact

Employers should carefully consider whether its layoff will result in an adverse or disparate impact to a protected class, including members of a certain gender, race, religion, national origin, age, or employees with a disability. If any protected class is disproportionately affected by the layoff, discrimination claims or lawsuits may result, regardless of whether the protected class is being targeted purposefully. Where a layoff produces a disparate impact on a protected class, the employer must justify its selection on the basis that it is job-related and consistent with business necessity, or, based on factors other than age, as related to claims of age discrimination.

Where an employer anticipates a forthcoming layoff, it should carefully assess and analyze the impact of relevant federal and state laws and ensure appropriate documentation is maintained in order to avoid or minimize the legal risk related to the layoff. While layoffs are an unpleasant occurrence for any business, being mindful of an employer's legal obligations in that regard will help curb any subsequent legal action and bring some ease to the process.

Employers May Need to Offer Accommodations to Job Applicants & Employees Even If They Do Not Ask for An Accommodation

By Holly Marie Wilson and Katie Zorc



Most employers maintain either formal or informal grooming and appearance policies. These policies address the employee's personal appearance while at work including hairstyle, jewelry, tattoos, piercings, head coverings and all manner of clothing. While



the law permits employers to regulate the appearance of its employees in the workplace, such appearance policies have recently come under attack by the EEOC and are being subjected to increased scrutiny from our courts.

For example, on June 1, 2015, the United States Supreme Court ruled 8-1 that the retail chain Abercrombie & Fitch may have violated Title VII of the Civil Rights Act of 1964 in denying employment to an observant Muslim woman because her hijab violated Abercrombie's "Look Policy" – even though the applicant's religious beliefs were never mentioned during the interview process and the applicant never asked for an accommodation. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031, 2015 U.S. LEXIS 3718 (2015).

In rendering this decision, the Supreme Court made clear that in order to survive motion practice in a claim of disparate treatment, applicants need only show that their need for an accommodation was a "motivating factor" for the employer's decision, not that the employer had actual

or certain knowledge that the prospective employee would need or even desired an accommodation. The Court held that Title VII was only concerned with whether religion was a motive in the employer's decision, no matter what the employer's knowledge was.

Over a year later, courts continue to expand on the doctrine established by this ruling.

In *EEOC v. JetStream Ground Servs.*, 134 F. Supp. 3d 1298, 1305 (D. Colo. 2015), the District of Colorado held that several applicants/employees for Jetstream Ground Services, Inc. could maintain claims of Title VII violations despite motion practice when JetStream acquired a contract for United Airlines cleaning services, and re-interviewed the employees of the prior cleaning service. Seven applicants/employees were observant Muslim women who wore hijabs and long skirts as part of their religious practices. They sued JetStream for denying them employment and/or hiring them, but then immediately laying them off, purportedly because the long skirts they wore violated JetStream's dress code, and JetStream did not want to offer them an accommodation.

One laid off employee was unique. She had not discussed her religion at any time during her interview with JetStream or after. She was observed wearing a hijab and long skirt during breaks and outside of work, but wore pants without a hijab during the work day. JetStream moved for summary

judgment on her claims because she had not discussed her religion or requested an accommodation for her dress, but instead, complied with the dress code and was purportedly laid off for unrelated reasons.

However, the court denied JetStream's request for summary judgment on this employee's claims, finding that because the employer witnessed this employee wearing these religious garments during non-work hours, including on her breaks and when she arrived and left for the day, and because this employee had expressed a desire for wearing a hijab and long skirts during work, a reasonable jury could still conclude that JetStream considered that this employee's religion would present a need for an accommodation, which was a motivating factor for their decision to lay her off.

Today, more than in the past, a carefully crafted and implemented appearance policy is necessary to ensure that such procedures cannot be said to have a discriminatory impact on an employee's age, religion, race, national origin, disability or gender. Any good policy begins with a consideration of the reasoning behind implementing the policy in the first place. Policies should be crafted with an eye towards the specific needs of the job as well as safety and health consideration and must be consistently applied. The careful implementation of such policies begins during the interview process and includes attentive responses to the inevitable requests for accommodations. A dress code that meets these tests and considerations should be enforceable.

Employers Must Re-Examine Overtime Practices After Department of Labor Drastically Restricts Exemptions

By Tyler Tarney and D. Patrick Kasson



The Department of Labor's (DOL) May 18, 2016 new overtime exemption requirements under the Fair Labor Standards Act (FLSA) affect a staggering 4.2 million workers—19% of 22,514,000 previously exempt from overtime—including 134,000 in Ohio, 87,000 in Indiana,

and 55,000 in Kentucky. Of the 4.2 million affected, 56% are women.

The most noteworthy changes—which take effect on December 1, 2016—are as follows:

- The minimum salary requirement is raised from \$23,660 to \$47,476 a year (or from \$455 to \$913/week);
- The salary threshold also automatically updates every three years based on wage growth with the first update to take effect January 1, 2020;
- Bonuses and incentive payments may count up to 10 percent towards the new salary level; and
- The “highly compensated employee” exemption salary threshold is raised from \$100,000 to \$134,004 above which only a minimal showing is needed to demonstrate ineligibility for overtime.

Practically, these changes are expected to raise wages by \$12 billion over the next 10 years. Notably, the final rule did not make any changes to the duties tests for any exemption.

The FLSA requires employers to pay covered, non-exempt employees overtime—at one-and-a-half times their “regular rate”—for all hours worked in a week over 40. Employers must pay employees overtime

unless employers satisfy their burden of showing the employees are “exempt” from these requirements. To be exempt from overtime: (1) employees typically must be paid a predetermined and fixed salary; (2) the salary must satisfy the minimum specific amount, which was \$23,660/year before the recent changes; and (3) generally the job must primarily involve executive, administrative, professional, or computer-related duties. In other words, simply receiving a salary does not make an employee ineligible for overtime. The exemptions are based on the DOL's belief that those who work more than 40 hours per week should typically get paid more for that extra time, and also that workers who satisfy the exemptions usually earn more and enjoy other privileges setting them apart from those entitled to overtime.

The DOL is the federal administrative agency charged with enforcing the FLSA and defining the contours of the exemptions. Employees can also pursue FLSA claims through private actions on behalf of themselves or on behalf of “similarly-situated” employees through a collective action. Due to the potential size of a collective action and the expansive remedies available, they can carry high exposure; they can be expensive to litigate; and they have recently been filed at record levels. With the DOL's new changes, the number of wage-and-hour lawsuits filed is not expected to slow down in the foreseeable future.

The changes are aimed to comply with the President's goal of ensuring workers receive “a fair day's pay for a fair day's work.” He previously instructed the DOL on March 13, 2014 to look for ways to modernize and simplify FLSA regulations while ensuring that the FLSA's intended overtime protections are fully implemented. The initial levels were set in 1975 and haven't been changed since. Forty years of

inflation put the \$23,600-per-year-salary threshold below the poverty line, which was \$24,008 for a family of four in 2015. After considering over 270,000 comments from interested stakeholders, the DOL issued its Final Rule—which spans over 160 pages—on May 18, 2016.

In response to these changes, affected employers have four options: (1) raise salaries above \$47,476; (2) pay time-and-a-half for overtime; (3) limit hours to 40 per week; or (4) implement some combination of the first three options. Employers are not permitted to pro-rate part-time employees' salaries to avoid compliance with the new rules. Raising salaries for employees at or above the salary level to maintain exempt status may work for employees with salaries close to the new level and who regularly work overtime. Paying overtime when necessary for hours worked over 40—in addition to the employee's current salary—may be a good fit for employees who typically work 40 hours or less.

Employers should also ensure that workload distribution and staffing levels are managed appropriately, which may require hiring additional workers. Accurately tracking the weekly hours worked by salary workers close to the thresholds will be helpful in adjusting to the new changes. Additionally, employers should implement a process for reviewing salary levels that can be repeated and re-used every three years, which will account for the automatic updates and will avoid having to start from scratch each cycle.

Although every workplace and every wage-and-hour issue are different, employers affected by the DOL's Final Rule should promptly: (1) re-examine their overtime and exemption policies and practices; (2) implement the appropriate changes; and (3) inform employees of the changes.

Employment Practices Defense

The workplace has evolved into a complex arena, fraught with regulatory and litigation-based challenges that can put any business at risk and threaten its very existence. In addition, employment law is a rapidly evolving area which requires the skill of a qualified advocate and counselor to navigate. Fast-paced changes come in the form of ever-evolving EEOC guidance, paradigm shifts in the law and the way we view employment relationships, and the growing importance of Human Resources departments. Our employment defense attorneys handle not only regulatory matters and lawsuits, but also offer expert advice to help employers avoid litigation.

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