



THE NEW DIVERSITY:

Transgender Persons and the EEOC's Aggressive Push to Redefine Title VII to Include Sexual Orientation


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The Times They Are A-Changing


- Public sentiment concerning LGBT issues has evolved rapidly
- Congress has failed to pass sexual orientation/gender identity protections in employment
- Congressional inaction has left administrative agencies, states, municipalities and courts to fill in the gaps
- The U.S. Supreme Court recently legalized same-sex marriage



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The Times They Are A-Changing



- The courts have long recognized protection for persons who do not conform to standard gender stereotypes
- Amendment of Title VII and other laws may not be necessary
- Let's look at the definitions, laws, and evolution to understand your rights and obligations

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Let's Start with the Definitions

- **Sex** = Biological sex at birth (male or female)
- **Gender** = One's internal sense of being a man or a woman; a person's sexual identity as a social or cultural construct, as evidenced by behavior and mode of dress
- **Gender identity** = one's own gender identification, which may be the same or opposite of biological fact

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Definitions

- **Transgender** = people who live, or wish to begin living, in the gender role associated with the other sex from the one in which they were born
- **Transsexual** = A person who has had sex-reassignment surgery
- **Sexual Orientation** = The status of being straight, gay or bisexual

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Definitions

- **"Gender identity discrimination"** means treating someone differently (segregating them, denying them benefits) based on the fact that the person identifies with a gender that is different than their biological gender

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What is the Law at the Federal Level?

The Employment Non-Discrimination Act (ENDA)

- First introduced in Congress in 1974
- Since 1994, ENDA has been reintroduced in every session of Congress except one
- Has not been passed by Congress
- If passed, it will prohibit discrimination in hiring and employment on the basis of sexual orientation and gender identity
- Would apply to civilian, non-religious employers with at least 15 employees

What is the Law at the State Level?

- Twenty-two states have laws prohibiting discrimination against individuals based on gender identity and/or sexual orientation:
 - CA, CO, CT, DE, HI, IA, IL, MA, MD, ME, MN, NH, NJ, NM, NV, NY, OR, RI, UT, VT, WA, and WI
 - Also DC, Guam, and Puerto Rico
- Twelve other states, by executive order, have transgender and/or sexual orientation inclusive discrimination prohibitions for state employees:
 - AK, AR, IN, KY, LA, MI, MO, MT, NC, OH, PA, and VA



What is the Law at the Local Level?

- At least 225 cities and counties have laws or ordinances prohibiting discrimination against individuals based on gender identity and/or sexual orientation
- Many major cities and metropolitan areas protect gender identity and expression, including Atlanta, Austin, Baltimore, Boston, Buffalo, Chicago, Dallas, Denver, Detroit, Indianapolis, Los Angeles, Milwaukee, Nashville, New Orleans, New York City, Oakland, Philadelphia, Pittsburgh, San Diego, and San Francisco

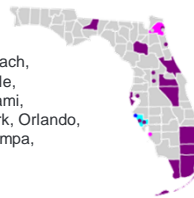
What is the Law in Florida?

- In 2016, Florida lawmakers considered a bill, SB 120, that would add sexual orientation and gender identity to the protected classes under the Florida Civil Rights Act for employment, housing, and public accommodations
- SB 120 failed at the committee level and did not reach the floor for a vote
- Supporters have vowed to bring the bill back every year until it passes



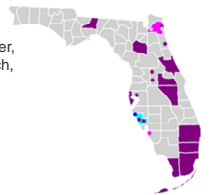
What is the Law in Florida?

- Florida Counties & Cities that prohibit employment discrimination for sexual orientation and gender identity:
 - Alachua, Broward, Leon, Miami-Dade, Monroe, Orange, Osceola, Palm Beach, Pinellas and Volusia
 - Atlantic Beach, Boynton Beach, Cape Coral, Delray Beach, Dunedin, Gainesville, Greenacres, Gulfport, Jacksonville, Key West, Lake Worth, Largo, Leesburg, Mascotte, Miami, Miami Beach, Neptune Beach, North Port, Oakland Park, Orlando, Pembroke Pines, St. Augustine Beach, Tallahassee, Tampa, Venice, West Palm Beach, and Wilton Manors



What is the Law in Florida?

- Florida Counties & Cities that prohibit employment discrimination for sexual orientation only:
 - Sarasota
 - Fort Lauderdale, Hialeah, Hypoluxo, Juno Beach, Jupiter, Miami Shores, Palm Beach Gardens, Royal Palm Beach, Sarasota, St. Petersburg



The Changing Landscape



- As of 2011, there were an estimated 700,000 transgender Americans and the current number is likely much higher
- According to a 2014 study, 90% of transgender employees have experienced harassment, mistreatment, or discrimination at work
- Where state and/or local laws exist, LGBT discrimination complaints are filed at comparable rates to sex and race discrimination

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Application of Title VII to LGBT Employees: Historically

- Prohibits discrimination "because of sex"
- No explicit protections for sexual orientation or gender identity
- Traditional view: discrimination based on gender identity and/or sexual orientation is not covered by the sex discrimination prohibition of Title VII
- Title VII claims by LGBT employees typically dismissed by courts
- *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984): the court held that "sex" under Title VII meant "biological sex" and not "sexual identity"

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Price Waterhouse v. Hopkins (U.S. 1989)

- Female employee alleged denial of partnership in accounting firm was due to gender nonconformity
 - Called "macho"
 - "Overcompensated for being a woman"
 - Needed "course at charm school"
 - Should walk, talk and dress more femininely
 - Should wear make-up and jewelry; style hair
- Supreme Court: Gender stereotyping is actionable under Title VII as discrimination "because of sex"
- Held: Violation of Title VII to deny a woman partnership based on her failure to conform to gender stereotype

Nichols v. Azteca Restaurant Enterprises (9th Cir. 2001)



- Male employee can sue for harassment by male co-workers based on his failure to conform to a masculine stereotype
- *Nichols* spawned a whole new breed of harassment claims:
 - Claims based on insults, comments and taunting of employees based on other employees' perception that they are behaving in a way that is too masculine or too feminine.
 - "Sissy," "wimp" and "girly-man" have become the hot-button slurs of this new generation of harassment suits

Evolution of Gender Identity Claims

- With *Price Waterhouse* and *Nichols* as precedent, as with other laws, the courts began to interpret Title VII expansively to include claims against transgender individuals
- In *Smith v. City of Salem* (6th Cir. 2004), a transsexual fire department lieutenant claimed he was fired from his position because he began dressing like a woman




Smith v. City of Salem (6th Cir. 2004)

"After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex..."



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Smith v. City of Salem (6th Cir. 2004)



... it follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."

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Many Other Gender Stereotyping Cases Followed

- **Ianetta v. Putnam Investments (D. Mass. 2001)** (plaintiff stated a case for sex discrimination involving sexual orientation because discrimination was attributed to his failure to meet a male gender stereotype preferred by the employer)
- **Tronetti v. TLC Healthnet (W.D.N.Y. 2003)** (denying a motion to dismiss where transsexual filed Title VII claim, noting that transsexuals "are not gender-less, they are either male or female and are thus protected under Title VII to the extent they are discriminated against on the basis of sex")
- **Barnes v. City of Cincinnati (6th Cir. 2005)** (issues of transsexualism fall within the definition of sex discrimination, because ultimate issue is gender non-conformity)

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Other Gender Stereotyping Cases, Cont'd

- **Mitchell v. Axcan (W.D. Penn. 2006)** (motion to dismiss denied where transgender individual contended Title VII violation occurred because harassment was due to failure to conform to gender-stereotypes)
- **Creed v. Family Express (N.D. Ind. 2007)** (permitting case of transgender person who sued for sex discrimination under Title VII as the claim was found to involve the employee's appearance or conduct and the employer's stereotypical perceptions)
- **Lopez v. River Oaks Imaging (S.D. Tex. 2008)** (holding that transgender persons were not covered by Title VII *per se*, but protected to the extent they fail to conform to traditional gender stereotypes)

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Other Gender Stereotyping Cases, Cont'd

- **Kastl v. Maricopa County Community College (9th Cir. 2009)** (finding it is unlawful to discriminate against transgender persons because they do not behave in accordance with employer's expectations for men and women; with issue focused on use of restroom prior to completion of sex reassignment surgery)
- **Michaels v. Akal Security (D. Colo. 2010)** (transgender person stated viable claim of gender discrimination under Title VII because the issue was her failure to look like a man)
- **Glenn v. Brumby (11th Cir. 2011)** (motion for summary judgment denied in sex discrimination claim under Title VII because sexual stereotypes involved)

But Contrast

- **Etsitty v. Utah Transit Authority (D. Utah 2005)** (a male bus driver who was terminated when he began presenting at work as a female, but was told when sexual reassignment surgery and process were complete, he could apply for reinstatement. Under these circumstances, the Court found no Title VII violation because the employer did not require conformity to a particular gender stereotype)



Regarding Sexual Orientation, Contrast

- **Christiansen v. Omnicom, Group, Inc. (S.D.N.Y. Mar. 9, 2016)**
 - Holding that it was bound to apply circuit precedent disallowing Title VII sex discrimination claims based on sexual orientation, the court nevertheless included in its decision an extensive critique of that precedent and others, observing:
 - "In light of the EEOC's recent [Baldwin] decision on Title VII's scope, and the demonstrated impracticality of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask - and, lest there be any doubt, this Court is asking - whether that line should be erased."

EEOC Decisions: Sexual Orientation

- **Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015)**
– “Complainant has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”

EEOC Decisions: Gender Identity

- **Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012)** (EEOC held that intentional discrimination against a transgender individual because of that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII)
- **Jameson v. U.S. Postal Service, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013)** (intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment)

EEOC Decisions: Gender Identity

- **Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014)** (employer's failure to revise its records pursuant to changes in gender identity stated a valid Title VII sex discrimination claim)
- **Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)** (EEOC held that an employer's restrictions on a transgender woman's ability to use a common female restroom facility constitutes disparate treatment)

Application of Title VII to LGBT Employees: The New

- **EEOC:** Title VII prohibits discrimination and harassment on the basis of gender identity and sexual orientation
- **DOJ:** In 2014, adopted the position that Title VII protects transgender employees
- **Courts:** increasingly interpreting "because of sex" broadly to include gender identity, not yet as inclined to extend protections for sexual orientation

Generally speaking, lesbian, gay, and bisexual persons have fewer rights than transgender persons in the current climate!

Other Changes to the Legal Landscape

LGBT Executive Orders

- July 2014, President Obama signed two Executive Orders prohibiting discrimination on the basis of sexual orientation and gender identity
- Affects federal employees and employees of federal contractors:
 - Employers with contracts of \$10,000 or more
 - Approximately 21% of U.S. workforce
- No religious exemption

Other Changes to the Legal Landscape

OSHA

- In 2015, OSHA issued Best Practices, "A Guide to Restroom Access to Transgender Workers"
- Recommends allowing transitioning employees to use the restroom of their choice
- Employers may offer (but not *require*) single-use, gender-neutral restrooms



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An Active EEOC

- EEOC Strategic Enforcement Plan FY 2013-2016:
 - Commission recognizes that coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply, are elements of emerging or developing issues
- In FY 2015, EEOC received a total of 1,412 charges that included allegations of sex discrimination related to sexual orientation (1,181) and/or gender identity/transgender status (271):
 - This represents an increase of approximately 28% over the total LGBT charges filed in FY 2014 (1,100).

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Breakdown of 2015 EEOC LGBT Charges

FY 2015				
	Total LGBT	Sex-Gender Identity/Transgender	Sex-Sexual Orientation	
Total Receipts	1,412	271	1,181	
Total Resolutions	1,135	184	975	
Resolutions	Settlements	91 (8.0%)	12 (6.5%)	95 (8.7%)
	Withdrawals w/Benefits	57 (5.0%)	63 (3.5%)	53 (5.4%)
	Administrative Closures	203 (17.9%)	38 (20.7%)	168 (17.2%)
	No Reasonable Cause	737 (64.9%)	110 (59.8%)	644 (66.1%)
	Reasonable Cause	42 (3.7%)	19 (9.8%)	25 (2.6%)
Reasonable Cause	Successful Conciliations	13 (1.1%)	7 (3.8%)	6 (0.6%)
	Unsuccessful Conciliations	29 (2.6%)	11 (6.0%)	19 (1.9%)
	Merit Resolutions	195 (17.2%)	36 (19.6%)	163 (16.7%)
	Monetary Benefits (Millions)*	\$3.3	\$0.3	\$3.0

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EEOC Enforcement Actions: Transgender

- In September 2014, EEOC filed its first two transgender suits against private employers:
 - EEOC v. G.R. Harris Funeral Homes:**
 - Filed in federal court in Michigan alleging wrongful termination after disclosing intention to transition from one sex to the other; Court denied motion to dismiss due to possible sex stereotyping
 - EEOC v. Lakeland Eye Clinic:**
 - Filed in federal court in Florida against an employer for allegedly firing its director of hearing services after she began wearing feminine clothing to work and informed the clinic she was transitioning from male to female.

EEOC Enforcement Actions: Sexual Orientation

- In March 2016, EEOC filed its first two lawsuits against private employers alleging discrimination and harassment based on sexual orientation:
 - *EEOC v. Scott Medical Health Center (PA)*
 - *EEOC v. Pallet Companies (MD)*

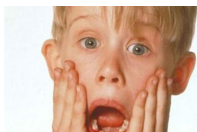
What Does This Mean For Employers?

- Examples of issues we are seeing:
 - Persons who want to use the restroom of the gender with which they identify
 - Persons who want to dress in the gender with which they identify
 - Persons going through chemical and/or surgical procedures to change gender
 - Persons who want to be called by the name or pronoun of their self-identification
 - Persons who want to compete or participate in events that are associated with the gender with which they identify
 - An accommodated employee may be subject to bullying, hazing, harassment, or isolation at work, requiring the intervention of the employer

What Does This Mean For Employers?

Competing Issues to Consider: Customer/Client Concerns

- Others might object to the presence of the transgender employee, requiring intervention of the employer
- There may be religious or privacy objections which require the intervention of the employer
 - "But other employees are complaining..."
 - "What will our customers think?"
 - "We'll lose business"



Keep in Mind

- Privacy concerns have generally been rejected by the courts:
 - **Cruzan v. Special School District No. 1 (8th Cir. 2002)** (a female employee sued her employer over its decision to allow a transsexual co-worker to use the female restroom, claiming creation of a hostile work environment. The Court rejected the privacy notions and religious concerns, finding there was an alternative restroom for the offended plaintiff)
- Perceived Community Bias?
 - **Schroerer v. Billington (D.D.C. 2008)**: “Deference to the real or presumed biases of others is discrimination, no less than if the employer acts on behalf of his own prejudices.”

So, What Do You Do?

- When faced with a request to accommodate a transgender employee, what are the options for approaching the issue?



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Dressing the Part



- Employers have the right to enforce policies relating to employees' physical appearance and attire:
 - Safety, professionalism/public image, productivity
- May be required to allow employees to dress consistent with gender identity
- Do not require adherence to male/female dress code
- Avoid gender stereotyping
- Accommodate during “transition” – determine which policies apply

Which Way to the Restroom?

- **March 2015:** Utah enacts law requiring employers to afford "reasonable accommodations based on gender identity" to employees, including in restrooms
- **May 2015:** OSHA requires employers to provide "meaningful" access to workplace restrooms, including for transgender employees
- **Spring 2016:** North Carolina and Mississippi regulations regarding bathrooms stir national concern

Restroom Takeaways

- Check for local laws and regulations
- Do not require transgender employees to use certain restrooms
- Allow employee to choose based on gender identity
- Suggest other, more private facilities if available
- Consider unisex/gender neutral designation




Best Practices

- **Awareness:** Be aware of all applicable state and local non-discrimination laws where business has operations
- **Compliance:** Ensure policies comply with all state and local laws and workplace non-discrimination objectives
- **Consistency:** Ensure all hiring and employment decisions are based solely on merit and not on discriminatory preconceived notions and gender stereotypes:
 - Do not require medical documentation or "proof" of transgender status



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Best Practices



- **Investigate:** Be alert to bullying and other unprofessional conduct, and discipline where necessary
- **Educate:** Train employees on policies and place appropriate emphasis on inclusive company culture
- **Accommodate** (where possible): Good will (even if not legally required) can go a long way

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Final Questions?

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THANK YOU

FOR THIS OPPORTUNITY

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WHAT'S NEW IN WAGE AND HOUR

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Overview


- Changes are here and continue to come
- Sense of uncertainty and lack of clarity
- Federal, state and local level
- Today's focus: federal level
- Prepare, enforce policies, and continued vigilance
- Control what you can

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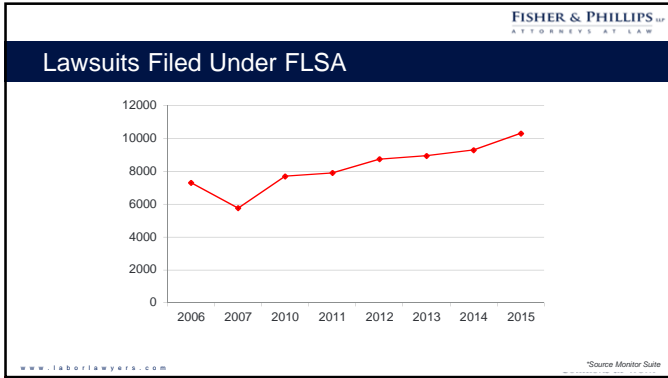
“Conventional Wisdom”

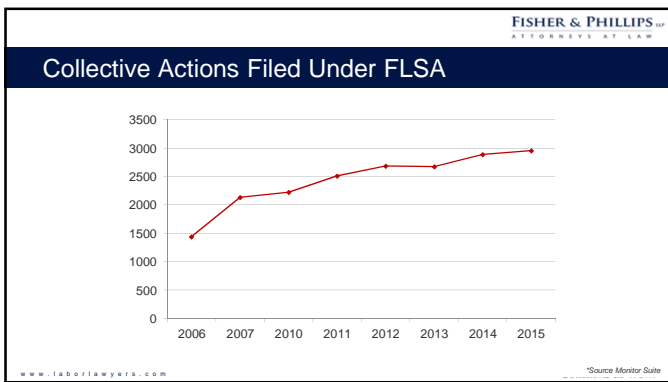
- “Conventional wisdom” is a major FLSA problem
 - “Everybody I know pays this way.”
 - “Salaried people don’t have to be paid overtime.”
 - “This is what our employees **want** us to do.”
 - “The employee **agreed** to this.”
 - “We’re too small for anyone to sue us.”



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Florida Remains FLSA Hotbed Nationally

- Middle District of Florida accounts for 7% of all filings nationwide
- Taking all three Florida districts together, they account for 19.4% of all suits

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Litigation Landscape

- Thousands of FLSA lawsuits filed in the last decade
- No slowdown in 2015, 2016 probably the same
- Both individual claims and “collective actions”
- Hundreds of millions (billions?) in judgments and settlements
- Count on it: This **will** continue

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U.S. Labor Department

- USDOL has hired hundreds more investigators
- Now trained and experienced, “true believer” mindset
- Tough enforcement, including “directed” audits
- Adversarial, “employers-are-scofflaws” attitude
- Using “shame,” press releases, adverse publicity as tools

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U.S. Labor Department

- Continued campaign to raise FLSA minimum wage, to have a “living wage”
- Eventually to \$10.10 or even higher (maybe \$15.00?)
- Relentless efforts to recover maximum back wages and other amounts (like “liquidated damages”)
- Continued USDOL campaign relating to “misclassification,” expand to “joint employment”

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Fissured Workplace

- Increased efforts to hold franchisors jointly responsible for franchisee violations
- Efforts to hold brandholder responsible for contractor violations
- Efforts to strong-arm franchisor/brandholder compliance agreements
- Attention to “leased” and “temporary” employees

Fissured Workplace

- “Misclassification initiative”: Focus upon independent contractors, “1099 workers,” “contract workers,” etc.
- Memorandum of understanding with IRS
- Memoranda of understanding with 26 states
- “[To] work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws”

Some Other **Hot** Issues

- “Off-the-clock” work, inaccurate time records:
 - Basic obligation: to keep **accurate records** of all time a nonexempt employee works each workday and each workweek
- Overtime violations:
 - Basic obligation: must pay nonexempt employees **1.5** times the **“regular rate”** for time worked over **40 hours** in a seven-day **“workweek”**
 - Not including all wages in the “regular rate” (bonuses, commissions, incentives)

Some Other **Hot** Issues

- Unlawful deductions/employee payments:
 - Uniforms, shortages, property damage, holding final paycheck
 - Can't cut into FLSA minimum wage or overtime
- Incorrectly treating employees as exempt:
 - Specific criteria apply, the employer's burden to prove they are met
 - Exemptions relate to individuals – not job descriptions, positions, etc.
 - Detailed, accurate, current job information is essential

Exemption Changes

- Proposed new rules for the so-called "white collar" exemptions
- Proposed minimum salary (now \$455 per week) would be at least \$921 per week (\$47,892 annualized)
- USDOL projects that it might be at least \$970 per week (\$50,440 annualized) once rule takes effect
- Requirement applies each **pay period (not annualized)**
- Proposed minimum 52-week threshold for "highly compensated employee" exemption would rise from \$100,000 to \$122,148

Exemption Changes

- Salary level would be subject to automatic annual "update" based upon:
 - Urban consumer price index, or
 - 40th percentile of BLS "non-hourly" pay statistics
- Annual "highly compensated employee" threshold "update"
- USDOL is considering whether "nondiscretionary bonuses and incentive payments" should be creditable towards the minimum salary

Exemption Changes

- Salary-level change will **not** affect employees who are:
 - Not subject to the salary test, or
 - Are exempt under some other FLSA provision
- For example, practicing doctors and lawyers and “outside salesmen” are not subject to the salary test
- “Teachers” are not subject to the salary test:
 - (Teaching, tutoring, instructing, or lecturing in the intellectual activity of imparting knowledge as a teacher in the educational establishment by which he or she is employed. USDOL scrutinizes preschools, daycare.)

Exemption Changes

- Unclear whether final regulation will change the “duties” tests, such as:
 - Strict “more than 50% of the time in exempt work” requirement?
 - “Concurrent” non-exempt work might count against this threshold?
 - A strict percentage limitation on non-exempt work?
- USDOL’s true goals: Reducing the number of exempt employees as much as possible, paying exempt employees more

Exemption Changes

- Period for comments closed on September 4, timing of final regulations is uncertain
- DOL did announce last month they expect to release the new salary levels in July, implement 60 days later
- Employers should be considering what they want to do
- Publicity will cause all employees (exempt or not) to focus upon their pay (the 2004 changes did):

Are You Sure That You Are 100% In Compliance ?

What Should You Do

- Find out **now** where you stand, especially if it's been a while since you looked
- Identify any **current** non-compliance
- For example, are you **sure** you are accurately tracking worktime, properly computing overtime, making only lawful deductions, able to defend each exemption, correct about all "contractors" . . . ?
- Get it right **before** employees start asking, *before* "wolf is at the door"

Who Cares

- IRS:
 - Estimated loss of \$3 to \$5 Billion each year due to misclassification
- State Unemployment Tax Agencies
- Department of Labor
 - Works in tandem with IRS
- Labor and Unions
 - Potential dues-paying members
- Class/Collective Action Lawyers



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Risks of Misclassification

- Minimum wage, overtime, and other unpaid wages
- Back taxes
- Unemployment audits
- Social Security contributions
- Unpaid benefits
- Employment law violations
- Workers' Compensation coverage
- Penalties and fines
- Litigation costs and attorney fees

So What Rules Should I Follow

- Difficult to provide blanket recommendations, because different tests are applied in different situations:
 - IRS & State tax departments
 - Department of Labor
 - NLRB
 - Unemployment claims
 - Workers' compensation claims
 - State and federal courts



New Guidance from the USDOL

- On July 15, 2015, the DOL issued an Administrator's Interpretation stating that "most workers (who are classified as independent contractors) are employees under the FLSA's broad definitions."
- The new guidance concludes that the FLSA's language of "to suffer or permit to work," interpreted through the **economic realities** test, is significantly broad, and as a result, the DOL concludes that most workers are employees under the FLSA.
- The defining question is whether the worker is truly operating a separate business that is economically independent from the employer.
- If the worker is economically dependent on the employer, the worker is an employee in the DOL's eyes.

Economic Realities Test

- The USDOL will evaluate the following factors to determine whether a worker is an employee or an independent contractor:
 - The extent to which the work is an integral part of the employer's business
 - The worker's opportunity for profit or loss
 - The extent of the investments of the employer and the worker
- Whether the work requires special skills
- The permanency of the relationship
- The degree of control exercised by the employer

What Does This Mean?

- An IC classification is more likely for a worker who:
 - Can earn a profit or suffer a loss from work
 - Furnishes needed tools/equipment
 - Is paid by the job
 - Works for more than 1 organization
 - Invests in equipment/facilities
 - Pays his/her own business and traveling expenses
 - Hires and pays assistants
 - Sets his/her own working hours

On The Other Hand

- An IC classification is unlikely for a worker who:
 - Can be fired at any time
 - Is paid by the hour
 - Receives instructions from the organization
 - Receives training from the organization
 - Works only for the hiring organization
 - Receives employee benefits
 - Has the right to quit without incurring liability
 - Provides services that are integral to the organization's purpose

What If I Think An IC Is Misclassified?

- 3 Options:
 - Do nothing
 - Reclassify the worker to employee status
 - Retain as IC but restructure the working relationship



What Are The Consequences?

- Misclassifying an employee as an IC may require you to pay:
 - The employer and employee's share of Medicare and Social Security
 - Federal and state income taxes that should have been withheld
 - Federal and state unemployment taxes
 - Overtime
 - Benefits



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Steps to Take Now - Specific

- Identify exempt jobs with salaries below \$50,440/year
- Increase salary or pay overtime?
 - Test hours worked / week
 - Calculate what hourly rate + overtime would look like and compare to salary
 - Consider lowering hourly rate
 - Consider limiting hours worked to 40
- How will you pay?
 - Salaried eligible for overtime? May not be same salary when overtime triggered
 - Hourly eligible for overtime? May be less than hour for hour rate

Steps to Take Now - General

- Review job descriptions:
 - Consider assigning exempt work to other exempt employees
 - Make sure they support exempt status
- Check time tracking system
- Audit exempt status and make overdue changes if needed
- Consider hiring more full-time, part-time, or seasonal employees

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Steps to Take Now - General

- Get "buy in"
 - Educate all senior administrators
 - Coordinate with CFO/Budget and Payroll Administrator
- Communicate
 - Plan communication strategy for employees
 - Prepare talking points and FAQ's
- Training
 - Train managers with reclassified employees
 - Train hourly employees that used to be exempt

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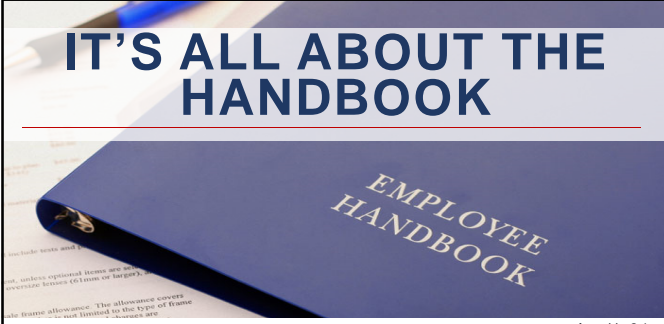


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IT'S ALL ABOUT THE HANDBOOK



EMPLOYEE HANDBOOK

Presented by:
Matt Westerman | James Douglass

April 21
2016

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But First, Let's Talk Handbook and Policy Basics

1. Have you found all policies and procedures relating to employment issues?
2. List the policies, procedures and handbooks and ask:
 - Why do I need each of those policies?
 - Do I use them?
 - How do they help me run my business?

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The Most Common Mistakes

- Not tailoring to your business or location
- Too long
- Forgetting to update
- Trying to solve every problem
- Not following through
- Creating bad evidence or obligations
- Becoming irrelevant
- Giving employees "rights"
- Making it a procedure manual for management



Handbook Essentials

- At-will
- EEO
- No Harassment
- Reasonable Accommodations
- Drug and Alcohol
- Open Door/Reporting Procedures
- Basic Work Rules
- Electronic Communications
- Work Schedule
 - Absenteeism/Tardiness
 - Overtime
- Timekeeping
- Leave Policies
 - Jury Duty
 - Witness Duty
 - Voting Leave
 - FMLA
- Protecting Information and Property

Thorough At-Will Language

- With or without cause
- With or without notice
- Supersedes any prior agreements
- Can only be changed in writing
- Signed by the Owner or President

Some of The Most Important Policies

- Equal Employment Opportunity
- Anti-Harassment
- Anti-Retaliation
- Problem Solving
- Accommodations
- Leave of Absences



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Leaves of Absences (Types)

- Non-Medical Leaves
 - Bereavement
 - Domestic Violence
 - Civic Responsibilities
 - Jury or witness duty
 - Voting
 - Eligibility Duration
 - Military
 - Personal
 - Sick
- FMLA Leave
 - Covered Employees
 - Employee Eligibility
 - Employees get 12 weeks:
 - Job protected
 - Benefits continued
 - Unpaid leave
- Non-FMLA Medical Leave

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**Reasonable Accommodations
(EEOC Guidance & Enforcement)**

- Inflexible leave policies
- Requiring employees to return to work without restrictions
- Counting FMLA and ADA protected absences under no fault attendance policies

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Inflexible Leave Policies


- Automatic termination upon expiration of leave = trouble
- "No fault" absence policies = trouble
 - No individualized assessment
 - No opportunity to determine if extended leave is a reasonable accommodation
- 100% return to work policies = trouble
 - Need to consider modified duty and/or reduced work schedules

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Leave: Best Practices

- Revise inflexible leave policies
- Eliminate reference to "100% recovered" or "full duty"
- Train supervisors to recognize accommodation requests
- Engage in a dialogue with each employee who requests leave
- Ask when the employee anticipates returning to work




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NLRB Attacks On Handbooks and Policies

- NLRB has waged war on employee handbooks and rules
- Applies in union and non-union companies – based on "Section 7" rights
- Unlawful policies "discourage" union participation



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Basis For The NLRB's Attacks

- § 7 – "Employees shall have the right...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"
- § 8(a)(1) – "It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed in §7 of this act"

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I'm Not A Union Employer, So Why Should I Care About NLRB Handbooks Attacks?

- Even if no union is involved, if you fire an employee for violation of an invalid rule, you'll be stuck with reinstatement, back pay and posting an "NLRB Notice."
- Unlawful rules and procedures could be used by a union to overturn a "No" vote.
- You might have to post an NLRB Notice acknowledging our bad behavior and reminding employees of their right to organize.
- Changes harm your ability to investigate wrongdoing, enforce No Harassment and Professionalism requirements or protect the Company's interest

How Are Employee Handbooks Impacted?

- On March 18, 2015 NLRB General Counsel issued a memorandum titled *Report of the General Counsel Concerning Employer Rules*.
- Even though a rule may not explicitly prohibit Section 7 activity, it can still be found unlawful in one of three circumstances:
 - Employees could reasonably construe the rules language to prohibit Section 7 activity thereby making the Rule facially invalid
 - The rule is promulgated by the employer in response to union or other Section 7 activity or
 - The rule, even though facially valid, is applied in such a way as to restrict the employee's exercise of Section 7 rights.

Confidentiality Policies

- "A confidentiality rule that broadly encompasses 'employee' or 'personnel' information, without further clarification, will reasonably be construed by employees to restrict Section 7- protected communications."



Confidentiality Policies

General Counsel found the following policies to be facially **lawful**:

- No unauthorized disclosure of "business 'secrets' or other confidential information."
- "Misuse or other unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."
- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."

Employee Conduct Towards the Company and Supervisors

- "A rule that prohibits employees from engaging in 'disrespectful,' 'negative,' 'inappropriate,' or 'rude' conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful."
- He also noted that an employee's criticism of an employer does not lose its protection under the NLRA if the criticism is false or defamatory but rather, it must be "maliciously false."

The General Counsel Cited the Following as Overbroad Unlawful Rules:

- "[B]e respectful to the company, other employees, customers, partners, and competitors;"
- Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors";
- "Be respectful of others and the Company;"
- No "[d]efamatory, libelous, slanderous, or discriminatory, comments about [the Company], its customers and/or competitors, its employees or management;
- "Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation;"
- Do not make "[s]tatements that damage the company or the company's reputation or that disrupt or damage the company's business relationships."

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The General Counsel Cited the Following as **Lawful Rules:**

- No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.
- "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."
- "Being insubordinate, threatening, intimidating, and disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in discipline."

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Conduct Toward Fellow Employees

- Employees have Section 7 rights to discuss terms and conditions of employment and criticize the Company's labor policies. They also have the right "to argue and debate with each other about unions, management, and their terms and conditions of employment. These discussions can become contentious, but ... protected concerted speech will not lose it protection even if it includes intemperate, abusive and inaccurate statements."

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Conduct Toward Fellow Employees

Examples of **unlawful** employee conduct rules toward fellow employees:

- "Don't pick fights" online.
- Don't make "insulting, embarrassing, hurtful or abusive comments about other company employees online", and "avoid the use of offensive, derogatory, or prejudicial comments."
- Do not send "unwanted, offensive or inappropriate" emails.

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Conduct Toward Fellow Employees

The following types of rules would be **lawful**:

- Don't make "inappropriate gestures, including visual staring."
- Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message."
- "Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."
- No "use of racial slurs, derogatory comments, or insults."

Use of Company's Logos, Copyrights and Trademarks

A company's name or logo might be protected by intellectual property laws, employees have the "right to use the name and logo on picket signs, leaflets and other protest material. Employer proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity." Based on that rationale, he noted the following types of rules would be **unlawful**:

- Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.
- Do not use "other people's property," such as trademarks, without permission in social media.
- "Company logos and trademarks may not be used without written consent."

Use of Company's Logos, Copyrights and Trademarks

- The following type of policy would be **lawful**:
 - "Respect all copyright and other intellectual property laws. For [the Employer's] protection as well as your own, it is critical that you show proper respect for the law governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer's] own copyrights, trademarks, and brands."

Restrictions on Photography and Recording

- Section 7 protects the right of employees to “photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings.” Thus, he concluded the following types of policies would be **unlawful**:
 - “Taking unauthorized pictures or video on company property” is prohibited.
 - “No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any [Employer] employee or [Employer] operation.”

Restrictions on Photography and Recording

- A total ban on use or possession of personal electronic equipment on Employer property.
- A prohibition on personal computers or data storage devices on Employer property.
- Prohibition from wearing cell phones, making personal calls or viewing or sending texts “while on duty.”

Restricting Employees From Leaving Work

- “Rules that regulate when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts.” The following rules would be **unlawful** because they contain broad prohibitions on walking off the job:
 - “Failure to report to your scheduled shift for more than three consecutive days without prior authorization or walking off the job during scheduled shift” is prohibited.
 - “Walking off the job” is prohibited.

Restricting Employees From Leaving Work

- The following rule would be **lawful**:
 - “Entering or leaving Company property without permission may result in discharge.”

How Are Employee Handbooks Impacted?

- E-mail Use:
 - Many companies allow employees to have off-duty access to the email system, particularly through mobile devices that might be linked to the email system.
 - The NLRB historically did not allow employee access for union organizing or other purposes.
 - The NLRB recently changed its position and now allows employees with off duty access to use the company’s email system for concerted activity, including union organizing.

Practical Impact

- Handbook rules and revisions to rules must be narrowly crafted in order to comply with the NLRB guidelines. Provide additional context to broadly written rules.
- There is no private right of action under the NLRA but a union or an employee can file an unfair labor practice charge with the NLRB (Region 12) and the Region will investigate and review your entire handbook.

Practical Impact

- If the Region determines that a rule is facially unlawful, or unlawful in its application, the Region will mandate that you change the rule or participate in an administrative hearing to allow an ALJ to decide the issue.
- If an employee is discharged for a rule violation and the rule is subsequently found to be unlawful, the employee's discharge is unlawful unless the employer can demonstrate the employee's conduct actually interfered with the employee's own work or actually interfered with operations (*The Continental Group*, 2011).



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