UNC
SCHOOL OF GOVERNMENT

PUBLIC EMPLOYMENT LAW UPDATE
MAY 10, 2019

AGENDA

7:45	**Registration Opens**
9:00–9:50	**Sex, Money, Religion and More: Latest Word from the Federal Courts** Kimberly J. Korando, Partner, Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, Raleigh
9:50–10:30	**TSERS and LGERS Pension-Capping: The Law and the Litigation** Michael Crowell, Attorney, Carrboro
10:30	**Break**
11:00–11:40	**Sexual Orientation and Transgender Status Discrimination** Diane Juffras, School of Government
11:40–12:20	**Recent Developments: North Carolina Courts and Public Employment** Bob Joyce, School of Government
12:20–1:30	**Lunch**
1:30–2:30	**Panel on CBD Oil and Employee Drug-Testing** Phil Dixon, Jr., School of Government Vernon Smith, Director of DOT Compliance, Safe-T-Works, Inc. Bob Joyce, School of Government
2:30–2:45	**Break**
2:45–4:00	**Wage and Hour Update: New FLSA Regulations on Overtime, the Regular Rate and Joint Employment, One New 4th Cir. Case on the Regular Rate and One Important DOL Opinion Letter on the FMLA** Diane Juffras, School of Government
4:00	**Adjourn**

Speaker Biographies

Kimberly Korando (*Recent Developments: Federal Courts***) –** Kim leads Smith Anderson's Employment, Labor and Human Resources practice group. She serves as general outside employment, labor and human resources counsel to public entities and private companies in a wide variety of industries. She is also retained as special counsel to conduct independent internal investigations into allegations of harassment, discrimination, code of conduct violations, whistleblowing and embezzlement and root cause of management failures. Kim regularly collaborates with employers developing in-house training programs and has trained thousands of supervisors, managers and Human Resources professionals in legally compliant employment practices, as well as investigators for the U.S. Equal Employment Opportunity Commission. You can contact Kim at kkorando@smithlaw.com .

Michael Crowell (*TSERS and LGERS Pension Capping*) – Michael is a lawyer in solo law practice in Carrboro, NC. For more than two decades at the firm of Tharrington Smith in Raleigh he represented clients in a wide of matters, including elections law, education law, and alcoholic beverage control law. Michael has had two stints as a member of the faculty of the Institute of Government (and then the School of Government), one (1970-1985) before his Raleigh law practice and one after (2007-2015). After retiring from the School, he established his current law practice, where he sues people who need suing. Michael is a graduate of the University of North Carolina at Chapel Hill and the Harvard Law School. He is an award-winning painter. You can contact Michael at lawyercrowell@gmail.com .

Diane M. Juffras (*Sexual Orientation and Transgender Status Discrimination; Wage and Hour Update*) – Diane is Albert & Gladys Coates Distinguished Term Professor of Public Law and Government at the School of Government, where she specializes in public employment law. Before joining the School of Government in 2001, she was in private legal practice in Connecticut. You can contact Diane at (919) 843-4926 or at juffras@sog.unc.edu .

Bob Joyce (*Recent Developments: North Carolina Courts*) – Bob is the Charles Edwin Hinsdale Professor of Public Law and Government at the School of Government, where he works in the areas of employment law, school law (especially schools as employers), higher education law and elections law. Bob joined the School of Government (then the Institute of Government) in 1980 after practicing law in both New York City and Pittsboro. You can contact Bob at (919) 966-6860 or at joyce@sog.unc.edu .

Phil Dixon, Jr. (*CBD Oil Panel*) – Phil joined the School of Government in 2017after working for eight years as an attorney in eastern North Carolina, focusing primarily on criminal defense and related matters. He earned a BA from UNC- Chapel Hill and a JD with highest honors from North Carolina Central University. At the School, he works on criminal law issues with the indigent education group. You can contact him at dixon@sog.unc.edu .

Vernon Smith (*CBD Oil Panel*) – After graduating from High Point College (now University) with a B.S. in Mathematics, Vernon worked with Guilford County Schools, first as a teacher and coach for 17 years, then as the Supervisor of Route Operations and Compliance for Guilford County Schools, where he administered the drug and alcohol testing program for the entire system. After retiring, he began a second career in the drug and alcohol testing industry. Vernon has served as the Director of DOT Compliance for Safe-T-Works, Inc. since early 2014. You can contact him at vsmith@safetworksinc.com .

Sex, Money, Religion and More: Latest Word from the Federal Courts

Kimberly J. Korando
Partner, Smith, Anderson, Blount, Dorset, Mitchell & Jernigan, LLP
Raleigh

SMITH ANDERSON

Sex, Money, Religion and More:
Latest Word from the Federal Courts

Kimberly J. Korando
May 2019

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Harassment

False rumor that employee slept with her boss to get a promotion can state a claim for sexual harassment

- Court recognizes effect of negative stereotypes (sex to get ahead, the "b-word" and working mother stigma)

Parker v. Reema Consulting Services, Inc. (4th Cir. 2019)

Harassment

Objectively severe or pervasive to establish claim for sexual harassment

- Invading personal space (blocking path in hall, placing chin on female firefighter shoulder and positioning body right up against employee)
- Comments (wanting to see her in bathing suit and asking if she could handle a big hose)
- **Suggesting she and boss were having sexual relationship**

Hernandez v. Fairfax County, 130 FEP 1195 (4th Cir. 2018)

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Harassment

Denying voluntary overtime is a tangible employment action

- Even if employee does not lose income

Ray v. International Paper Company (4th Cir. 2018)

Equal Pay

EEOC v. Maryland Insurance Administration (4th Cir. 2018)

- Cordaro, Green, & Rogers are women who were hired by MIA as Fraud Investigators
- They learned that they were paid less than four male Fraud Investigators
- EEOC sued MIA on their behalf, alleging Equal Pay Act (EPA) violation
- Claim dismissed – pay disparity was based on factors other than sex
- Appeal

Equal Pay

- EPA requires that men and women receive equal pay for equal work
- A *prima facie* case arises when:
  - Employees of opposite sex are paid different wages
  - For equal work on jobs requiring equal skill, effort and responsibility
  - That is performed under similar working conditions
- No evidence of discriminatory intent is needed

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Equal Pay

- Once a *prima facie* case is established, employer must prove that unequal pay is due to one of these:
  - seniority system
  - merit system
  - quantity or quality of output
  - "any other factor other than sex"
- Employer must prove that the proffered non-sex reason does in fact explain the disparity and no rational jury could conclude otherwise
  - Evidence that a non-sex reason *could* explain the disparity is insufficient

Equal Pay

- In MIA:
  - Fact that many male Fraud Investigators were paid less than the plaintiffs did not defeat claim
  - Greater qualifications, certifications, and employment history *could* be valid reasons for a pay disparity, but MIA failed to prove that those *were* in fact the reasons
  - So, jury must decide case

Equal Pay

Spencer v. Virginia State University (4th Cir. 2019)

- Spencer (female) sociology professor paid $70,000 salary, median salary for men in department
- Spencer compared her pay to two male sociology professors paid over $100,00 salary
- Spencer sued for EPA and Title VII violation

Equal Pay

- To establish EPA claim, work must be substantially equal in skill, effort and responsibility
  - Simply showing that work is of comparable value is not sufficient
  - Broad generalizations at high level of abstraction is not sufficient (e.g., preparing syllabi, instruction, managing classroom, grading)
    - Compare middle school teacher and college engineering professor
    - "not interchangeable like widgets…"
  - Market forces of *position* may be considered

Equal Pay

- Court acknowledges red-circling as defense
- Erroneous application of red-circling policy did not defeat defense

Title VII Compensation Claim

- Unlike EPA, Title VII claim:
  - requires establishing intentional discrimination
  - but only requires that jobs are similar, not equal

Title VII Compensation Claim

- Similarity standard:
  - Same job description
  - Subject to same standards
  - Subordinate to same supervisor
  - Comparable in factors considered by employer (e.g., experience, education)
- Comparators must be similarly situated in all respects

Religion

EEOC v. Consol Energy (4th Cir. 2017)

- Butcher was a coal miner for 40 years
- Company installed biometric hand-scanner for recording attendance
- Butcher objected on religious grounds--He believed hand-scanner would give him Mark of the Beast, allowing him to be manipulated by the Antichrist

Religion

- Company requested letter from a pastor supporting his request
- Company then gave him a letter from the scanner manufacturer, which explained that:
  - No mark made by the scanner
  - Mark of the Beast is only associated with right hand, so Butcher should let his left hand be scanned
- Butcher disagreed with company's interpretation of the Book of Revelations

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Religion

- Two other employees requested and were granted accommodation from scanning due to hand injuries
- Company accommodated requests

Religion

- Butcher considered left hand proposal, but, after reviewing the Scriptures and praying, he feared he would be "tormented with fire and brimstone" if he did
- Company responded that, he would be progressively disciplined each time he refused the scan, which ultimately would lead to discharge
- Butcher "retired"

Religion

- EEOC filed lawsuit alleging company violated Title VII by failing to accommodate Butcher's religious belief, culminating in his constructive discharge
- EEOC won at trial
  - $150,000 in compensatory damages
  - $450,000 in front and back pay
- Company appealed

Religion

- Title VII:
  - prohibits discrimination because of religion
  - requires reasonable accommodations for religious beliefs unless undue hardship
- To establish claim employee must:
  - have bona fide religious belief that conflicts with an employment requirement
  - inform the employer of the belief
  - be disciplined for failing to comply

Religion

Practical Tips

- Attempting to challenge the legitimacy of a religious belief is a losing strategy
- Don't forget that Title VII's prohibition on religion discrimination includes an accommodation obligation
- Use common sense
  - Company could have accommodated his request with no cost
  - Instead, it picked an expensive legal fight and lost
  - Over four years of litigation and over $1 million in cost

Retaliation

Netter v. Barnes (4th Cir. 2018)

- Employee's unauthorized review and duplication of confidential personnel records to provide HR office in support her discrimination complaint violated state law (NCGS 153A-98(f))
- Employer fired employee for this illegal action
- Employee alleges that her action was protected activity

Retaliation

Netter v. Barnes (4th Cir. 2018) *(con't)*

- Court holds that illegal activity to support claim of discrimination is not protected activity
  - Mere violation of confidentiality policy would be protected
  - Court declines to decide whether state law can validly be applied to prohibit employee from disclosing the evidence to EEOC in confidence

Retaliation

Villa v. Cavamezze Grill (4th Cir. 2018)

- Firing employee for knowingly fabricating false claim of discrimination/harassment does not violation Title VII opposition clause
- Firing employee for participating in EEOC proceeding (including false testimony) is prohibited by Title VII participation clause

Retaliation

Villa v. Cavamezze Grill (4th Cir. 2018) *(con't)*

- Because its investigation led it to conclude in good faith that Villa had simply made up her conversation with Bonilla, Cava's reason for terminating her was necessarily *not* retaliatory.
- If Villa was fired for misconduct she did not actually engage in, that is unfortunate, but a good-faith factual mistake is not the stuff of which Title VII violations are made.

Retaliation

Villa v. Cavamezze Grill (4th Cir. 2018) *(con't)*

- "[W]hen an employer is presented with a 'he said, she said' set of facts involving two employees," and the employer disbelieves the employee and disciplines her, the employer is not liable so long as it "took the adverse action because of a good faith belief that the employee made false accusations."
- "When an employer is told of improper conduct at its workplace, the employer can lawfully ask: is the accusation true? When the resulting employer's investigation (not tied to the government) produces contradictory accounts of significant historical events, the employer can lawfully make a choice between the conflicting versions—that is, to accept one as true and to reject one as fictitious—at least, as long as the choice is an honest choice."

ADA

EEOC v. McLeod Health, Inc. (4th Cir. 2018)

- Employee had mobility disability that affected stability
- Job involved employee driving to a number of employer sites
- After demonstrating performance problems and falling 3 times, employee was required to take fitness for duty exam

ADA

EEOC v. McLeod Health, Inc. (4th Cir. 2018)

- FFE resulted in recommended accommodations:
  - 10-mile travel limitation
  - Use of motorized scooter or other assistive device
  - Parking space without curb

ADA

EEOC v. McLeod Health, Inc. (4th Cir. 2018)

- Based on FFE recommended accommodations, employer determined that employee could not travel and, as such, could not perform essential functions of job
- Employee was placed on leave and told that she could submit her own doctor reports; she failed to do so
- Employer assigned recruiter to assist employee in identifying another position; available positions were lower paying
- Employee was terminated after 6 months on leave

ADA

EEOC v. McLeod Health, Inc. (4th Cir. 2018)

- Employee filed claim that required FFE violated the ADA because there was a lack of objective evidence that such an exam was necessary
- To legally require the FFE, the employer must show:
  - Employee's ability to perform essential job function is impaired by medical condition, or
  - Employee can perform all essential job functions but doing so will pose direct threat to safety or health

ADA

EEOC v. McLeod Health, Inc. (4th Cir. 2018)

- Court holds that threshold question is whether navigating to/within sites is essential job function
- To legally require the FFE, the employer must show:
  - Employee's ability to perform essential job function is impaired by medical condition, or
  - Employee can perform all essential job functions but doing so will pose direct threat to safety or health
- Court holds that jury must decide

ADA

EEOC v. McLeod Health, Inc. (4th Cir. 2018)

- Court holds that additional question is whether employer had reasonable belief based on objective evidence that employee was unable to navigate to/within sites
- The objective evidence was insufficient::
  - Employee had done job for 28 years
  - 3 falls in 4 months; no significant injury
  - Performance problems were missed deadlines, late, struggle with work load
  - Employee looked winded and groggy at work
- Court holds that jury must decide

FMLA

Hannah P v. Coats (4th Cir. 2019)

- Intelligence analyst diagnosed with depression
- Notifies 2 supervisors of diagnosis but does not request accommodation
- Employee takes meds for condition

FMLA

Hannah P v. Coats (4th Cir. 2019)

- Employee attendance becomes erratic
- Supervisors notice employee is lethargic and unconcerned about attendance and demeanor flat
- Employee tells supervisors that there has been recent change in meds

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FMLA

Hannah P v. Coats (4th Cir. 2019)

- Employee and supervisors devise plan to accommodate attendance issues
- Employee does not follow plan
- Plan was modified; employee still does not follow plan
- Employee was referred to EAP
- Employee requested and was granted leave
- Employee applied for and was not selected for other positions when her contract assignment ended

FMLA

Hannah P v. Coats (4th Cir. 2019)

- Employee disclosure of depression diagnosis put supervisor on notice that employee could qualify for FMLA protection
- Once on notice, it is employer responsibility to inquire further about need for FMLA
- Had employee been afforded FMLA, she would have structured time off differently
- Court held that jury would decide FMLA interference claim

Process

- Placement on paid leave pending investigation into alleged misconduct is not adverse action
- A change in work schedules that effectively stops harassment is adequate remedial action

Nzabandora v. Rectors and Visitors of University of Virginia, 2018 FEP 386433 (4th Cir. 2018)


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Sex, Money, Religion and More:
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TSERS and LGERS Pension-Capping: The Law and the Litigation

Michael Crowell
Attorney
Carrboro

T&SERS AND LGERS PENSION CAPPING: THE LAW AND THE LITIGATION

Public Employment Law Update
UNC School of Government
May 10, 2019

Michael Crowell
Carrboro

July 2014 — The General Assembly enacts Session Law 2014-88 to take effect January 1, 2015.

- New GS 135-5(a3) sets a "contribution-based benefit cap" on the amount the Teachers' and State Employees' Retirement System ("T&SERS") will pay toward an individual retiree's pension. New GS 128-27(a3) does the same thing for the Local Governmental Employees' Retirement System ("LGERS")
- Pensions are not reduced for employees who belong to T&SERS or LGERS before January 1, 2015. The amount of the pension still is determined by the individual's years of service and highest average compensation. If the individual's pension exceeds the cap calculated under GS 135-5(a3) (for T&SERS) or GS 128-27(a3) (for LGERS), however, the difference must be paid by the retiree's last employer as an "additional contribution" to T&SERS or LGERS.
- For employees who join the retirement system after January 1, 2015, the individual will have to pay the additional contribution to avoid having their pension reduced, or convince their employer to do so.
- The pension cap is determined by a statutory formula primarily based on the individual's own contributions to the retirement system and the cost of a single-life annuity equivalent to that amount.
- The final step in calculation of the pension cap is the application of a "contribution-based benefit cap factor" to be set by the T&SERS and LGERS Board of Trustees. The only guidance given by statute is that the cap factor be set so that no more than three-quarter of one percent of retirees are affected.

October 2014 — The T&SERS Board of Trustees adopts a cap factor of 4.8 to implement SL 2014-88. The LGERS trustees adopt a cap factor of 5.1.

January 1, 2015 — SL 2014-88 takes effect, applies to retirements occurring on or after this date.

May 2015 — Dr. Barry Shepherd retires as superintendent of the Cabarrus County Schools and T&SERS bills the school system for an additional contribution of $208,405.81 under the pension cap law.

October 2015 — The T&SERS Board of Trustees adopts a new cap factor of 4.5. The LGERS trustees adopt a new cap factor of 4.7.

March 2016 — Dr. Ed Croom retires as superintendent of the Johnston County Schools and T&SERS bills the school system $435,913.54 for an additional contribution under the pension cap law.

Dr. Marty Hemric retires as superintendent of the Wilkes County Schools and T&SERS bills the school system $590,694.32 for an additional contribution under the pension cap law.

May 2016 — House Bill 1134 is introduced in the General Assembly. Among other provisions it would exempt the retirement systems from following Administrative Procedure Act ("APA") (GS Chapter 150B) procedures for rulemaking in adopting the cap factor. The exemption is to apply retroactively to January 1, 2015. The bill does not pass.

June 2016 — Dr. Mary Ellis retires as superintendent of the Union County Schools and T&SERS bills the school system $495,114.71 for an additional contribution under the pension cap law.

June 2016 — The Johnston, Wilkes, Union, and Cabarrus county boards of education file declaratory judgment actions in Wake County Superior Court asking the court to say that the assessments under the pension cap law are void because of the failure of the T&SERS Board of Trustees to follow APA rulemaking procedures in adopting the cap factor to implement GS 135-5(a3).

September 2016 — Judge Paul Ridgeway of Wake County Superior Court dismisses the school boards' declaratory judgment actions for failure to exhaust administrative remedies.

October 2016 — The Johnston, Wilkes, Union, and Cabarrus school boards petition T&SERS under the APA to adopt a rule setting the cap factor. At the same time the boards request a declaratory ruling from T&SERS that the cap factor previously adopted is void for failure to failure to follow the rulemaking procedures of the APA.

The T&SERS Board of Trustees considers and votes to deny the school boards' petition for rulemaking.

November 2016 — Steven Toole, Director of the Retirement Systems Division, denies the school boards' request for a declaratory ruling that the cap factor previously adopted by the T&SERS trustees is void.

December 2016 — The Johnston, Wilkes, Union, and Cabarrus boards of education file petitions for judicial review in Wake County Superior Court. Eight petitions are filed, two for each board. One petition for each board seeks judicial review of the T&SERS decision to deny the board's rulemaking petition and the other seeks judicial review of Toole's decision denying the request for a declaratory ruling.

February 2017 — House Bill 183 is introduced in the General Assembly. One of its provisions would exempt the retirement systems from APA rulemaking in adopting the cap factor. Those provisions are removed before the bill is enacted.

May 2017 — Judge James E. Hardin, Jr., of Wake County Superior Court enters judgment in favor of the school boards in all eight cases, holding that the cap factor is subject to the rulemaking procedures of the APA and that the cap factor adopted by the T&SERS without following the APA procedures is void and of no effect. T&SERS appeals to the Court of Appeals.

June 2017 — Senate Bill 117 is amended to add an exemption from APA rulemaking for adoption of the cap factor, retroactive to January 1, 2015. This provision is later removed before the bill is enacted.

September 2017 — The Person County Board of Education files a declaratory judgment action in Wake County Superior Court to stop T&SERS from collecting an additional contribution under the pension cap law in light of the court's May decision in the cases involving the Johnston, Wilkes, Union, and Cabarrus boards. The court grants a preliminary injunction.

December 2017 — At a special meeting the T&SERS Board of Trustees votes to commence APA rulemaking for a cap factor of 4.5. The LGERS board votes to proceed to rulemaking for a cap factor of 4.7.

January 2018 — The T&SERS and LGERS trustees hold public hearings on their proposed cap factor rules.

March 2018 — The T&SERS and LGERS trustees vote to adopt the proposed cap factor rules, to take effect May 1, 2018.

April 2018 — The Rules Review Commission holds a hearing and approves the proposed cap factor rules.

May 2018 — Because of objections filed by school boards, the T&SERS cap factor rule does not go into effect and cannot take effect until the 31st legislative day of the next regular session of the General Assembly or when the next session adjourns, whichever occurs first. No objection is filed to the LGERS rule and it takes effect May 1, 2018.

June 2018 — The General Assembly enacts House Bill 1055 which includes, among its many provisions, an exemption from APA rulemaking for the adoption of the cap factor. The bill is vetoed by Governor Cooper for reasons unrelated to the pension cap, and the legislature fails to consider overriding the veto before adjourning in December 2018.

The Madison County Board of Education files a declaratory judgment action in Wake County Superior Court to stop T&SERS from collecting an additional contribution under the pension cap law in light of the court's May 2017 decision in the cases involving the Johnston, Wilkes, Union, and Cabarrus boards, and the court's September 2017 decision granting an injunction to the Person school board. The court grants a preliminary injunction.

September 2018 — The Court of Appeals unanimously affirms the superior court decision, holding that the T&SERS trustees were required to follow APA rulemaking procedures in adopting the cap factor. The lead case is *Cabarrus County Board of Education v. Department of State Treasurer*, ___ NC App ___, 821 SE2d 196 (2018). The opinion is written by Chief Judge Linda McGee, with judges Wanda Bryant and Donna Stroud concurring.

October 2018 — T&SERS petitions the Supreme Court for discretionary review of the Court of Appeals' decision.

November 2018 — The Edgecombe, Granville, Harnett, and Lenoir County boards of education file a declaratory judgment action in Wake County Superior Court asking the court to declare that pursuant to the Court of Appeals' decision in the Johnston, Wilkes,

Union, and Cabarrus cases they are entitled to refunds from T&SERS of additional contributions previously paid under the pension cap law. The action also challenges the constitutionality of the pension cap law under the impairment of contract clause of the United States Constitution and the due process clause of the State Constitution. At the same time the boards file petitions for contested cases in the Office of Administrative Hearings seeking to have T&SERS refund those payments.

December 2018 — The Swain County Board of Education files a declaratory judgment action in Wake County Superior Court to stop T&SERS from collecting an additional contribution under the pension cap law, based on the Court of Appeals' decision in the case involving the Johnston, Wilkes, Union, and Cabarrus boards.

April 2019 — The North Carolina Supreme Court agrees to hear the retirement system's appeal of the September 2018 Court of Appeals' decision holding the cap factor void for failure to follow rulemaking.

The retirement system denies the contention of the Wilkes, Johnston, and Union school boards that the new cap factor rule cannot be applied retroactively to retirements in their systems that occurred before the rule took effect. The denial provides those school boards the opportunity to initiate a contested case in the Office of Administrative Hearings.

<u>Issues still to be resolved</u>:

- Could the T&SERS trustees adopt the pension cap factor without going through formal rulemaking? [The Court of Appeals said no, but the issue is now before the Supreme Court.]
- If rulemaking was required, are employers who paid pension cap assessments before the current rule was adopted entitled to refunds?
- If formal rulemaking is required, did the trustees follow the proper procedure in adopting the current cap factor rule?
- If the current cap factor rule is valid, may it be applied retroactively to retirements that occurred before the rule was adopted?
- Is the pension cap law constitutional or is it an unlawful impairment of contract for contracts entered before January 1, 2015?

Sexual Orientation and Transgender Status Discrimination

Diane Juffras
School of Government

Sexual Orientation and Transgender Status (Gender Identity) Discrimination

Diane M. Juffras
Public Employment Law Update
School of Government
May 10, 2019

UNC SCHOOL OF GOVERNMENT

Title VII: 42 U.S.C. 2000e-2

Prohibits employers from failing or refusing to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin . . . .*

Definitions: Sex v. Gender

Sex is a label — male or female —that individuals are given at birth based on biological and medical factors, including your chromosomes, hormones, anatomy of an individual's reproductive system. This is what appears on birth certificates.

Gender is a set of expectations from society about that behaviors, characteristics, and thoughts an individual should have based on their biological sex. Each culture has standards about the way that people should behave based on whether they are male or female.

The US Supreme Court Cases in the Background

- **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989).
  (employer who acts on the basis of sex stereotypes acts on the basis of sex)
- **Oncale v. Sundowner Offshore Services, Inc.**, 523 U.S. 75 (1998)
  (same-sex sexual harassment is actionable sex discrimination under Title VII)

"WALK MORE FEMININELY, TALK MORE FEMININELY, DRESS MORE FEMININELY, WEAR MAKE-UP, HAVE YOUR HAIR STYLED AND WEAR MORE JEWELRY."

Definitions: Sexual Orientation

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. (Williams Institute of UCLA)

Sexual orientations include straight, gay, lesbian, bisexual, and asexual.

Does Title VII's prohibition against discrimination on the basis of sex include discrimination on the basis of sexual orientation?

Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017) (*en banc*).

- Holding: Discrimination on the basis of sexual orientation is a form of sex discrimination.

Zarda v. Altitude Express, 833 F.3d 100 (2nd Cir. 2018) (*en banc* decision).

- Holding: Same, overruling prior 2nd Cir. precedent.

Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017).

- Holding: Discrimination on the basis of sexual orientation is not actionable under Title VII under 11th Circuit precedent. Neither Price Waterhouse nor Oncale are clearly on point.

Bostock v. Clayton County Board of Comm'rs, 723 Fed.Appx. 964 (11th Cir. 2018)

- Holding: Discrimination on the basis of sexual orientation is not actionable under Title VII under Evans.

Hively and Zarda

- Interpretation of "sex" has expanded
- Comparative analysis/gender stereotyping approach
- Associational discrimination

Evans v. Georgia Regional Hospital

- 11th Cir. previously recognized and affirms that discrimination based on gender non-conformity is actionable sex discrimination.
- Under 11th Cir. Precedent, sexual orientation discrimination is not actionable sex discrimination.
- Rehearing and rehearing en banc denied.
- Cert. denied (Dec. 11, 2017).

Definitions: Gender Identity v. Gender Expression

Gender identity is one's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from the sex assigned at birth.

Gender expression is the external appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

Definitions: Transgender v. Gender Transition

Transgender is an umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.

Gender transition is the process by which some people strive to more closely align their internal knowledge of gender with its outward appearance.

Transgender Status as Protected under Title VII

- Fairly widespread acceptance on the district court level.
- One federal court of appeals decision:
  EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

  "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait."

The ADA: 42 U.S.C. § 12211

(a) Homosexuality and bisexuality. For purposes of the definition of "disability" . . ., homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions. . . . the term "disability" shall not include—

1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, ***gender identity disorders not resulting from physical impairments***, or other sexual behavior disorders;
2) compulsive gambling, kleptomania, or pyromania; or
3) psychoactive substance use disorders resulting from current illegal use of drugs.

The Diagnostic and Statistical Manual of Mental Disorders (DSM)- V

- 2013 Switch from Gender Identity Disorder to Gender Dysphoria

Gender Dysphoria in Adolescents and Adults 302.85 (F64.0 F64.1)

1. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following:

a. a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics.

b. strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender.

c. strong desire for the primary/secondary sex characteristics of the other gender.

d. strong desire to be of the other gender.

e. strong desire to be treated as the other gender.

f. strong conviction that one has the typical feelings/reactions of the other gender.

2. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Blatt v. Cabela's Retail, Inc.,
2017 WL 2178123 (E.D.Pa. May 18, 2017).

- Blatt, a transgender woman, was hired to be a merchandise stocker.
- After she informed her employer that she suffered from gender dysphoria, the store forbade her from using the women's restroom, and refused to issue her a female uniform or name tag with her female name.
- Store fired her w/in six months.
- Blatt sued alleging discrimination on the basis of disability and retaliation and failure to accommodate her disability.

District Court Judge's Decision on Cabela's Motion to Dismiss

- ADA covers gender dysphoria (as opposed to gender identity disorder) because it is disabling inasmuch as it limits Blatt's major life activities of interacting with others, reproducing and functioning both socially and occupationally.

Parker v. Strawser Construction, Inc., 307 F.Supp.3d 744, 754 (S.D.Ohio 2018)

- Gender dysphoria is not a disability under the ADA, rejecting Blatt.
- But court notes that transgender and transitioning status is protected by Title VII, following 6th Cir.'s decision in RG & GR Harris Funeral Homes.

Transgender Discrimination Prohibited by the ACA?

Yes:

Boyden v. Conlin, 341 F.Supp.3d 979, 997 (W.D.Wisc. 2018)

Prescott v. Rady Children's Hopstial-San Diego, 265 F.Supp.3d 1090 (S.D. Calif. 2017).

No:

Baker v. Aetna Life Insurance Co., 228 F.Supp.3d 764 (N.D.Texas 2017)

What about the State Health Plan?

Kadel v. Folwell, filed in the M.D.N.C. in March 2019, alleging violations of the Equal Protection Clause, Title IX and the ACA.

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SEXUAL ORIENTATION AND TRANSGENDER STATUS DISCRIMINATION

Public Employment Law Update
May 10th, 2019

1. RELEVANT U.S. SUPREME COURT CASES

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (employer who has acted on the basis of sex stereotypes has acted on the basis of sex in violation of Title VII).

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (same-sex sexual harassment is discrimination on the basis of sex in violation of Title VII).

2. UPCOMING U.S. SUPREME COURT CASES

On April 22, 2019, the Supreme Court granted cert. in Bostock, Zarda and R.G. & G.R. Harris Funeral Homes, on which see below.

3. RECENT COURTS OF APPEALS CASES ON SEXUAL ORIENTATION DISCRMINATION AS A FORM OF SEX DISCRIMINATION UNDER TITLE VII

Bostock v. Clayton County Board of Commissioners, 723 Fed.Appx. 964 (11th Cir. 2018) (discrimination based on sexual orientation is not actionable under Title VII, following Evans), motion for a rehearing *en banc* denied, 894 F.3d 1335 (2018).

Zarda v. Altitude Express Inc., 883 F.3d 100 (2nd Cir. 2017) (*en banc* decision) (Title VII prohibits discrimination on the basis of sexual orientation as discrimination because of sex, overruling prior 2nd Cir. precedent).

Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017) (*en banc* decision) (discrimination on the basis of sexual orientation is a form of sex discrimination. Overruling prior 7th Cir. precedent).

Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017) (discrimination based on sexual orientation is not actionable under Title VII).

3. ONE COURT OF APPEALS CASE AND SOME RECENT DISTRICT COURT CASES ON TRANSGENDER STATUS AS A FORM OF SEX DISCRMINATION UNDER TITLE VII

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571-72, 575-76 (2018) (discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex in violation of Title VII).

EEOC v. A & E Tire, Inc., 325 F.Supp.3d 1129 (D.Colo. 2018) (discrimination on the basis of transgender status sufficiently stated a claim for sex discrimination in violation of Title VII).

Roberts v. Clark County School District, 215 F.Supp.3d 1001, 1014 (D.Nev. 2018) (discrimination against a person based on transgender status is discrimination "because of sex" under Title VII).

Baker v. Aetna Life Insurance Co., 228 F.Supp.3d 764 (N.D.Texas 2017) (transgender woman stated a claim of sex discrimination under Title VII when she alleged that her employer engaged in intentional discrimination by denying her breast augmentation surgery based solely on her gender).

Fabian v. Hospital of Central Connecticut, 172 F.Supp.3d 509, 527 (D.Conn. 2016) (employment discrimination on the basis of transgender identity is employment discrimination "because of sex" in violation of Title VII).

Lewis v. High Point Regional Health System, 79 F.Supp.3d 588, 589-90 (E.D.N.C. 2015) (Terrence Boyle, J.) (Denying defendant's motion to dismiss because it relies on *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) and *Oncale* for the proposition that Title VII does not provide a cause of action based on sexual orientation; sexual orientation and transgender status are two distinct concepts and the plaintiff did not allege discrimination on sexual orientation).

Cummings v. Greater Cleveland Regional Transit Authority, 88 F.Supp.3d 812 (N.D.Ohio 2015) (transgender female has standing to pursue gender discrimination claim under Title VII).

Finkle v. Howard County, Maryland, 12 F.Supp.3d 780, 788 (D.Md. 2014) (discrimination against transsexuals violates Title VII's proscription of discrimination on the basis of sex).

4. AN OLD N.C. SUPERIOR COURT CASE

Arledge v. Peoples Services, Inc., 2002 WL 1591690 (NC Super.Ct. 2002) (Caudill, J.) (Unpublished Superior Court decision holding that transgender woman's claim of wrongful discharge in violation of public policy cannot be based on violation of N.C.G.S. provisions prohibiting discrimination on the basis of sex or disability because 1) transgender individuals are not protected from discrimination on the basis of sex under Title VII (N.C.G.S. provisions track and look to Title VII for guidance), 2) section 12208 of the ADA says that the term "disabled" or "disability" shall not apply to an individual solely because that person is a transvestite, and 3) section 12211 excludes transsexualism and gender identity disorders not resulting from physical impairments from the meaning of the term disability.

5. THE AFFORDABLE CARE ACT AND HEALTH INSURANCE DENIALS OF GENDER REASSIGNMENT SURGERY

Kadel v. Folwell, filed in the M.D.N.C. on March 11, 2019 (alleging that the North Carolina State Health Plan's denial of coverage for treatment of gender dysphoria violates the Equal Protection Clause, Title IX and the Affordable Care Act; Title IX, rather than Title VII, is in play because UNC-Chapel Hill and NC State University are also defendants in the suit).

Boyden v. Conlin, 341 F.Supp.3d 979, 997 (W.D.Wisc. 2018) (state health plan's exclusion of HRT and gender reassignment surgery treats transgender individuals differently on the basis of sex either because it is differential treatment based on natal sex or because it is a form of sex stereotyping where an individual is required effectively to maintain his or natal sex characteristics).

Baker v. Aetna Life Ins. Co. & L-# Communications Corp., 2018 WL 572907 (N.D. Tex. 2018) (ealth plan's denial of coverage for breast augmentation surgery for male employee transitioning to female was not discriminatory where plan covered hormone replacement therapy for the growth of breasts, hormone replacement therapy was successful, and plan did not cover breast augmentation surgery because it deemed it a cosmetic procedure).

Prescott v. Rady Children's Hopstial-San Diego, 265 F.Supp.3d 1090 (S.D. Calif. 2017) (Title IX antidiscrimination provisions are imported into the ACA; because Title VII, which is frequently used as guidance for Title IX cases, and thus by extension, Title IX, recognizes that discrimination on the basis of gender identity is discrimination on the basis of sex, the ACA affords the same protections).

Baker v. Aetna Life Insurance Co., 228 F.Supp.3d 764 (N.D.Texas 2017) **(**the ACA does not provide a cause of action for discrimination on the basis of transgender status).

Tovar v. Essentia Health, 857 F.3d 771, 779 (8th Cir. 2017) (very limited ACA ruling reversing the district court's conclusion that plaintiff mother of transgender son did not have standing to bring a claim under the ACA and remanding the case to the district court to determine whether plaintiff had stated a claim under the ACA).

6. CASES ON GENDER DYSPHORIA AS A DISABILITY UNDER THE ADA

Blatt v. Cabela's Retail, Inc., 2017 WL 2178123 at *4 (E.D.Pa. 2017) (the ADA's textual exclusion of gender identity disorders is to be narrowly construed in the narrow, simple sense as an exclusion of the condition of identifying with a different gender; exclusion does not include disabling conditions that persons who identify with a different gender may have, such as gender dysphoria, which substantially limit a person in one or more major life activities).

Parker v. Strawser Construction, Inc., 307 F.Supp.3d 744, 754 (S.D.Ohio 2018) (gender dysphoria is not a disability under the ADA, rejecting *Blatt*; court notes that transgender and transitioning status is protected by Title VII, following 6th Cir.'s decision in *RG & GR Harris Funeral Homes*).

Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII

Supreme Court Decisions on the Scope of Title VII's Sex Discrimination Provision

Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998). The Supreme Court held that same-sex harassment is sex discrimination under Title VII. Justice Scalia noted in the majority opinion that, while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII . . .statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex.' [This] . . . must extend to [sex-based] discrimination of any kind that meets the statutory requirements." Id. at 79-80.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Supreme Court recognized that employment discrimination based on sex stereotypes (e.g., assumptions and/or expectations about how persons of a certain sex should dress, behave, etc.) is unlawful sex discrimination under Title VII. Price Waterhouse had denied Ann Hopkins a promotion in part because other partners at the firm felt that she did not act as woman should act. She was told, among other things, that she needed to "walk more femininely, talk more femininely, [and] dress more femininely" in order to secure a partnership. Id. at 230-31, 235. The Court found that this constituted evidence of sex discrimination as "[i]n the . . . context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250. The Court further explained that Title VII's "because of sex" provision strikes at the "entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Id. (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted)).

Federal Court Decisions Supporting Coverage for Transgender Individuals as Sex Discrimination

Chavez v. Credit Nation Auto Sales, L.L.C., 2016 WL 158820 (11th Cir. Jan. 14, 2016). Reversing summary judgment for the employer on the plaintiff's claim that she was terminated from her job as an auto mechanic because she is transgender, the court remanded the case for trial because there was sufficient circumstantial evidence to create a triable issue of fact as to whether gender bias was a motivating factor. The employer asserted that the plaintiff was fired for sleeping on the job and noted that other employees had been fired for the same offense. However, less than two months before the plaintiff's termination, her supervisor had said that her transgender status made him "nervous" and would negatively impact the business and coworkers. Moreover, the plaintiff had received an excellent performance appraisal prior to disclosing her gender transition, and the employer deviated

from its progressive disciplinary policy in imposing termination in the plaintiff's case.

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). The plaintiff, a transgender female, brought a claim under 42 U.S.C. § 1983 alleging unlawful discrimination based on sex in violation of the Equal Protection Clause when she was terminated from her position with the Georgia General Assembly. Relying on Price Waterhouse and other Title VII precedent, the court concluded that the defendant discriminated against the plaintiff based on her sex by terminating her because she was transitioning from male to female. The court stated that a person is considered transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes." As a result, there is "congruence" between discriminating against transgender individuals and discrimination on the basis of "gender-based behavioral norms." Because everyone is protected against discrimination based on sex stereotypes, such protections cannot be denied to transgender individuals. "The nature of the discrimination is the same; it may differ in degree but not in kind." The court further concluded that discrimination based on sex stereotypes is subject to heightened scrutiny under the Equal Protection Clause, and government termination of a transgender person for his or her gender nonconformity is unconstitutional sex discrimination. Although in this case the defendant asserted that it fired the plaintiff because of potential lawsuits if she used the women's restroom, the record showed that the plaintiff's office had only single-use unisex restrooms, and therefore there was no evidence that the defendant was actually motivated by litigation concerns about restroom use. The defendant provided no other justification for its action, and therefore, the plaintiff was entitled to summary judgment.

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005). Plaintiff, who "was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty [and] had a reputation throughout the police department as a homosexual, bisexual or cross-dresser," alleged he was demoted because of his failure to conform to sex stereotypes. The court held that this stated a claim of sex discrimination under Title VII.

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004). The plaintiff alleged that he was suspended based on sex after he began to express a more feminine appearance and notified his employer that he would eventually undergo a complete physical transformation from male to female. The court held that Title VII prohibits discrimination against transgender individuals based on gender stereotyping. The court determined that discrimination against an individual for gender-nonconforming behavior violates Title VII irrespective of the cause of the behavior. The court reasoned that the "narrow view" of the term "sex" in prior case law denying Title VII protection to transgender employees was "eviscerated" by Price Waterhouse, in which the Supreme Court held that Title VII protected a woman who failed to conform to social expectations about how women should look and behave.

Rosa v. Parks W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000). Citing Title VII case law, the court concluded that a transgender plaintiff, who was biologically male, stated a claim of sex discrimination under the Equal Credit Opportunity Act by alleging that he was denied a loan application because he was dressed in traditionally female attire.

Schwenck v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000). Citing Title VII case law, the court concluded that a transgender woman stated a claim of sex discrimination under the Gender Motivated Violence Act based on the perception that she was a "man who 'failed to act like one.'" The court noted that "the initial approach" taken in earlier federal appellate Title VII cases rejecting claims by transgender plaintiffs "has been overruled by the language and logic of Price Waterhouse."

Baker v. Aetna Life Ins., et al., __ F. Supp. 3d __, 2017 WL 131658 (N.D. Tex. Jan. 13, 2017). The court ruled that an employee stated a claim against her employer for sex discrimination in violation of Title VII based on denial of coverage under employer-provided health insurance plan for costs associated with surgery related to gender transition.

Mickens v. General Electric Co., No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016). The court denied the employer's motion to dismiss a Title VII sex discrimination claim in which

a transgender plaintiff alleged he was unlawfully denied use of the male bathroom close to his work station, and then was fired for attendance issues resulting from having to go to a bathroom farther away. He also alleged that once his supervisor learned of his transgender status, he was singled out for reprimands, and no action was taken in response to his reports of coworker harassment.

Rejecting the employer's argument that discrimination based on transgender status is not actionable under Title VII, the court cited Sixth Circuit precedent recognizing that, in light of Price Waterhouse, the prohibition against gender discrimination in Title VII "can extend to certain situations where the plaintiff fails to conform to stereotypical gender norms." The court held that the complaint sufficiently pled a Title VII sex discrimination claim, noting that "[s]ignificantly, plaintiff alleges that GE both permitted continued discrimination and harassment against him and subsequently fired him because he did not conform to the gender stereotype of what someone who was born female should look and act like."

Roberts v. Clark Cty. Sch. Dist., No. 2:15-cv-00388-JAD-PAL, 2016 WL 5843046 (D. Nev. Oct. 4, 2016). Expressly adopting the EEOC's holdings in Macy and Lusardi, the court ruled that plaintiff, a transgender school police officer, was subjected to sex discrimination in violation of Title VII when he was told by his employer that he could not use either the men's or women's bathroom at work.

Doe v. Ariz., 2016 WL 1089743 (D. Ariz. Mar. 21, 2016). The plaintiff, a corrections officer, alleged the Department of Corrections violated Title VII's prohibition on sex discrimination based on gender identity when supervisors tolerated harassment of him and breached his confidentiality by informing prison inmates of his transition. Denying the employer's motion to dismiss, the court noted that the EEOC and courts have held that Title VII's sex discrimination provision prohibits workplace discrimination based on gender identity, and that the claim was described with sufficient clarity in the EEOC charge to render it exhausted.

Fabian v. Hosp. of Central Conn., 172 F. Supp. 3d 509 (D. Conn. 2016). Plaintiff, an orthopedic surgeon, brought a Title VII sex discrimination claim alleging she was not hired because she disclosed her identity as a transgender woman who would begin work after transitioning to presenting as female. Analyzing Title VII's legislative history and case law in extensive detail, the court held that Price Waterhouse abrogates the narrow view of 0Title VII's plain language that previously excluded sex discrimination claims by transgender individuals, citing supportive rulings by the 6th, 9th, and 11th Circuits, as well as the EEOC's decision in Macy. See also Adkins v. City of New York, 143 F. Supp. 3d 134 (S.D.N.Y. 2015) (allowing equal protection claim by transgender individual to proceed under 42 U.S.C. Section 1983).

Lewis v. High Point Regional Health Sys., 79 F. Supp. 3d 588 (E.D.N.C. 2015). Plaintiff, a certified nursing assistant, alleged she was denied hire for several positions because of her transgender status. At the time of her interviews, she was anatomically male, and was undergoing hormone replacement therapy in preparation for sex reassignment surgery in the future. The district court denied the employer's motion to dismiss the case because the employer had argued only that sexual orientation was not covered under Title VII and sexual orientation and gender identity are two distinct concepts. The court therefore allowed plaintiff's transgender discrimination claim to proceed under Title VII.

Finkle v. Howard Cty., Md., 12 F. Supp. 3d 780 (D. Md. 2014). Denying the county's motion to dismiss or for summary judgment on a Title VII claim brought by a volunteer auxiliary police officer, the court ruled that the officer was an "employee" for Title VII purposes, and that her claim that she was discriminated against "because of her obvious transgendered status" raised a cognizable claim of sex discrimination. The court reasoned: "[I]t would seem that any discrimination against transsexuals (as transsexuals) - individuals who, by definition, do not conform to gender stereotypes - is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by Price Waterhouse. As Judge Robertson offered in Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008), '[u]ltimately I do

not think it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.'"

Parris v. Keystone Foods, 959 F. Supp. 2d 1291 (N.D. Ala. 2013), appeal dismissed, No. 13-14495-D (11th Cir. Dec. 26, 2013). Plaintiff, a transgender female, alleged that she was discharged from her job at a chicken processing facility because of her "gender non-conformity." The district court, citing Glenn v. Brumby, recognized that the plaintiff's claims were covered by Title VII's sex discrimination prohibitions, but granted summary judgment to the employer on the ground that plaintiff's comparator evidence and evidence of discriminatory remarks by coworkers did not show that her discharge was motivated by her gender identity as opposed to the legitimate non-discriminatory reason proffered by the employer.

Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye, & Dental Fund, 867 F. Supp. 2d 1023 (D. Minn. 2012). Assessing a claim under ERISA for wrongful termination of benefits to a legal spouse of a transgender individual, the court quoted the language from Smith v. City of Salem that the Supreme Court's decision in Price Waterhouse "eviscerated" the "narrow view" of "sex" articulated in earlier Title VII cases, and observed: "An individual's sex includes many components, including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual."

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). The plaintiff, a transgender female, was offered a position as a terrorism research analyst before she had changed her name and begun presenting herself as a woman. After the plaintiff notified the employer that she was under a doctor's care for gender dysphoria and would be undergoing gender transition, the employer withdrew the offer, explaining that the plaintiff would not be a "good fit." The court stated that since the employer refused to hire the plaintiff because she planned to change her anatomical sex by undergoing sex reassignment surgery, the employer's decision was literally discrimination "because of ... sex." The court analogized the plaintiff's claim to one in which an employee is fired because she converted from Christianity to Judaism, even though the employer does not discriminate against Christians or Jews generally but only "converts." Since such an action would be a clear case of discrimination "because of religion," Title VII's prohibition of discrimination "because of sex" must correspondingly encompass discrimination because of a change of sex. The court concluded that decisions rejecting claims by transgender individuals "represent an elevation of 'judge-supposed legislative intent over clear statutory text,'" which is "no longer a tenable approach to statutory construction."

Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008). The plaintiff alleged that she was subjected to sex discrimination when the employer rescinded its job offer after learning that she was transgender. Denying the employer's motion for summary judgment, the court concluded that the plaintiff's claim was actionable as sex discrimination under Title VII on the theory that she failed to comport with the employer's notions of how a male should look. A finder of fact might reasonably conclude that the employer's statement that the job offer was rescinded because she had "misrepresented" herself as female reflected animus against individuals who do not conform to gender stereotypes.

Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 WL 456173, at *2 (W.D. Pa. 2006). Plaintiff alleged sex-based harassment and termination in violation of Title VII after the employer learned that plaintiff had been diagnosed with gender identity disorder and plaintiff began presenting at work as a female after having presented as a male during the first four years of employment. Denying the employer's motion to dismiss, the court held that because the complaint "included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions, plaintiff has sufficiently pleaded claims of gender discrimination."

Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-cv-375E, 2003 WL 22757935, at *4 (W.D.N.Y.

2003). Relying on the reasoning in Schwenck v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000), the court ruled that plaintiff's sex discrimination claims of hostile work environment harassment and discriminatory discharge arising from her transition and sex reassignment surgery were actionable under Title VII, based on factual allegations that she was discriminated against for "failing to act like a man." See also Doe v. United Consumer Fin. Servs., No. 1:01-cv-1112, 2001 WL 34350174, at *2-5 (N.D. Ohio 2001).

Creed v. Family Express Corp., 101 Fair Empl. Prac. Cas. (BNA) 609, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007). The plaintiff, a transgender female, alleged facts permitting an inference that she was terminated because of gender stereotypes; specifically, that she was perceived by her employer to be a man while employed as a sales associate and was fired for refusing to present herself in a masculine way. See also Hunter v. United Parcel Serv., 697 F.3d 697 (8th Cir. 2012) (affirming summary judgment for the employer under both Title VII and state law, the court did not rule that such discrimination was not actionable under Title VII, but rather that there was no evidence that the prospective employer knew or perceived that plaintiff was transgender during the job interview, and therefore a prima facie case of sex discrimination was not established).

Miles v. New York Univ., 979 F. Supp. 248, 249-50 (S.D.N.Y. 1997). Noting that the phrase "on the basis of sex" in Title IX is interpreted in the same manner as similar language in Title VII, the court held that a transgender female student could proceed with a claim that she was sexually harassed "on the basis of sex" in violation of Title IX.

Federal Court Decisions Supporting Coverage of Sexual Orientation-Related Discrimination as Sex Discrimination

Hively v. Ivy Tech Cmty. Coll. of Ind., __ F.3d __, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) (en banc). In an 8-3 en banc decision, the Seventh Circuit agreed with the EEOC that Title VII's prohibition on sex discrimination incorporates a prohibition on sexual orientation discrimination, overruling its contrary prior precedent. Chief Judge Wood, writing for the majority, first relied on the "comparative method" of analysis, reasoning that "Hively alleges that if she had been a man married to a woman . . . and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. . . .This describes paradigmatic sex discrimination." The majority also relied upon the gender-stereotyping theory articulated in Price Waterhouse: "Viewed through the lens of the gender non-conformity line of cases," the majority said, "Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual." Next, the majority relied on the "associational theory," likening discrimination because of same-sex relationships to discrimination because of mixed-race relationships. Finally, the majority pointed to the "backdrop" of the Supreme Court's decisions regarding sexual orientation. Tracing the evolution of case law from Romer v. Evans, 517 U.S. 620 (1996), through Obergefell v. Hodges, 135 S. Ct. 2584 (2015), the majority described an evolving sense that laws "?burden[ing] the liberty of same-sex couples . . . abridge central precepts of equality.'" Judge Posner joined the majority opinion but wrote separately to argue that more than 50 years after its enactment, Title VII "invites an interpretation that will update it to the present," observing that "[n]othing has changed more in the decades since the enactment of the statute," he said, "than attitudes toward sex," and concluding that "[t]he compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose 'interpretation' of the word 'sex' in Title VII to embrace homosexuality . . . ." Two other concurring judges joined the bulk of the majority opinion, but not its reliance on the "backdrop" of Supreme Court opinions regarding sexual orientation, and wrote separately to emphasize that "[o]ne cannot consider a person's homosexuality without also accounting for their sex" because sexual orientation discrimination involves discriminating against a woman because she is (a) a woman, who is (b) sexually attracted to women, and therefore sexual orientation discrimination is necessarily motivated in part by the employee's sex. The three dissenting judges criticized the

majority for "deploy[ing] a judge-empowering, common-law decision method . . . [producing] a statutory amendment courtesy of unelected judges," reasoning that courts must interpret a statute "as a reasonable person would have understood it at the time of enactment."

Two other appellate courts, in rulings by divided three-judge panels, have recently reached the opposite conclusion, finding that they were bound by circuit precedent disallowing sexual orientation discrimination claims under Title VII; however, there were extensive separate opinions written in each case reasoning that the older precedent should be overturned. See Anonymous v. Omnicom Grp., Inc., 2017 WL 1130183 (2d Cir. Mar. 27, 2017) (concurring, two judges extensively critiqued the circuit precedent disallowing Title VII sexual orientation discrimination claims, and endorsed all three rationales set forth by the EEOC in Baldwin); Evans v. Ga. Reg'l Hosp., 2017 WL 943925 (11th Cir. Mar. 10, 2017), pet. for reh'g en banc filed (Mar. 31, 2017) (ruling that the sexual orientation discrimination is not actionable but the claim could proceed because the facts supported a permissible Title VII claim of sex discrimination based on gender nonconformity; dissenting, one judge reasoned that plaintiff's sexual orientation discrimination claim should also have been permitted to proceed, because when a woman alleges "she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be - specifically, that women should be sexually attracted to men only").

Muhammad v. Caterpillar Inc., 767 F.3d 694 (7th Cir. Sept. 9, 2014, as amended on denial of reh'g, Oct. 16, 2014). Plaintiff alleged that hostile work environment harassment relating to his perceived sexual orientation was sex-based harassment in violation of Title VII. Affirming the district court's grant of summary judgment to the employer, the appellate court ruled that the employer took prompt remedial action once on notice of the harassment. As urged by the EEOC in an amicus brief filed in connection with plaintiff's petition for rehearing, the court denied the petition but amended its original decision to delete language that had stated sexual orientation-related discrimination claims are not actionable under Title VII.

Latta v. Otter, 771 F.3d 456 (9th Cir. 2014). The Ninth Circuit Court of Appeals held that statutes and constitutional amendments in Idaho and Nevada prohibiting same-sex marriages and refusing to recognize same-sex marriages validly performed in other states violated the Equal Protection Clause. The opinion of the court held that the laws were invalid as they discriminated on the basis of sexual orientation without sufficient justification. It also noted that "the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory." Id. at 474. A concurrence by Judge Berzon focused exclusively on the sex discrimination argument. Her opinion stated that she would have found that the Idaho and Nevada laws unlawfully discriminated on the basis of sex as, among other reasons, "the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations." Id. at 495.

Boutillier v. Hartford Pub. Schs., No. 3:13-cv-01303, 2016 WL 6818348 (D. Conn. Nov. 17, 2016). Plaintiff, an elementary school teacher, alleged that discrimination against her based on her sexual orientation violated Title VII's sex discrimination prohibition. The court denied the employer's motion for summary judgment, citing the pendency of the issue before the circuit's appellate court and mixed circuit precedent, as well as arguments it found persuasive in support of plaintiff's claim. The court reasoned that Title VII's plain language as well as precedent supported plaintiff's claim, concluding that "straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex; the two are necessarily intertwined in a manner that, when viewed under the Title VII paradigm set forth by the Supreme Court, place sexual orientation discrimination within the penumbra of sex discrimination." See also Boutillier v. Hartford Pub. Schs., 2014 WL 4794527 (D. Conn. Sept. 25, 2014) (denying employer's motion to dismiss).

EEOC v. Scott Med. Health Ctr., P.C., __ F. Supp. 3d __, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016).

The Commission alleged that harassment and constructive discharge based on the sexual orientation of a teleworker was actionable as sex discrimination under Title VII. Denying the employer's motion to dismiss, the court held that "Title VII's 'because of sex' provision prohibits discrimination on the basis of sexual orientation." The court explained: "There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality. As the EEOC states, "[d]iscriminating against a person because of the sex of that person's romantic partner necessarily involves stereotypes about 'proper' roles in sexual relationship-that men are and should only be sexually attracted to women, not men." The court stated that in its view, a line between sex discrimination and sexual orientation discrimination is "a distinction without a difference. Forcing an employee to fit into a gendered expectation-whether that expectation involves physical traits, clothing, mannerisms or sexual attraction-constitutes sex stereotyping and, under Price Waterhouse, violates Title VII." The court concluded that such discrimination, "based upon nothing more than the aggressor's view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate."

Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs, 197 F. Supp. 3d 1334 (N.D. Fla. 2016). Employee of county emergency medical services department brought Title VII sex discrimination claim alleging discrimination based on sexual orientation or perceived sexual orientation. Denying the employer's motion to dismiss, the court explained that it found persuasive the sex stereotyping rationale articulated in the EEOC's decision in Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015), and observed: "To hold that Title VII's prohibition on discrimination 'because of sex' includes a prohibition on discrimination based on an employee's homosexuality or bisexuality or heterosexuality does not require judicial activism or tortured statutory construction. It requires close attention to the text of Title VII, common sense, and an understanding that '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting Manhart, 435 U.S. at 707 n.13).

Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151 (C.D. Cal. 2015). Pepperdine University filed a renewed motion to dismiss plaintiff's Title IX claim, stating that the plaintiff alleged sexual orientation discrimination and not sex discrimination. The district court denied the motion, explicitly holding that "sexual orientation discrimination is a form of sex or gender discrimination." The court cited with approval the Commission's decision in Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015), explaining that sexual orientation discrimination is sex discrimination "because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex."

Isaacs v. Felder, 143 F. Supp. 3d 1190 (M.D. Ala. 2015). Granting the employer's motion for summary judgment on plaintiff's Title VII claim due to insufficient evidence of discriminatory intent on the facts of the case, the court nevertheless explicitly rejected arguments that sexual orientation discrimination cannot be challenged under Title VII: "This court agrees instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII. In [Baldwin], the Commission explains persuasively why 'an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII' … Particularly compelling is its reliance on Eleventh Circuit precedent [prohibiting discrimination based on a protected characteristic because of a personal association]. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ('Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII].')' ….To the extent that sexual orientation discrimination occurs not because of the targeted individual's romantic or sexual attraction

to or involvement with people of the same sex, but rather based on her or his perceived deviations from 'heterosexually defined gender norms,' this, too, is sex discrimination, of the gender-stereotyping variety …. See also Latta v. Otter, 771 F.3d 456, 486 (9th Cir. 2014) (Berzon, J., concurring) ('The notion underlying the Supreme Court's anti-stereotyping doctrine in both Fourteenth Amendment and Title VII cases is simple, but compelling: '[n]obody should be forced into a predetermined role on account of sex,' or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender. See Ruth Bader Ginsburg, 'Gender and the Constitution,' 44 U. Cin. L.Rev. 1, 1 (1975)."

Strong v. Grambling State Univ., 159 F. Supp. 3d 697 (W.D. La. 2015). The court analyzed on the merits plaintiff's claim that he was subject to sex discrimination in violation of Title VII based on his "gender status as heterosexual" because "women and homosexuals earn higher salaries than he does and receive pay increases where he does not." Granting the employer's motion for summary judgment, the court found there was insufficient evidence to support an inference of discriminatory intent.

Hall v. BNSF Ry. Co., 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014). Denying an employer's motion to dismiss a Title VII sex discrimination claim challenging the employer's policy of providing health insurance coverage for employees' legally married opposite-sex spouses but not same-sex spouses, the court found that the allegations were sufficient to allege discrimination based on the sex of the employee.

Terveer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014). Denying the employer's motion to dismiss the plaintiff's Title VII sex discrimination claims for denial of promotion and harassment because of non-conformance with sex stereotypes, the court found sufficient the plaintiff's allegations that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men [at his workplace]," and "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male."

Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032 (N.D. Ohio 2012). Denying defendant's motion for summary judgment where plaintiff alleged his supervisor discriminated against him based on sex stereotypes because he is married to a man and took his husband's last name, the court held: "That *is* a claim of discrimination because of sex." (emphasis in original).

Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002). In a Title VII sex harassment case brought by a lesbian employee who was subjected to negative comments about her sex life, the court stated that the belief that men or women should only be attracted to or date persons of the opposite sex constitutes a gender stereotype. "If an employer subjected a heterosexual employee to the sort of abuse allegedly endured by Heller-including numerous unwanted offensive comments regarding her sex life-the evidence would be sufficient to state a claim for violation of Title VII. The result should not differ simply because the victim of the harassment is homosexual." In this case, the court held, a jury could find that [the manager] repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."

Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002). In dicta, the court explained: "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."

From the SCOTUS Blog: https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/

Posted Mon, April 22nd, 2019 10:35 am

Court to Take Up LGBT Rights in the Workplace

by Amy Howe

The Supreme Court announced today that it will weigh in next term on whether federal employment discrimination laws protect LGBT employees. After considering a trio of cases — two claiming discrimination based on sexual orientation and the third claiming discrimination based on transgender status — at 11 consecutive conferences, the justices agreed to review them. Until today, the cases slated for oral argument next term had been relatively low-profile, but this morning's announcement means that the justices will have what will almost certainly be blockbuster cases on their docket next fall, with rulings to follow during the 2020 presidential campaign.

In *Altitude Express v. Zarda*, the justices will decide whether federal laws banning employment discrimination protect gay and lesbian employees. The petition for review was filed by a New York skydiving company, now known as Altitude Express. After the company fired Donald Zarda, who worked as an instructor for the company, Zarda went to federal court, where he contended that he was terminated because he was gay – a violation of (among other things) Title VII of the Civil Rights Act of 1964, which bars discrimination "because of sex."

The trial court threw out Zarda's Title VII claim, reasoning that Title VII does not allow claims alleging discrimination based on sexual orientation. But the full U.S. Court of Appeals for the 2nd Circuit reversed that holding, concluding that Title VII does apply to discrimination based on sexual orientation because such discrimination "is a subset of sex discrimination."

Altitude Express took its case to the Supreme Court last year, asking the justices to weigh in. In 2017, the justices had denied review of a similar case, filed by a woman who alleged that she had been harassed and passed over for a promotion at her job as a hospital security officer in Georgia because she was a lesbian. However, that case came to the court in a somewhat unusual posture: Neither the hospital nor the individual employees named in the lawsuit had participated in the proceedings in the lower courts, and they had told the Supreme Court that they would continue to stay out of the case even if review were granted, which may have made the justices wary about reviewing the case on the merits.

Altitude Express' case will be consolidated for one hour of oral argument with the second case involving the rights of gay and lesbian employees: *Bostock v. Clayton County, Georgia*. The petitioner in the case, Gerald Bostock, worked as a child-welfare-services coordinator in Clayton County, Georgia. Bostock argued that after the county learned that he was gay, it falsely accused

him of mismanaging public money so that it could fire him – when it was in fact firing him because he was gay.

Bostock went to federal court, arguing that his firing violated Title VII. The county urged the court to dismiss the case, arguing that Title VII does not apply to discrimination based on sexual orientation. The district court agreed, and the U.S. Court of Appeals for the 11th Circuit upheld that ruling.

In the third case granted today, *R.G. & G.R. Harris Funeral Homes v. EEOC*, the justices will consider whether Title VII's protections apply to transgender employees. The petition for review was filed by a small funeral home in Michigan, owned by Thomas Rost, who describes himself as a devout Christian. In 2007, the funeral home hired Aimee Stephens, whose employment records identified Stephens as a man. Six years later, Stephens told Rost that Stephens identified as a woman and wanted to wear women's clothing to work. Rost fired Stephens, because Rost believed both that allowing Stephens to wear women's clothes would violate the funeral home's dress code and that he would be "violating God's commands" by allowing Stephens to dress in women's clothing.

The federal Equal Employment Opportunity Commission filed a lawsuit on Stephens' behalf, and the U.S. Court of Appeals for the 6th Circuit ruled for the EEOC and Stephens. The funeral home went to the Supreme Court last summer, asking it to review the lower court's ruling. Today the justices granted the funeral home's petition for review, agreeing to consider whether Title VII bars discrimination against transgender people based on either their status as transgender or sex stereotyping under the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, which indicates that a company can't discriminate based on stereotypes of how a man or woman should appear or behave. The funeral home's case will be argued separately from Bostock and Altitude Express.

From the Constangy Brooks, Smith & Prophete Employment and Labor Insider Blog:
https://www.constangy.com/employment-labor-insider/what-you-need-to-know-about-supreme-court-lgbt-cases

What you need to know about the Supreme Court LGBT cases

BY ROBIN SHEA ON 4.26.19

The status, the arguments, and my predictions.

I've been waiting anxiously since September for the Supreme Court to agree to review three lower court decisions on whether LGBT discrimination violates Title VII of the Civil Rights Act of 1964.

Wouldn't you know it? The Court agreed to take the cases while I was on a long weekend and off the grid. So, I'm dispensing with the "breaking news" because everyone else in the world has beaten me to it.

"Of all the Mondays in the past eight months, the Supreme Court has to pick this one?"

THE NO-LONGER-BREAKING NEWS

The Court issued an order on Monday, April 22, saying that it was granting the petitions for certiorari filed in the cases of Bostock v. Clayton County, Georgia and Altitude Express v. Zarda. In Bostock, the U.S. Court of Appeals for the Eleventh Circuit ruled that sexual orientation discrimination did not violate Title VII. In Altitude Express, the U.S. Court of Appeals for the Second Circuit ruled that it did.

The Court has agreed to consider the following: "Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination 'because of . . . sex' encompasses discrimination based on an individual's sexual orientation."

The Supreme Court will consolidate Bostock and Altitude Express and will allot one hour of argument to be scheduled during its October 2019 term.

The Court also granted the petition for cert filed by the employer in EEOC v. R.G. & G.R. Harris Funeral Homes. In that case, the U.S. Court of Appeals for the Sixth Circuit ruled that discrimination based on gender identity violates Title VII. The Supreme Court will consider the following issue: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under Price Waterhouse v. Hopkins . . .."

Price Waterhouse was a 1989 decision in which the Supreme Court ruled in favor of a woman who was denied partnership in an accounting firm because she was not "feminine" enough. According to the Court, this type of sex stereotyping violated Title VII.

The funeral home had also asked the Court to decide whether Price Waterhouse meant that employers could not establish sex-specific dress codes or provide amenities such as sex-specific restrooms. The Court will not consider that issue.

WHO'S RIGHT?

Here is a summary of the arguments that are likely to be made when the Court reviews these cases.

Differential treatment based on "sex"

ARGUMENT: An employer who discriminates against an employee based on sexual orientation is discriminating based on that employee's sex. For example, a woman who is attracted to men faces no discrimination, but a man who is attracted to men does. With transgender individuals, the biological male who presents as a female is discriminated against, while a biological female who presents as a female is not. In both instances, the LGBT employee is subjected to differential treatment based on sex.

COUNTER-ARGUMENT: No, the gay man is being treated differently because he is attracted to members of his own sex rather than members of the opposite sex. A lesbian presumably would be treated the same, and for the same reason. It is the "orientation," rather than the sex of the individual, that is the issue. Similarly, with gender identity discrimination, the issue is not the sex of the individual but whether he or she presents as a member of his or her biological sex -- regardless of what that biological sex is.

Congressional intent, penumbras, and emanations

ARGUMENT: Admittedly, no one was thinking about sexual orientation or gender identity when Title VII was enacted in 1964. But since that time, the Supreme Court has expanded the meaning of "sex" discrimination to encompass sexual harassment (also mentioned nowhere in Title VII) and sex stereotyping, as in Price Waterhouse. Our views on sexual orientation and gender identity have evolved significantly since the '60s, so extending Title VII's protections to these categories is an appropriate way to adapt to changing standards. To paraphrase the late Justice William O. Douglas, sexual orientation and gender identity discrimination form a "penumbra" that "emanates" from the sex discrimination prohibitions in Title VII.

COUNTER-ARGUMENT: In 1964, when Title VII was enacted, discrimination against women in the workplace was generally normal, accepted, and out in the open. Sexual harassment and sex stereotyping are more-subtle ways to discriminate based on sex. Whether it's an old-fashioned refusal to hire women, or the very current #MeToo sexual harassment, biological sex is always the "protected class." Sexual orientation and gender identity would be completely different, and new, protected classes. The courts can't create new protected classes that don't already appear in the statutes. Only Congress can do that, and it has done so with the Pregnancy Discrimination Act, the

Age Discrimination in Employment Act, and the Americans with Disabilities Act. If Congress wants to prohibit LGBT discrimination, all it has to do is pass a law.

Sex stereotyping

ARGUMENT: The Supreme Court, in Price Waterhouse and Oncale v. Sundowner Offshore Services, has said that stereotyping based on sex can violate Title VII. In the context of LGBT discrimination, the stereotype is that a man should look and act like a man, and be attracted to women. Or that a woman should look and act like a woman, and be attracted to men. LGBT individuals do not always fit these stereotypes, and so discrimination based on LGBT status is a form of unlawful sex stereotyping prohibited by Title VII.

COUNTER-ARGUMENT: This isn't what sex stereotyping means. Unlawful sex stereotyping occurs when an employee suffers a disadvantage because he or she is expected to act in a way typical of his or her sex. For example, men used to have a hard time being hired as nurses because women were seen as the nurturers. Sex stereotyping can also occur when the employee does not look or behave in the way expected of someone of his or her sex (as in Price Waterhouse, or Oncale -- in which a heterosexual man was harassed and threatened by his co-workers because they thought he was "effeminate"). LGBT discrimination doesn't fit this model. Instead, the employer discriminates because he or she thinks that same-sex relationships are undesirable.

ARGUMENT: Even if you're right about sexual orientation, what about transgender individuals?

COUNTER-ARGUMENT: Uh . . . let me get back to you on that.

Associational discrimination

ARGUMENT: Just as it's illegal to discriminate against a white employee for being in an interracial marriage, it should be illegal to discriminate against an employee for being in a same-sex relationship. Either way, you're discriminating against someone because of their "association" with someone in a protected category.

COUNTER-ARGUMENT: No, those are not the same. In the interracial context, the Caucasian partner is being discriminated against because he or she is in a relationship with someone who is (wrongly) seen as part of an "inferior" group. The obsolete laws against interracial marriage were all based on the view that Caucasians were superior to members of other races. That isn't the case with same-sex relationships. In a same-sex relationship, the employee is associating with his or her "equal" -- that is, a person of his or her own sex. But in the view of an employer who is prejudiced against gay people, that is exactly the problem.

Windsor and Obergefell

ARGUMENT: The Supreme Court has already ruled in two cases (U.S. v. Windsor and Obergefell v. Hodges) that same-sex marriages have the same legal status as opposite-sex

marriages. How can an employee have a legal same-sex marriage on Saturday, and then legally be fired from his job on Monday for being gay? It's totally illogical.

COUNTER-ARGUMENT: You're comparing apples to oranges. In Windsor and Obergefell, the Court's decisions were based on the Fourteenth Amendment to the U.S. Constitution. But Title VII isn't part of the Constitution. It's a statute, and Congress can repeal it, expand it, or otherwise change it at any time. If LGBT discrimination should be illegal under federal law, all Congress has to do is enact a law making it so. But Congress has considered that many times and has never done it. (The mere fact that Title VII doesn't mention LGBT discrimination doesn't mean that it violates the Constitution.)

What will they do?

PREDICTIONS

Now you are in good shape to listen to oral arguments next fall and get where the parties (as well as the Justices) are coming from.

What do you think the Court will do? I'm going to predict a 5-4 decision against Title VII protection for sexual orientation, with Alito, Gorsuch, Kavanaugh, Roberts, and Thomas in the majority, and Breyer, Ginsburg, Kagan, and Sotomayor dissenting.

I'm having a harder time predicting how the gender identity issue will go because the sex stereotyping argument is fairly compelling. But, what the heck. I'll predict that the same 5-4 majority will decide that gender identity discrimination is not protected by Title VII

U. S. Equal Employment Opportunity Commission

PREVENTING EMPLOYMENT DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL OR TRANSGENDER WORKERS

Employment discrimination is illegal. Discrimination occurs when you are being treated differently than others (or are harassed) ***because of*** your race, color, national origin, sex, pregnancy, religion, age, disability, or genetic information. It is also against the law for an employer to retaliate against you because you report discrimination against you or on behalf of others.

Although Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity, the EEOC and courts have said that **sex discrimination** includes discrimination based on an applicant or employee's gender identity or sexual orientation. For example, it is illegal for an employer to deny employment opportunities or permit harassment because:

- A woman does not dress or talk in a feminine manner.
- A man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women.
- A female employee dates women instead of men.
- A male employee plans to marry a man.
- An employee is planning or has made a gender transition from female to male or male to female.

Who is protected?

Title VII applies to all private sector and state/local government employers with at least 15 employees. Note: State or local laws in your jurisdiction also may explicitly prohibit employment discrimination based on sexual orientation or gender identity.

Applicants and civilian employees of federal government agencies also have rights against LGBT discrimination under Title VII, and also Executive Order 11478, as amended.

Discrimination against an individual because that person is **transgender**, is by definition discrimination based on sex, and violates Title VII. *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (transgender discrimination is sex discrimination in violation of Title VII because it involves non-conformance with gender norms and stereotypes, or based on a plain interpretation of the statutory language prohibiting discrimination because of sex); *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (March 27, 2015) (Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee's gender identity, or harasses an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun corresponding to the employee's gender identity as communicated to management and employees).

Discrimination based on **sexual orientation** also necessarily states a claim of sex discrimination under Title VII because (1) it literally involves treating an applicant or employee differently based on his or her sex, (2) it takes sex into account by treating him or her differently for associating with a person of the same sex, and, (3) it involves discrimination based on gender stereotypes -- employer beliefs about the person to whom the employee should be attracted because of the employee's sex. *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015). Examples of sex discrimination involving sexual orientation include:

- Denying an employee a promotion because he is gay or straight
- Discriminating in terms, conditions, or privileges of employment, such as by providing a lower salary to an employee because of sexual orientation, or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman.
- Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex.

It also violates Title VII to discriminate against or harass an employee because of his or her sexual orientation or gender identity in combination with another unlawful reason, for example, on the basis of transgender status and race, or sexual orientation and disability.

How Do I Report Workplace Discrimination?

Employees or applicants of a private company, state government, or local municipality: EEOC will investigate complaints of employment discrimination, harassment and retaliation and may act to stop it and seek remedies on your behalf for free. We accept complaints from job applicants, employees (full-time, part-time, seasonal and temporary), and former employees. Regardless of your citizenship and work authorization status, the law still protects you. Complaints may be filed by mail or in person at the nearest EEOC office. Visit www.eeoc.gov to find out more about laws against employment discrimination. In some cases, you have 180 days to file a complaint. In others, you have 300 days. Call us immediately if you believe you experienced discrimination.

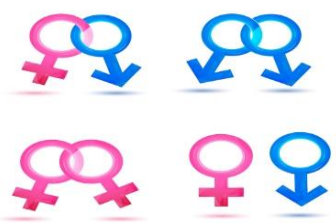
Federal government applicants and employees should contact their agency EEO office within 45 days of experiencing discrimination to pursue a Title VII claim. Federal employees also may have rights to pursue claims in internal processes governed by E.O. 11478.

The Equal Employment Opportunity Commission is the federal agency that enforces laws against employment discrimination, harassment and retaliation. We have offices around the country that can help you. We can explain whether the situation you face is lawful or unlawful.

Contact Us!

Call 1-800-669-4000

You can ask for translation assistance.



Our mission is to stop and remedy unlawful employment discrimination.

Bathroom/Facility Access and Transgender Employees

Background

- "Transgender" refers to people whose gender identity and/or expression is different from the sex assigned to them at birth (e.g., the sex listed on an original birth certificate). The term transgender woman typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term transgender man typically is used to refer to someone who was assigned the female sex at birth but who identifies as male. A person does not need to undergo any medical procedure to be considered a transgender man or a transgender woman.

Title VII of the Civil Rights Act of 1964 and Transgender Individuals

- In addition to other federal laws, EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, national origin, religion, and sex (including pregnancy, gender identity, and sexual orientation). Title VII applies to private and state/local government employers with 15 or more employees, as well as to federal agencies in their capacity as employers. Like all non-discrimination provisions, these protections address conduct in the workplace, not personal beliefs. Thus, these protections do not require any employee to change beliefs. Rather, they seek to ensure appropriate workplace treatment so that all employees may perform their jobs free from discrimination. Contrary state law is not a defense under Title VII. 42 U.S.C. § 2000e-7.

- Employment discrimination complaints by federal sector applicants and employees are handled by the agency involved, but can be followed by an appeal of the agency's decision to the EEOC, which can order the agency to provide relief if discrimination is found. By contrast, charges alleging discrimination by a state/local government or private employer are filed directly with the EEOC for investigation and, where possible, voluntary resolution; the EEOC cannot order relief in such matters, but in some cases may pursue litigation.

- In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012), the EEOC ruled in a federal sector appellate case that discrimination based on transgender status is sex discrimination in violation of Title VII. In *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015), also a federal sector appeal, the EEOC held that:
  1. a federal agency that denied an employee equal access to a common bathroom/facility corresponding to the employee's gender identity discriminated on the basis of sex;
  2. the agency could not condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and
  3. the agency could not avoid the requirement to provide equal access to a common

bathroom/facility by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).

For More Information …

- Further information from other federal government agencies includes: *A Guide to Restroom Access for Transgender Workers*, issued by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), https://www.osha.gov/Publications/OSHA3795.pdf, and *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/,issued by the U.S. Office of Personnel Management.

What to Do if You Think You Have Been Discriminated Against

- If you believe you have been discriminated against, you may take action to protect your rights under Title VII by filing a complaint:

  Private sector and state/local government employees may file a charge of discrimination by contacting the EEOC at 1-800-669-4000 or go to https://www.eeoc.gov/employees/howtofile.cfm.

  Federal government employees may initiate the complaint process by contacting an EEO counselor at your agency; more information is available at https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

This is an Equal Employment Opportunity Commission (EEOC) resource document. EEOC resource documents *help the public understand existing EEOC positions. They are developed as questions arise from the public to assist employees and employers to better understand their rights and obligations under the federal workplace discrimination laws. For more information about different types of EEOC documents, go to https://www.eeoc.gov/eeoc/newsroom/wysk/regulations_guidance_resources.cfm.*

BestPractices

A Guide to Restroom Access for Transgender Workers

Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.

Introduction

The Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) requires that all employers under its jurisdiction provide employees with sanitary and available toilet facilities, so that employees will not suffer the adverse health effects that can result if toilets are not available when employees need them. This publication provides guidance to employers on best practices regarding restroom access for transgender workers. OSHA's goal is to assure that employers provide a safe and healthy working environment for *all* employees.

Understanding Gender Identity

In many workplaces, separate restroom and other facilities are provided for men and women. In some cases, questions can arise in the workplace about which facilities certain employees should use. According to the Williams Institute at the University of California-Los Angeles, an estimated 700,000 adults in the United States are *transgender*—meaning their internal *gender identity* is different from the sex they were assigned at birth (e.g., the sex listed on their birth certificate). For example, a *transgender man* may have been assigned female at birth and raised as a girl, but identify as a man. Many transgender people *transition* to live their everyday life as the gender they identify with. Thus, a transgender man may transition from living as a woman to living as a man. Similarly, a *transgender woman* may be assigned male at birth, but transition to living as a woman consistent with her gender identity. Transitioning is a different process for everyone—it may involve social changes (such as going by a new first name), medical steps, and changing identification documents.

Why Restroom Access Is a Health and Safety Matter

Gender identity is an intrinsic part of each person's identity and everyday life. Accordingly, authorities on gender issues counsel that it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity. Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety. Bathroom restrictions can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.

OSHA's Sanitation Standard

Under OSHA's Sanitation standard (1910.141), employers are required to provide their employees with toilet facilities. This standard is intended to protect employees from the health effects created when toilets are not available. Such adverse effects include urinary tract infections and bowel and bladder problems. OSHA has consistently interpreted this standard to require employers to allow employees prompt access to sanitary facilities. Further, employers may not impose unreasonable restrictions on employee use of toilet facilities.

Model Practices for Restroom Access for Transgender Employees

Many companies have implemented written policies to ensure that *all* employees—including transgender employees—have prompt access to appropriate sanitary facilities. The core belief underlying these policies is that all employees should be permitted to use the facilities that correspond with their gender identity. For example, a person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him- or herself.

The best policies also provide additional options, which employees may choose, but are not required, to use. These include:

- Single-occupancy gender-neutral (unisex) facilities; and
- Use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

Regardless of the physical layout of a worksite, all employers need to find solutions that are safe and convenient and respect transgender employees.

Under these best practices, employees are not asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities. In addition, no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status. Under OSHA standards, employees generally may not be limited to using facilities that are an unreasonable distance or travel time from the employee's worksite.

Other Federal, State and Local Laws

Employers should be aware of specific laws, rules, or regulations regarding restroom access in their states and/or municipalities, as well as the potential application of federal anti-discrimination laws.

The Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), DOL, and several other federal agencies, following several court rulings, have interpreted prohibitions on sex discrimination, including those contained in Title VII of the *Civil Rights Act of 1964*, to prohibit employment discrimination based on gender identity or transgender status. In April 2015, the DOL's Office of Federal Contract Compliance Programs (OFCCP) announced it would require federal contractors subject to Executive Order 11246, as amended, which prohibits discrimination based on both sex and gender identity, to allow transgender employees to use the restrooms and other facilities consistent with their gender identity. Also in April 2015, the EEOC ruled that a transgender employee cannot be denied access to the common restrooms used by other employees of the same gender identity, regardless of whether that employee has had any medical procedure or whether other employees' may have negative reactions to allowing the employee to do so. The EEOC held that such a denial of access constituted direct evidence of sex discrimination under Title VII.

The following is a sample of state and local legal provisions, all reaffirming the core principle that employees should be allowed to use the restrooms that correspond to their gender identity.

Colorado: Rule 81.9 of the Colorado regulations requires that employers permit their employees to use restrooms appropriate to their gender identity rather than their assigned gender at birth without being harassed or questioned. 3 CCR 708-1-81.9 (revised December 15, 2014), available at http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1251629367483.

For more information refer to: "Sexual Orientation & Transgender Status Discrimination—Employment, Housing & Public Accommodations," Colorado Civil Rights Division, available at: http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1251631542607.

Delaware: Guidance from the Delaware Department of Human Resource Management provides Delaware state employees with access to restrooms that correspond to their gender identity. The guidance was issued pursuant to the state's gender identity nondiscrimination law.

Delaware's policy also suggests: Whenever practical, a single stall or gender-neutral restroom may be provided, which all employees may utilize.

However, a transgender employee will not be compelled to use only a specific restroom unless all other co-workers of the same gender identity are compelled to use only that same restroom.

For more information refer to: State of Delaware Guidelines on Equal Employment Opportunity and Affirmative Action Gender Identity, available at: http://www.delawarepersonnel.com/policies/documents/sod-eeoc-guide.pdf.

District of Columbia: Rule 4-802 of the D.C. Municipal Regulations prohibits discriminatory practices in regard to restroom access. Individuals have the right to use facilities consistent with their gender identity. In addition, single-stall restrooms must have gender-neutral signage. D.C. Municipal Regulations 4-802, "Restrooms and Other Gender Specific Facilities," available at: http://www.dcregs.dc.gov/Gateway/RuleHome.aspx?RuleNumber=4-802.

Iowa: The Iowa Civil Rights Commission requires that employers allow employees access to restrooms in accordance with their gender identity, rather than their assigned sex at birth.

For more information refer to: "Sexual Orientation & Gender Identity – An Employer's Guide to Iowa Law Compliance," Iowa Civil Rights Commission, available at: https://icrc.iowa.gov/sites/files/civil_rights/publications/2012/SOGIEmpl.pdf.

Vermont: The Vermont Human Rights Commission requires that employers permit employees to access bathrooms in accordance with their gender identity.

For more information refer to: "Sex, Sexual Orientation, and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees," Vermont Human Rights Commission, available at: http://hrc.vermont.gov/sites/hrc/files/pdfs/other%20reports/trans%20employment%20brochure%207-13-12.pdf.

Washington: The Washington State Human Rights Commission requires employers that maintain gender-specific restrooms to permit transgender employees to use the restroom that is consistent with their gender identity. Where single occupancy restrooms are available, the Commission recommends that they be designated as "gender neutral."

For more information refer to: "Guide to Sexual Orientation and Gender Identity and the Washington State Law Against Discrimination," available at: http://www.hum.wa.gov/Documents/Guidance/GuideSO20140703.pdf.

Additional Information

- American Psychological Association. Answers to your questions about transgender people, gender identity and gender expression, 2011: http://www.apa.org/topics/lgbt/transgender.aspx.
- Transgender Law Center's model employer policy, with an extensive section on restrooms, can be found at: http://transgenderlawcenter.org/wp-content/uploads/2013/12/model-workplace-employment-policy-Updated.pdf.
- "Restroom Access for Transgender Employees" on Human Rights Campaign website: http://www.hrc.org/resources/entry/restroom-access-for-transgender-employees.
- National Gay and Lesbian Task Force and the National Center for Transgender Equality. National Transgender Discrimination Survey, 2011: http://endtransdiscrimination.org/report.html.

How OSHA Can Help

OSHA has a great deal of information to assist employers in complying with their responsibilities under the law. Information on OSHA requirements and additional health and safety information, including information on OSHA's Sanitation standard, is available on the agency's website (www.osha.gov).

Workers have a right to a safe workplace (www.osha.gov/workers.html#2). The law requires employers to provide their employees with working conditions that are free of known dangers. An employer's duty to provide a safe workplace includes the duty to provide employees with toilet facilities that are sanitary and available, so that employees can use them when they need to do so. Employers also have a duty to protect all

their employees, regardless of whether they are transgender, from any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. For more information on workplace violence, please see OSHA's website at: www.osha.gov/SLTC/workplaceviolence.

Workers who believe that they have been exposed to a hazard or who just have a question should contact OSHA. For example, workers may file a complaint to have OSHA inspect their workplace if they believe that their workplace is unsafe or that their employer is not following OSHA standards. Just contact OSHA at: 1-800-321-OSHA (6742), or visit www.osha.gov. Complaints that are signed by an employee are more likely to result in an on-site inspection. It's confidential. We can help.

The *Occupational Safety and Health Act* (OSH Act) prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. These rights include raising a workplace health and safety concern with the employer, reporting an injury or illness, filing an OSHA complaint, and participating in an inspection or talking to an inspector. If workers have been retaliated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action. For more information, please visit www.whistleblowers.gov.

OSHA can also help answer questions or concerns from employers. To reach your closest OSHA regional or area office, go to OSHA's Regional and Area Offices webpage (www.osha.gov/html/RAmap.html) or call 1-800-321-OSHA (6742). OSHA also provides free, confidential on-site assistance and advice to small and medium-sized employers in all states across the country, with priority given to high-hazard worksites. On-site Consultation services are separate from enforcement activities and do not result in penalties or citations. To contact OSHA's free consultation program, or for additional compliance assistance, call OSHA at 1-800-321-OSHA (6742).

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Department of Labor, Office of Federal Contract Compliance Programs, 2015. "Frequently Asked Questions EO 13672 Final Rule", available at: http://www.dol.gov/ofccp/lgbt/lgbt_faqs.html#Q35.

National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011 at 56 (noting that only 22% of transgender people have been denied access to gender-appropriate restrooms), available at: http://endtransdiscrimination.org/report.html.

Gates, Gary J., How many people are lesbian, gay, bisexual, and transgender? Williams Institute, UCLA School of Law, 2011. Retrieved 5/18/2015 from: http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. Injustice at Every Turn: A Report of the National Transgender Discrimination Survey. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011 at 56 (noting that only 22% of transgender people have been denied access to gender-appropriate restrooms), available at: http://endtransdiscrimination.org/report.html.

Lusardi v. McHugh, EEOC Appeal No. 0120133395 (Apr. 1, 2015), available at: http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf.

Macy v. Holder, EEOC Appeal No. 0120120821 (2012); Attorney General Memorandum, Treatment of Transgender Employment Discrimination Claims (Dec. 15, 2015). Retrieved 5/18/2015 from: http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf.

Memorandum to Regional Administrators and State Designees of the Occupational Safety and Health Administration on the Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998), available at: www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932.

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Recent Developments: North Carolina Courts and Public Employment

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A.

Contractual Obligations to Retirees

Part One: The Old *Bailey* Case

In 1939, the state began setting up retirement benefits programs for governmental employees in North Carolina, including the Teachers' and State Employees' Retirement System (TSERS) and the Local Government Employees' Retirement System (LGERS). Once an employee worked a set number of years (initially 20, eventually down to five), the employee vested in the benefits of the system. From the start, one benefit found in the statutes was this: retirement pay paid to a retiree was exempt from North Carolina income tax.

In 1989, the General Assembly (for reasons we will not get into here), placed a cap on the annual amount of a retiree's retirement pay that would be exempt: $4,000. Everything above that would be subject to state income tax.

Wait a minute! Retirees who had vested before passage of the 1989 law objected. When we came to work, it was on the understanding that we would contribute to the retirement system from our paychecks and our employer would contribute to the retirement system on our behalf and once we became vested we would be eligible to retire and receive retirement pay and that pay would not be taxed. We worked for all these years, we got vested, and now you want to tax us.

You can't do that! We have a contract. Under the contract, we worked and you paid us salary during the time that we worked and that was fine. But you also agreed that in the future we would get retirement benefits and they would not be taxed. We relied on that promise. That non-taxed income is deferred compensation. We earned it then and you have to pay it to us now. If you do not, you are violating our constitutional right to be free from impairment of contract.

The retirees sued. In the case of *Bailey v. State of North Carolina*[1], in 1998, the Supreme Court of North Carolina agreed with them. The statutory provision that retirement pay in TSERS and LGERS would be free from state income tax was a contractual obligation of the state. Every person who became vested before the passage of the 1989 law is the beneficiary of that contract. Their retirement pay cannot be subject to North Carolina income tax. We speak of these lucky people (I'm one!) as *Bailey*-qualified or *Bailey*-protected.

[1] 348 N.C. 130.

Part Two: The New *Lake* Case

It wasn't until 1971 that the state created a health insurance program—the State Health Plan—for state employees. In 1974, the General Assembly extended the State Health Plan to retirees. Retirees were required to pay "the established applicable premium for the plan." Over the years, the plans for both active employees and retirees changed numerous times—sometimes particular plans required premiums and sometimes not. By 2011, there was the option of a 70/30 preferred-provider plan or an 80/20 plan. Neither required a premium from active employees or from retirees. In 2011, the General Assembly added a premium for the 80/20 plan.

Wait a minute! Retirees who wished to continue under the 80/20 plan without paying the new premium objected. This is like the *Bailey* case, they said. Health insurance is an employment benefit that arose in the course of our employment. Once we vested in TSERS, we gained a contractual right to the health insurance benefit. The benefit that we worked under as employees—no premium for the 80/20 plan—was part of our compensation package, we vested in it, we have a contractual right to it, and you cannot now take it away.

No.

The North Carolina Court of Appeals in 2019, in *Lake v. State Health Plan for Teachers and State Employees*,[2] said that there are big differences between the retirement benefits at stake in *Bailey* and the health benefits in retirement at stake in this case. One is part of a contract; the other is not. In the case of the retirement system, participation is mandatory. Employees must contribute 6% of their salary, and their employer—the state—contributes its share. The employee's future retirement benefit is calculated on the employee's salary and length of service. That future benefit is a form of deferred compensation, earned by the employee as he or she goes along.

Retiree health benefits are an entirely different matter, the court said. Employee participation is voluntary. Employees become eligible to enroll, but are not required to do so. The level of retiree health benefit is in no way related to the employee's position, salary, or length of service. And the statute that created the State Health Plan specifically provides—and has from the start—that the General Assembly retains "the right to alter, amend, or repeal." The court said: "This express reservation by the General Assembly is hardly the language of contract." (internal quotation marks and citation omitted)

So, under *Bailey* once an employee is vested, his or her retirement benefits may not be reduced. The retirees who sued in the health benefits case tried to make a similar argument. They acknowledged that of course health benefits plans will change over time, but, they argued, the state cannot reduce the "value" of their future retiree health benefits. The court characterized this argument as "specious."

Instead, the court said, "retired state employees are promised nothing more than equal access to health care benefits on an equal basis with active state employees."

[2] 2019 WL 1028627, __ N.C. App. ___ (March 5, 2019) (Motions for appeal to Supreme Court pending)

Part Three

In the *Bailey* case, the state's highest court said that vested benefits in retirement pay are a kind of deferred benefit protected by contract. In the *Lake* case, the court of appeals said that retiree health care benefits are not protected by contract, and thus the retirees are not entitled to a plan they once had.

But the *Lake* court says that retirees are promised "equal access to health care benefits on an equal basis with active state employees." It does not explain how and why that is so.

B.

"Just Cause" under the State Human Resources Act

The North Carolina Human Resources Act (Chapter 126 of the General Statutes) applies to employees of the state (except for those specifically exempted) and to employees of many county departments of health, social services, and emergency management. Covered employees may be discharged, suspended, or demoted for disciplinary reasons only for "just cause." G.S. 125-35

Under the provisions of the North Carolina Administrative Code, "just cause" may consist of unsatisfactory job performance, grossly inefficient job performance, or unacceptable personal conduct. 25 NCAC 01J .0604

When an employer discharges an employee (or suspends or demotes the employee), the employee has the right to challenge the action through a grievance procedure within the employing agency. If the employee is dissatisfied with the result of the grievance procedure, he or she may initiate a "contested case" in the Office of Administrative Hearings (OAH). After a hearing before an Administrative Law Judge (ALJ), either the employee or the employer may appeal to the North Carolina Court of Appeals (and then, perhaps, to the state Supreme Court)

The cases below came through that process to the appellate courts in 2018 or so far in 2019, involving, at least in part, a discussion of whether "just cause" existed. There is nothing extraordinary about them. They simply give a flavor of "just cause" cases that reach the appellate courts.

- *Gray v. NC Department of Public Safety*, 822 S.E.2d 331 (N.C. App. 2019)
- *Rouse v. Forsyth County Department of Social Services*, 822 S.E.2d 100 (N.C. App. 2018)
- *Watlington v. Department of Public Services Rockingham County*, 822 S.E.2d 43 (N.C. App. 2018)
- *Smith v. N.C. Department of Public Instruction*, 820 S.E.2d 561 (N.C. App. 2018)
- *Hardy v. North Carolina Central University*, 817 S.E.2d 495 (N.C. App. 2018)
- *Swauger v. UNC at Charlotte*, 817 S.E.2d 434 (N.C. App. 2018)

- *Antico v. N.C. Department of Public Safety*, 812 N.C. App. 203 (N.C. App. 2018)

Let's look briefly at each one.

Gray v. NC Department of Public Safety

Type of "just cause" involved: The court decision does not specify the type of just cause involved, but, from the factual recitations, it appears to be a combination of unsatisfactory job performance and unacceptable personal conduct.
Allegation of "just cause": Male nurse at correctional facility was dismissed. The just cause allegations supporting the dismissal were excessive use of a personal telephone during duty hours, tardiness, and failure to follow policies in assessment and documentation regarding an inmate.
How the matter proceeded: The employee responded with an assertion that he was being discriminated against on the basis of his sex. He filed an EEOC charge, but the EEOC did not pursue the matter. The employee initiated a contested case in OAH, and included the allegations of sex discrimination. The ALJ found that there was sufficient cause for discipline of the employee, but that the decision to dismiss was the result of sex discrimination. The ALJ ordered a 30-day unpaid suspension and reinstatement with back pay.
The court decision: The record as a whole contains sufficient evidence to support the ALJ's findings and they are affirmed, except that the maximum unpaid suspension allowable under the applicable provisions of the Administrative Code is two weeks.

Rouse v. Forsyth County Department of Social Services

Type of "just cause" involved: Grossly inefficient job performance (among others).
Allegation of "just cause": County DSS worker, in attempting to secure a proper placement for their son, had conversations with the mother and the father. The mother indicated that the son had sexually abused other children of hers. The mother, immediately in the same interview, recanted that statement. The DSS worker did not file an abuse report on the allegation of sexual abuse. When it appeared that the son subsequently abused the other children, the DSS worker was dismissed for grossly inefficient job performance, based on her failure to file the report.
How the matter proceeded: The DSS worker initiated a contested case. The ALJ found that the evidence did not support a finding of grossly inefficient job performance, in that the DSS worker followed an informal office practice of "supportive counselling," a course that was justifiable given that the allegation of abuse was immediately recanted.
The court decision: The court upheld the ALJ's decision in favor of the DSS worker: "Supportive counseling was not included in the State's [] reporting mechanism, but was a practice utilized by respondent's management." To follow the informal practice did not amount to grossly inefficient job performance.

Watlington v. Department of Public Services Rockingham County

Type of "just cause" involved: Unacceptable personal conduct.
Allegation of "just cause": DSS worker was dismissed for accepting a $60 loan from a client, using $6 of money allocated to a minor child to purchase food for herself, accepting food from

clients on several occasions, giving a foster family a bassinet from DSS supplies without authorization, and accepting a gift of earrings from a client family.
How the matter proceeded: The DSS worker initiated a contested case. The ALJ found that the allegations were true and that they amounted to unacceptable personal conduct.
The court decision: The court affirmed the ALJ's findings. The court noted the relatively minor nature of the DSS worker's infractions, yet said that her conduct "albeit not necessarily malicious or corrupt, could erode the public's faith in [DSS] and provide the requisite cause to justify dismissal."

Smith v. N.C. Department of Public Instruction

Type of "just cause" involved: Unacceptable personal conduct.
Allegation of "just cause": A section chief in the state education agency was dismissed because of (among other things) disruptive behavior in a disagreement with a coworker in the hallway, indicating to a job applicant that the agency engaged in sex discrimination and implying that the applicant should withdraw, and "liking" items on his LinkedIn account that included images of women in sexually provocative poses.
How the matter proceeded: The DSS worker initiated a contested case. The ALJ found that the allegations were true and that they amounted to unacceptable personal conduct.
The court decision: The court affirmed the ALJ's findings. The court said, "We are satisfied that Smith's actions had the potential to adversely affect the mission of DPI and constituted conduct that is detrimental to State service."

Hardy v. North Carolina Central University

Type of "just cause" involved: Unacceptable personal conduct.
Allegation of "just cause": University police lieutenant had received prior warnings for unsatisfactory job performance and was demoted, for both unsatisfactory job performance and unacceptable personal conduct, for creating a hostile work environment for her subordinates, through "autocratic, divisive, bullying management" of her team. Her conduct violated the university's workplace violence policy, the demotion letter said. She appealed to the chancellor, who upheld the demotion as constituting unacceptable personal conduct.
How the matter proceeded: The DSS worker initiated a contested case. The ALJ found that the university had not carried its burden to prove that just cause existed to unacceptable personal conduct.
The court decision: The court affirmed the ALJ's findings. The conduct might constitute "poor job performance," the court said, but not "unacceptable personal conduct."

Swauger v. UNC at Charlotte

Type of "just cause" involved: Not specifically stated in the court report.
Allegation of "just cause": The employee's university employer switched its email from Microsoft Outlook to Google Gmail. The employee refused to agree to Google's Terms of Service for Gmail and was dismissed.
How the matter proceeded: The employee initiated a contested case. The ALJ found that the university proved that just cause existed to dismiss the employee.

The court decision: [The issue before the court was not whether the ALJ's decision should be upheld. The effect of the court's action is that the decision stands.]

Antico v. N.C. Department of Public Safety

Type of "just cause" involved: Unacceptable personal conduct.
Allegation of "just cause": At the end of his shift at a detention facility, a corrections officer was about to leave the facility when he was ordered by his supervisor to return. All officers were being required to stay while a search was underway for missing equipment. This officer thought the requirement was unreasonable and left. He was dismissed for unacceptable personal conduct.
How the matter proceeded: The employee initiated a contested case. The ALJ found that the department carried its burden to prove that just cause existed to unacceptable personal conduct.
The court decision: The corrections officer argued (among other things) that dismissal was an unjust, overly harsh punishment. Citing the need for order in a correctional facility, the court upheld the ALJ's decision affirming dismissal as an appropriate action.

C.

Claims of Negligent Retention and Wrongful Discharge

The law intersects with employment in some very direct and common ways. The Fair Labor Standards Act speaks to hours of work and premium overtime compensation. The Family and Medical Leave Act guarantees to many employees job-protected time away from work because of the serious health conditions of employees or family members. Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act protect us all against discrimination in employment because of our race, color, religion, sex, national origin, age, or disability. The United States Constitution provides to governmental employees protections related to freedom of speech and freedom from unreasonable searches.

But the law dances around the edges of employment in some less direct and less common ways.

Part One: Negligent Hiring, Retention, or Supervision

One of those less direct and less common approaches to employment by the law involves a claim against an employer by someone who is harmed in some way by an employee of that employer. The claim, essentially, is that the employer was negligent when the employer hired the employee. You knew (or should have known) that this guy was a bad guy and that the way he behaved could lead to someone (like me) getting hurt. It was negligent of you to hire him and expose me to this danger. It is only because of your negligence that this guy was in the position he was in that allowed him the access he had to me to injure me.

Here is an example.[3] In 1968, parents accused a school principal in a North Carolina school system of sexually assaulting their daughter. The principal neither confirmed nor denied the accusation, but he resigned. He applied for a principal's job in another North Carolina school system. That second system talked to references in the first system, and no one mentioned the sexual abuse problem. The second system hired him and some years later he allegedly assaulted another student. The parents of the student sued the second school system for negligent hiring. The guy was unfit to be a principal, yet you hired him and you knew or should have known that he was unfit. That is negligent hiring. But in this case, the court held that the second school system could not be held liable for negligent hiring because it had no reason to know that the principal may have pedophilic tendencies.

The claim of negligence may relate to hiring an unfit person, as this case demonstrates. It may also relate to alleged negligence in supervision of a person who, it could be claimed, would not be dangerous if properly supervised, or to alleged negligence in retaining an employee when you learn after hiring that he is unfit.

Here is an example from 2019. *It is Bordini v. Trump for President Inc*.[4]

In 2015, the Trump campaign hired a guy named Phillip (that's his last name) to run its North Carolina operations. Phillip hired a guy named Bordini to work in the campaign.

Phillip had a concealed carry permit and regularly carried a pistol. Bordini alleged that on one particular occasion in 2016, while Phillip was driving and Bordini was a passenger, Phillip pulled out his pistol and, with his finger on the trigger, held the gun against Bordini's knee. Bordini found this very emotionally damaging and he sued the Trump campaign for negligent retention and supervision. He said that Phillip had on two prior occasions, while working for the Trump campaign, behaved inappropriately with the gun. Once, he cocked the gun and pointed it at the feet of a second campaign coworker. Another time he unholstered the gun in the presence of a third campaign coworker. The campaign, with this warning, knew or should have known, Bordini said, that Phillip could cause someone injury with his gun and the campaign was negligent in its supervisor or retention, cause injury to Bordini.

The court held that Bordini could not recover from the Trump campaign. The second and third coworkers were not employees "vested with the general conduct and control of defendant's business." Therefore, whatever knowledge they had that Bordini might be dangerous could not be attributed to the campaign itself. No evidence showed that anyone in control of the Trump campaign had knowledge that Bordini was unfit (or that they should have known), so the Trump campaign cannot be liable for negligent supervision or retention.

[3] Medlin v. Bass, 327 N.C. 715 (1990).
[4] 822 S.E.2d 168 (N.C. App. 2019)

Part Two: Wrongful Discharge

The Court of Appeals, in 1985 in *Sides v. Duke Hospital*,[5] created something that had not existed before in North Carolina law—the tort of wrongful discharge.

A nurse at Duke Hospital claimed that she was dismissed in retaliation for testimony she had given in a medical malpractice lawsuit against Duke. She claimed she was fired because her truthful testimony under oath had cost Duke money. The superior court judge threw her case out, saying that she was alleging a tort—wrongful discharge—that simply did not exist in North Carolina. Even if what she claimed was true, Duke could dismiss her for that reason if it wanted to.

The court of appeals, when the case reached it in 1985, for the first time recognized the wrongful discharge tort as an exception to employment at will. To allow employers to punish their employees for testifying truthfully, the court said, would be "an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly, and a violation of the right that all litigants in this State have to have their cases tried upon honest evidence fully given."

So, the court said, "while there might be a right to terminate a contract [of employment] at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy."

The "public policy" implicated in this case was the policy that every citizen should testify fully and truthfully at court. The public policy exemption to the doctrine of employment at will was given birth and the tort of wrongful discharge is alive and active today.

Here is an example from 2019. It is *Brodkin v. Novant Health Inc.* [6] An oncologist at a North Carolina hospital used a treatment for cancer patients that caused concern among other oncologists at the hospital. Eventually, the hospital presented to the doctor an ultimatum: he could sign a letter agreeing to limit some treatment practices or be fired. When he refused to sign the letter, he was in fact fired.

The doctor sued, alleging, among other things, wrongful discharge. He cited a North Carolina statute[7] that prohibits the North Carolina Medical Board from revoking a doctor's license "solely because of that person's practice of a therapy that is experimental, nontraditional, or that departs from acceptable and prevailing medical practice," unless the board can show that the treatment is unsafe or ineffective. The doctor said that this statute establishes a North Carolina public policy in favor of experimental or nontraditional medical practices and that to fire him because he refused to sign an agreement not to engage in his favored treatments would be a violation of this public policy.

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[5] 74 N.C. App. 331.
[6] 824 S.E.2d 868 (N.C. App. 2019)
[7] G.S. 90-14(a)(6)

The court disagreed. Even if the statute does establish such a public policy—a question the court explicitly said it was not deciding—still a hospital may discharge an employee "whose medical decisions, in the hospital's view, are harmful to its patients." The court said:

> "[E]ven assuming there is a public policy protecting physicians' independent judgment, that policy would not force an employer . . . to continue employing . . . a physician whose professional judgment they believe is wrong."

D.

A New Basis for Employment Lawsuits: The Fruits of Your Labor

Here is what I wrote for the Public Employment Law Update a year ago, about what was then a brand new decision of the North Carolina Supreme Court in the case of *Tully v. City of Wilmington*[8]:

> *[Under a new decision by the North Carolina Supreme Court] a public employee has a claim that the North Carolina Constitution is violated if (1) a public employer has a clear employment rule or policy, (2) the employer violates that rule or policy, and (3) the employee is injured.*
>
> *That is, a failure to follow your own policy can, in itself, give rise to a constitutional violation.*
>
> *This is not a due process case, the Court was clear to say. It does not turn on property interests. It applies to at-will employees. Violate your own employment rules and injure an employee and you may face constitutional consequences.*
>
> *The case is Tully v. City of Wilmington, decided March 2 of this year.*
>
> *Kevin Tully was an officer in the Wilmington Police Department. In 2011 he sought a promotion to the rank of sergeant. Because of the procedural status of the case at the time the Supreme Court issued its opinion, the Court accepted Tully's version of the facts as true.*
>
> *In seeking the promotion, Tully took a written exam, but he did not achieve a passing score. That prevented him from proceeding in the promotion process. He received a copy of the official examination answers and discovered that the official answers were based on outdated law. He filed a grievance. He was told that the test answers were not something that could be the subject of a grievance.*

[8] 370 N.C. 527.

The Police Department Policy Manual—which was not adopted as a city ordinance—provided that "[c]andidates may appeal any portion of the selection process." It also provided that "[i]f practical, re-application, re-testing, re-scoring and/or re-evaluation of candidates may be required if an error in the process is substantiated."

Tully filed a lawsuit in the superior court, alleging, among other things, that the city had violated his rights under Article I, Section 1 of the North Carolina Constitution. That section states:

> *"We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."*

By denying his promotion due to his answers on the exam and then determining that such a reason could not be a subject of a grievance, Tully said, the city had deprived him of "the fruits of" his own labor. He asked the court for a declaration that he had been deprived of his constitutional right to the fruits of his labor and he asked for money damages.

After the case had made its way through the superior court and the Court of Appeals, the Supreme Court agreed with Tully. Taking Tully's claims as true, the Court said:

> *"[W]e conclude that the City's actions here implicate Tully's right under Article I, Section 1 to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process."*
>
> *"[W]e hold that to state a direct constitutional claim grounded in this unique right under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation. If a public employee alleges these elements, he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor.*

This decision concerns promotions. The three-part test that the Court sets out specifically applies to promotions. But the reasoning of the Court would seem to apply to all kinds of employment policies.

The implications are worthy of note. If a public employer has a clearly established rule or policy concerning an employment matter, and it violates that rule, and an employee is injured as a result of the violation, the employee has a claim that the North Carolina Constitution has been violated.

I concluded that only time would tell whether this new constitutional cause of action would in fact lead to lawsuits against units of government in North Carolina. So far there are no reported appellate decisions citing *Tully* in the employment context.

It remains likely, in my opinion, however, that governmental employees will, over time, bring *Tully*-based claims. The *Tully* decision came, to many observers, as a surprise in the employment context. But the "fruits" of one's labor provision in the state Constitution has long been used as a basis for decision in another context: the licensing of occupations. For example, in 1957, the state Supreme Court decided that the requirement of licensure for tile layers was an unconstitutional infringement on the rights of individuals to earn a living. Since there was no health and safety interest that would support the licensure requirement, the requirement would unconstitutionally "prohibit unlawful occupations or impose unreasonable and unnecessary restrictions on them."[9] In 2014, the Supreme Court struck down a town's imposition of a fee schedule to be imposed on tow truck operators who tow unauthorized cars from private lots. It doing so it said that "[t]his Court's duty to protect fundamental rights includes preventing arbitrary governmental actions that interfere with the rights to the fruits of one's own labor."[10]

These are examples. There are numerous other cases involving licensure and the regulation of businesses. I am confident we will see cases directly involving employment claims, under *Tully*.

E.

Special Bonus: Federal Court Applying State Law Liberty Interest and the Name-Clearing Hearing

The Fourteenth Amendment to the U.S. Constitution provides that the government may not "deprive any person of . . . liberty . . . without due process of law." "Liberty," like "property," (also protected by the Fourteenth Amendment), has a broad meaning. It means more than simply staying out of jail.

Liberty interest in engaging in life's ordinary occupations. The term "liberty" includes the right "to engage in the common occupations of life, unfettered by unreasonable

[9] Roller v. Allen, 245 N.C. 520, 525.
[10] King v. Town of Chapel Hill, 367 N.C. 400.

restrictions" imposed by the government.[11] That right is abridged when the government "unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities." In one North Carolina case, a veteran dining room manager alleged that her liberty interest was violated when her supervisor publicly disclosed his belief that the manager was supplying liquor to painters at work in the building for them to drink on the premises. That public statement by the supervisor, made in connection with the dismissal of the manager, would, if left unrefuted, apply a stigma to the manager, making it difficult for her to obtain employment.

The procedural protections of due process apply, the North Carolina Supreme Court said in another case, if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment or other adverse employment action.[12] The federal Fourth Circuit Court of Appeals has said that the due process requirement applies when the government's statements about its employee

- placed a stigma on the employee's reputation
- were made public by the employer
- were made in conjunction with the employee's termination or demotion, and
- were false[13]

Notice and hearing. When those elements are present, due process requires notice and a hearing. "[W]here [the government] publicly and falsely accuses a discharged employee of dishonesty, immorality, or job-related misconduct, considerations of due process demand that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma to his reputation."[14]

Due process. The scope of the process that is due to protect an employment liberty interest is more modest and ill-defined than the process due to protect property interests. The purpose of the due process hearing, the United States Supreme Court has said, is to provide the person an opportunity to clear his or her name. Once that has happened at the hearing, the employer is free to deny the person future employment. In fact, the hearing may even come after the termination of employment (or other adverse action), because the focus of the liberty interest is on *future* employment opportunities.[15] But while the hearing may come after the termination, the federal Fourth Circuit Court of Appeals, in the case mentioned above, made clear that the hearing must be offered before the stigmatizing, false information is made public. "An opportunity to clear your name after it has been ruined by dissemination of false, stigmatizing charges is not meaningful," the court said.[16]

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[11] *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979), (internal quotation marks and citation omitted). *See Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707, 33 L. Ed. 2d 548, 558 (1972).
[12] *Crump*, 326 N.C. at 614, 392 S.E.2d at 584. *See Williams v. Johnston County Bd. of Educ*., No. 5:95-CV-621-B02 (E.D.N.C., 1996).
[13] *Sciolino* v. City of Newport News, 480 F.3d 642, 646 (2007).
[14] *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617.
[15] *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617.
[16] *Sciolino*, 480 F.3d at 653.

Protection for all employees. The due process protections of this liberty interest apply equally to all public employees—at-will employees, probationary employees, and employees with property interests in their jobs.

A complication from the 2010 changes in the personnel records statutes. In 2010 the General Assembly made five substantive changes to the personnel records privacy statutes. One of those changes provides that, in the case of a dismissal for disciplinary reasons, a written notice setting forth the specific acts or omissions that were the basis for the dismissal is a public document.

In other words, if the governmental employer terminates an employee for disciplinary reasons, and gives to the employee a letter stating what those reasons are, that letter is "a public document." It must be shown to whoever wants to see it.

Let's take an example. Suppose a local news media outlet asks to see such a letter regarding a terminated employee. The governmental employer would be obligated to turn it over. Does the requirement for a due process name-clearing right kick in? Recall that there are four criteria:

- stigma on the employee's reputation
- made public by the employer
- made in conjunction with the employee's termination or demotion, and
- false

In our example, the third of the four is clear. The termination letter is certainly in conjunction with the termination. And the second of four is clear. The letter has been turned over to the news media outlet because the 2010 changes require it.

So, if the employer does not provide the opportunity for a name-clearing hearing before turning the letter over to the news media outlet, the terminated employee can sue (and win) if he can show that the letter was stigmatizing and something in it was false.

In 2018, the Fourth Circuit applied just this reasoning in a case involving several law enforcement officers dismissed from the town of Bald Head Island in North Carolina. After they received their dismissal letters, they asked for a hearing. The town did not give them one. Then a local newspaper asked for copies of the letters. The town determined that it was obligated to turn them over, under the 2010 changes, and it did so. The officers sued, alleging that their liberty interest was violated without due process. The court held that the charges in the letters were both stigmatizing and false and ruled in favor of the terminated employees.[17]

Defendants argued that the requirement of a name-clearing hearing should not have been triggered by the fact that the dismissal letters were turned over to the newspaper because "that disclosure was not made voluntarily but rather was required by the 2010 changes. The district

[17] *Cannon v. Village of Bald Head Island*, 891 F.3d 489 (2018).

court said that "this argument is misplaced as there is no requirement that the 'making public' be voluntary."[18]

When the matter reached the Fourth Circuit Court of Appeals, that court agreed that even if the disclosure could be described as non-voluntary, still the rules regarding due process in denial of a liberty interest apply.

Maybe the right is triggered just by mere presence in the personnel file. The circuit court then went one step further. It noted that in previous cases,[19] it had held that all that was required to trigger the right to a due process hearing was the *likelihood* that prospective employers or the public at large would see the false and stigmatizing material and that discharged public employees have "a right that [their] personnel file contain no substantially false information with respect to [their] work performance or the reasons for [their] discharge when that information is *available* to prospective employers."

Therefore, the court said, the right to a due process hearing may have been triggered even if the discharge letters had not been made public:

> "Accordingly, notwithstanding Peck's disclosure to the media of the Officers' termination letters, the availability upon request of those same letters from the Officers' personnel file may give rise to a constitutionally cognizable public disclosure." [20]

The hearing must be afforded before disclosure. Finally, the Fourth Circuit said that while it was not clear that a hearing must be afforded to the employee before the employee's termination from employment, it is clear that the Fourteenth Amendment requires that the employer must afford "a constitutionally adequate name-clearing hearing before publicly disclosing false information regarding the basis for [the termination]."[21]

[18] *Cannon v. Village of Bald Head Island*, 2017 WL 2712958 (E.D.N.C. 2017)
[19] *Sciolino*, 480 F.3d at 650 and *Ledford v. Delancy*, 612 F.2d 883 (4th Cir. 1980)
[20] *Cannon*, 891 F. 3d at 504.
[21] *Cannon*, 891 F.3d at 506.

CBD Oil and Employee Drug Testing

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The Legality of CBD: Caveat Emptor – North Carolina Criminal Law

by Phil Dixon

Chances are you've heard of CBD products. Many cities around North Carolina have stores specializing in CBD products, and it's widely available online and in 'vape' shops. It's marketed for its health benefits and is touted as a safe and legal (if largely unregulated) treatment for a variety of conditions, from depression to inflammation to cancer and acne. I was recently asked to look at the law surrounding CBD products, and this post summarizes what I found.

What is CBD?

CBD is the common name for the compound cannabidiol, one of over 100 cannabinoid compounds found in the cannabis plant. While "cannabis" is often used in common parlance as another word for marijuana, marijuana and hemp are actually different varieties of the *Cannabis sativa* species—although both can be used to manufacture CBD. Among other botanical differences, hemp has a high concentration of CBD and low concentrations of THC (delta-9 tetrahydrocannabinol, the more renowned cannabinoid and the primary psychoactive ingredient in marijuana). CBD itself is not considered an impairing substance and at most has trace amounts of THC . . . although we'll come back to that point.

For many years, researchers apparently believed the compound was chemically inert. More recently, it has been shown that CDB is an effective treatment for certain types of childhood seizure disorders, whatever other potential benefits it might have. CDB is available in a variety of forms, and can be eaten, drunk, dissolved through the skin or under the tongue, or inhaled. Back in June of this year, the Food and Drug Administration approved the first prescription CDB-based medicine, Epidiolex, an oral solution. Note, one thing CBD is *not* is synthetic marijuana—those compounds, sometimes marketed as K2 or Spice, are designed to mimic the effects of marijuana but don't actually contain any marijuana. Synthetic marijuana is a Schedule I controlled substance in NC and is known to cause psychosis and other major health problems.

So is it legally safe to purchase and use CBD products in NC?

That was in essence the question I received—is this a legal product in North Carolina? The answer is yes, at least sometimes. The state definition of marijuana in G.S. 90-87(16) excludes "industrial hemp as defined in G.S. 106-568.51, when the industrial hemp is produced and used in compliance with the rules issued by the North Carolina Industrial Hemp Commission". G.S. 106-568.51(7) defines "industrial hemp" as all parts of the cannabis plant grown by a licensed grower that has less than 0.3% THC content. It appears that a product meeting those requirements is legal under state law—it is not marijuana

by definition and not controlled by any other state law of which I'm aware.

Note, Article 5G of Chapter 90 of the General Statutes of North Carolina carves out another exception for the use of hemp extracts to treat intractable epilepsy in certain circumstances; G.S. 90-94.1 allows products for this class of patients to contain up to 0.9% THC. These more specific laws automatically terminate on July 1, 2021, and apply only to a very narrow set of people. For everyone else, the limit on legal hemp products is 0.3% THC.

So, easy right?

What about the Feds?

Despite the state rules, confusion abounds about the federal treatment of CBD. The federal definition of marijuana found in the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et. seq.*, mirrors the state definition of marijuana but without the exception for hemp. "Marihuana" (as it is called in the U.S. Code) remains a Schedule I controlled substance under federal law. Schedule I controlled substances are considered to have no known medicinal value and a high potential for abuse.

In 2014, however, the U.S. Congress passed a Farm Bill that authorized industrial hemp programs and modified the federal definition of marijuana to exclude hemp. 7 U.S.C. § 5940 provides that any part of the *Cannabis sativa* plant with a THC concentration of less than 0.3% is deemed industrial hemp and not marijuana, notwithstanding the definition under the CSA.

The Drug Enforcement Agency ("DEA") also recently reclassified some CBD products as Schedule V controlled substances, apparently to allow Epidiolex (mentioned above) onto the market. Under that directive, a product containing CBD with less than 0.1% THC content would be a schedule V controlled substance, instead of schedule I. The directive is narrow and directed specifically at Epidiolex; all other CBD products are presumably still treated as a schedule I substance.

An earlier directive adds yet another wrinkle. Depending on which part of the plant that is used to make CBD, it may not be a controlled substance *at all*. The federal definition of marijuana (like the state definition) excludes the mature stalks of the plant. According to the DEA, "[t]he mere presence of cannabinoids is not itself dispositive as to whether a substance is within the scope of the CSA; the dispositive question is whether the substance falls within the CSA definition of marijuana." In other words, that definition looks to which part of the plant is used to create the end product, not the presence of THC or any other specific cannabinoid. If the CBD isn't made from the prohibited parts of the plant, it's arguably not a controlled substance under federal law, regardless of THC content. How that distinction is enforced is far from clear—how is law enforcement supposed to distinguish between products sourced from lawful hemp versus marijuana? You could test for THC, which might show the product exceeds the THC level to qualify as hemp under state or federal law, but that still wouldn't tell you which part of the plant it came from, which matters under the state and federal definitions.

As far as I can tell, the takeaway is that federal law allows the use and possession of CBD at least in those three situations: where it's produced from industrial hemp; where it's produced from parts of the cannabis plant that don't count as marijuana; and where it's lawfully prescribed.

So What's the Problem?

Where should we begin? People have been arrested for possessing and selling the product in and out of the state, and sellers in NC have had shipments seized by federal authorities in transit. Some law enforcement agencies have taken a proactive approach to determining the legality of CBD products by testing them off store shelves. Proving to law enforcement that any given CBD product is legal could be challenging. Further, because the product is not FDA approved or subject to standardized quality controls (at least in terms of the over-the-counter commonly available versions), a retail buyer does not necessarily have an easy way to determine how the CBD was made (Is it really made from industrial hemp? From NC-licensed industrial hemp growers? Is it from the mature stalks of regular marijuana, or from other, illegal parts of the plant?), or what the exact chemical composition of the substance truly is (is it really CBD? In the correct dosage it claims to contain? Does it have less than 0.3% THC? Does it contain any measurable THC?).

Aside from issues with the source, a well-intentioned CBD user might get a batch that happens to contain a higher-than-advertised THC level. This could not only result in unintentional impairment, but also a positive drug screen in the event the user is tested. Conversely, a marijuana user, confronted with a positive drug screen, might claim they were only using lawful CBD products. I haven't been able to find hard and fast information on how likely it is that a product with less than 0.3% THC would be detectable in most drug screens, but there's at least some evidence that large doses of CBD can trigger a positive result for THC, and different drug screens have different levels of sensitivity. Many CBD products from marijuana-legal states contain THC and other cannabinoids in much higher concentrations. So, in addition to the risk that a CBD product inadvertently contains too much THC, there's also the risk that what is billed as hemp-sourced CBD product is really just a marijuana product with THC levels above the 0.3% mark. While many companies selling CBD assure potential customers that their products comply with the law and won't typically cause a positive drug screen result (and I imagine many do strive to comply with the law and are concerned about detectable THC levels in their products), these are not insignificant risks for many workers—health care, law enforcement, and the military come to mind, among other fields. It's anyone's guess how high these risks really are, but the consequences of a positive drug screen (or an arrest) can obviously be grave. Until there is more uniform regulation (and I'd be willing to bet that we will see legislation on this topic one way or the other soon, at either the state or federal level, or both), my advice to would-be users of CBD products is summed up in the Latin subtitle to this post: Buyer beware.

Readers, do you have experience with CBD products? How is law enforcement treating them in your area? Have you seen a criminal case brought for CBD? Post a comment and share your stories.

CBD, Hemp, and Drug Testing

SAFE-T-WORKS
DRUG & ALCOHOL TESTING AND EMPLOYMENT SERVICES

HUB · E-Verify · eScreen · Respirator Fit Testing · Corporate/Employee Wellness

Drug Testing

- Purpose: To determine abuse
- Testing does not determine impairment
- Confirmation cutoff level is the possible abuse level, set to eliminate casual contact as a source of a positive result
- Cutoff levels are defined by the US Department of Health and Human Services (DHHS)
- Lab-based testing eliminates "false positives" by use of GC/MS or LC/MS confirmation

Drug Testing

- "Instant" tests can only be used in employment testing for a pre-employment test, and only then when there is laboratory testing for confirmation of any non-negative result.
- A Medical Review Officer (MRO) must review any DOT non-negative result and determine if the result is indeed positive taking into account medical information that may justify the presence of the drug. Any non-negative result in a non-DOT test that is employment related should have the same scrutiny applied.

CBD and Hemp Products



The Drugs

- CBD (cannabidiol) is extracted from marijuana and any other cannabis plant, including hemp
- Hemp is a cannabis plant with generally lower levels of CBD than marijuana
- Marijuana users use the plant, usually the leaves and flowers of the marijuana plant, not an extract.

THC

- Tetrahydrocannabinol (THC) is the psychoactive metabolite of marijuana
- It is derived from heating tetrahydrocannabinolic acid (THCA) which is present in the marijuana plant. THC exists in small amounts in marijuana and hemp. Hemp does not have THCA.
- Potency of marijuana is measured in the amount of THCA in it which equates roughly to the content of THC
- Marijuana may range from 7.5% THC to 40% THC

CBD and Hemp

- CBD is an extract, not the actual plant
- Commercial CBD and hemp products can contain up to 0.3% THC
- These products cannot be legally sold as a dietary supplement nor can specific claims of therapeutic value be made
- Due to the low volume of THC these products are not considered to be psychoactive.
- The manufacturer is, for the most part, the quality control agent

Claims for Benefits of CBD

- Acne
- Anxiety
- Pain
- Depression
- Epilepsy
- Glaucoma
- Insomnia
- Loss of appetite/weight loss
- Muscle spasms
- Parkinson's Disease

FDA-Recognized Use of CBD

- There is one FDA-approved medical use
- Epidiolex, which has CBD as an active ingredient, is approved for treatment of Lennox-Gastaut Syndrome and Dravet Syndrome
- These are rare, severe forms of epilepsy, usually occurring in children and young adults
- Epidiolex has been proven to help reduce the number and severity of seizures

How Is CBD Used

- Oral application is the easiest application. Orally administered CBD absorbs through the digestive system.
- Topical application is usually employed for joint/muscle pain. Absorption is lessened because the skin acts as a barrier (we don't absorb water through the skin, for example).
- Inhaling CBD is a third option. This is the most efficient application in terms of the delivery to the body since heat causes a more efficient release and a more easily absorbed version of CBD.

Side Effects of CBD

- Anxiety
- Changes in appetite
- Moodiness
- Dizziness
- Diarrhea
- Drowsiness
- Dry mouth
- Nausea

THC in the Body

- THC is fat-soluble, meaning it attaches to fat cells, organs and tissues in the body
- No other drug in the testing regimen acts in this way
- The fatty tissue is eventually "used up" by the body and the THC is re-released into the system
- A test for THC in the body detects the THC present, not just that which was recently inhaled or ingested
- The detection period for THC is an extended period far beyond the psychoactive "high" that occurs near the use of marijuana

THC in the Body

- The rate and timing of re-release of THC into the body are not under the control of the user
- Metabolic rate, body mass index (BMI), age and gender can affect the rate of re-release into the system
- Smoking a single joint of marijuana can produce a positive result 3-5 days after the event, and frequent users can easily take a month to get the THC out of the system

The Human Factor

- Many people operate under the idea that they don't get full result from medications. If one works okay, two would work better, three might get me relief.
- THC and hemp are over-the-counter products, meaning there is no control on how much you can buy at one time or how often you can buy.
- There are suggestions for how much and how frequently to use these products, but there is certainly no requirement or motivation to follow those directions.

CBD, Hemp, and THC

- It is essentially impossible to predict how much THC may be accumulated from CBD/hemp use since there are so many uncontrollable factors
- It is likely that consumed products (as opposed to topical) would cause a higher accumulation, but that is not guaranteed.

DOT and MRO

- The DOT has flatly stated that CBD and hemp products will not be considered as a defense against a positive test result for marijuana.
- DOT regulations do not allow the medical review officers (MRO) to consider CBD or hemp use in their deliberation on a marijuana positive
- A marijuana positive is determined by the level of THC in the body. There are no mitigating factors to consider.

Conclusion

- CBD and hemp products may cause an accumulation of THC in the body
- CBD and hemp are not a defense for a marijuana (THC) positive
- There is no way to determine (except by a drug test) how much THC is accumulated in the body.
- **It is wise for those who are subject to employment drug testing to refrain from use of CBD and hemp products.**

Wage and Hour Update: New FLSA Regulations on Overtime, the Regular Rate and Joint Employment, One New 4th Cir. Case on the Regular Rate and One Important DOL Opinion Letter on the FMLA

Diane Juffras
School of Government

WAGE AND HOUR UPDATE
Public Employment Law Update
May 10, 2019

UNC SCHOOL OF GOVERNMENT Diane M. Juffras School of Government

Wage and Hour Opinion Letter 2019-1-A (March 14, 2019)

If an employee has
a FMLA-qualifying health condition
or otherwise qualifies for FMLA leave,
the employer
MUST
designate the time-off as FMLA leave.

The Proposed New Salary Threshold

$679 per week

or

$35,308 per year

Comments

- **Accepted until May 21, 2019**

UNC

The Current Overtime Rule: What is It?

Current Requirements for Exemption from Overtime:

- the position must be paid on a salary basis;
- the position must be paid a minimum of **$466 per week ($23,660 annually)**; and
- the position's duties must satisfy either the executive, administrative or professional duties test.

UNC

The Current Overtime Rule as Published in the CFR

- the position must be paid a minimum of **$913 per week**
- This was enjoined by the court and never amended

⇨ Final rule will be the amendment.

UNC

The Proposed New Overtime Rule: What is It?

- Position must be paid on a salary basis;
- The position must be paid a minimum of **$679 per week ($35,308 annually)**; and
- The position's duties must satisfy either the executive, administrative or professional duties test.

UNC SCHOOL OF GOVERNMENT

Salary threshold test: Meant to be a "bright line rule"

Updating the Salary Threshold

- Every four years through notice and comment rulemaking process

UNC SCHOOL OF GOVERNMENT

Nondiscretionary Bonuses

Old

New

Nondiscretionary bonuses and incentive payments may be included in calculation of up to 10% of minimum salary threshold

UNC

Nondiscretionary Bonuses

- Bonuses must be awarded on an annual basis or more frequently.
- Each pay period, employer must pay 90% of the standard salary threshold ($611.10 per week).

UNC

Nondiscretionary Bonuses

- Final catch-up payment within one pay period after end of each 52-week period permitted.
- At end of 52-week period, if salary + bonuses ≠ $35,308, then employer has one pay period to make up difference.

UNC

Highly Compensated Employees

Current	New
Salary Threshold of $100,000 per year	**Salary Threshold of $147,414** – 90th percentile of F/T salaried employees nationally – Was $134,000 in 2016 Rule – Projected to $147,414 in 2020

UNC SCHOOL OF GOVERNMENT

Highly Compensated Employees

- Salary Threshold of $147,414
  - May include nondiscretionary bonuses up to any amount
  - 10% limitation does not apply to HCE
  - Final catch-up payment within one pay period after end of each 52-week period permitted.

UNC SCHOOL OF GOVERNMENT

No Changes Proposed or Adopted to Computer Professional Exemption

Current	New
▪ Computer professional may be salaried or may be paid $27.63/hour	▪ No change to minimum hourly rate for computer professional ▪ Salaried computer professional must earn at least $679/week

UNC SCHOOL OF GOVERNMENT

No Changes Proposed or Adopted to:

- Comp time
- 207(k) exemption
- Fluctuating workweek
- Rules governing on-call time, training time, travel time and other rules governing compensable time

UNC

Remember

- Minimum salary for all exempt status positions will be $35,308 per year. **NO EXCEPTIONS!**
- Positions that make less than that minimum **CANNOT** be exempt, regardless of duties.
- Positions that were exempt but become nonexempt because of salary must be compensated for working overtime.

UNC

PROPOSED REVISIONS TO THE REGULAR RATE RULE

29 USC § 207(e)

29 CFR Part 778

UNC

Calculating Overtime — Regular Rate of Pay Includes:

- Hourly rate/salary
- Retroactive salary increases
- On-call pay
- Nondiscretionary bonuses
- Shift differentials
- Longevity pay

UNC

Calculating Overtime — Regular Rate Does NOT Include:

- Overtime pay
- Severance pay
- Paid Vacation of Sick Leave
- Uniform allowances
- Automobile allowances
- Travel Expenses
- Value of Benefits
- Tuition reimbursement

UNC

Organizational and Cosmetic Changes

29 CFR § 778.219 Pay for Foregoing Holidays and Unused Leave

- Clarification that payments for accrued sick, vacation and personal leave to be treated the same way. Additional examples.
- No changes to treatment of holiday pay

UNC

Bona Fide Meal Periods

- Deletion of the term "lunch period" from § 778.218(b) to eliminate potential inconsistency between sections.
- Rule is that time spent and any payment made for bona fide meal periods do not count toward overtime and are not included in the regular rate.

UNC

Tuition Payments or Reimbursements

- Not expressly addressed in regs
- No proposed change but DOL seeks comments.
- Previous analyses under reimbursement regulations: for whose benefit?
- DOL commentary under "other similar payments"

UNC

Straight Fee Payment for Noncompensable On-Call Time

No Change

UNC

Bonuses: 29 CFR § 778.211(c)

Examples of nondiscretionary bonuses:

- Incentive bonuses to get employees to work more quickly or more efficiently;
- Attendance bonuses;
- Individual or group production bonuses;
- Bonuses for quality and accuracy of work; bonuses contingent upon the employee's continuing in employment until the time the payment is to be made.

UNC

Bonuses: 29 CFR § 778.211(d) (NEW)

Examples of discretionary bonuses:

- Bonuses to employees who make unique or extraordinary efforts;
- Severance bonuses (??);
- Bonuses for overcoming challenging or stressful situations;
- Employee of the month bonuses

UNC

U.S. Dep't of Labor v. Fire & Safety Investigation Consulting Services, LLC, 915 F.3d 277(4th Cir. 2019)

A blended rate derived from a salary meant to compensate an employee for both straight and fixed overtime hours violates the FLSA.

Dep't of Labor v. Fire & Safety Investigation

29 CFR 778.309: Employers may pay fixed amount to employees who work a fixed overtime schedule.

Dep't of Labor v. Fire & Safety Investigation

Issue: Whether an employer can use a blended rate derived from the fixed amount when the employee works fewer than 40 hours.

Employees worked 168 hours in a two-week scheduling period for which they were paid a set amount.

- Hourly regular rate of $21.44
- Traditional method compensated 80 straight time hours and 88 overtime hours = $4,545 per two week period.
- $4,545 / 168 = $27.05

Dep't of Labor v. Fire & Safety Investigation

Employee works only 36 hours.

- Hourly regular rate of $21.44
  - 36 x $21.44 = $771.84
  - He was paid $973.93
  - 36 x $27.05 = $973

UNC

PROPOSED NEW RULE ON JOINT EMPLOYMENT 29 CFR § 791.2

Proposed new rule identifies two joint employer scenarios for FLSA purposes:

1. Single employer but another "person" benefits from the employee's work;
2. Two employers who are "sufficiently associated with respect to the employment of the employee."

UNC

JOINT EMPLOYMENT FIRST SCENARIO

Where another "person" simultaneously benefits from the employee's work that other person is the employee's joint employer only if the person is acting directly or indirectly in the interest of the employer in relation to the employee.

UNC SCHOOL OF GOVERNMENT

Four Factor Balancing Test:

Does the other person:

1. Hire or fire employee
2. Supervise and control employee's work schedule or conditions of employment
3. Determine employee's rate and method of payment
4. Maintain employee's employment records

UNC SCHOOL OF GOVERNMENT

Four Factor Balancing Test:

- Potential joint employer must actual exercise one or more of the four factors
- Potential ability or legal right not relevant
- Economic dependence and economic reality test not relevant

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JOINT EMPLOYMENT SECOND SCENARIO

Dissociated v. ***Significantly Associated***

- Arrangement to share employee's services;
- One employer is acting directly or indirectly in the interest of the other employer in relation to the employees; OR
- They share control of the employee directly or indirectly because one employer controls the other or they are under common control.

UNC

EXAMPLE 3

A city hires a janitorial services company to clean its buildings after-hours. The city agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services. But the city does not set the janitorial employees' pay rates or individual schedules and do not *in fact* supervise the workers' performance of their work in any way. Is the city a joint employer of the janitorial employees?

UNC

EXAMPLE 4: A county contracts with a landscaping company to maintain its golf course. The contract does not give the county authority to hire or fire the landscaping employees or to supervise their work. In practice, a county employee oversees landscaping employees by sporadically assigning them tasks throughout each workweek, providing them with periodic instructions during each workday, and keeping intermittent records of their work. At the county's direction, the landscaping company agreed to terminate a worker for failure to follow the county employee's instructions. Is the county a joint employer of the landscaping employees?

EXAMPLE 5

A large agency requests workers on a daily basis from a staffing agency. The agency determines each worker's hourly rate of pay, supervises their work, and continuously adjusts the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the agency a joint employer of the staffing agency's employees?

UNC SCHOOL OF GOVERNMENT

EXAMPLE 6

An association provides optional group health coverage to its members to offer to their employees. Employer B and Employer C both provide the Association's optional group health coverage to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association's health plan make the Association a joint employer of B's and C's employees, or B and C joint employers of each other's employees?

UNC SCHOOL OF GOVERNMENT

U.S. Wage and Hour Division
(March 2019)

Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Defining and Delimiting the Exemptions for Executive, Administrative, and Professional Employees

The Department of Labor (Department) is proposing to update and revise the regulations issued under the Fair Labor Standards Act (FLSA or Act) implementing the exemption from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales and computer employees.[1]

Since 1940, the Department's regulations have generally required each of three tests to be met for one of the FLSA's exemptions to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed ("salary basis test"); (2) the amount of salary paid must meet a minimum specified amount ("salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test").

The Department proposes to update both the minimum weekly standard salary level and the total annual compensation requirement for "highly compensated employees" to reflect growth in wages and salaries. The Department believes that the proposed update to the standard salary level will maintain the traditional purposes of the salary level test and will help employers more readily identify exempt employees. The Department also proposes to revise the special salary levels for employees in the motion picture industry and certain U.S. territories. The Department is not proposing any change to the duties test. If finalized as proposed, the Department estimates that 1.3 million currently exempt employees would, without some intervening action by their employers, become nonexempt.

* Key Provisions of the Proposed Rule *

The NPRM focuses primarily on updating the salary and compensation levels needed for these workers to be exempt. Specifically, the Department proposes to:

1. increase the standard salary level to $679 per week (the equivalent of $35,308 annually for a full-year worker), up from the currently enforced level of $455 per week;

2. increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to $147,414 annually, up from the currently enforced level of $100,000 annually; and

[1] On May 23, 2016, the Department issued a final rule increasing the standard salary level, among other changes. That rule was declared invalid by the United States District Court for the Eastern District of Texas, and an appeal of that decision to the United States Court of Appeals for the Fifth Circuit is being held in abeyance pending the completion of the Department's rulemaking. Currently, the Department is enforcing the regulations in effect on November 30, 2016, including the $455 per week salary level set in 2004.

3. allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided these payments are made on an annual or more frequent basis, while inviting comment on whether the proposed 10 percent cap is appropriate, or if a higher or lower cap is preferable.

Additionally, the Department is asking for public comment on the NPRM's language for periodic review to update the salary threshold. An update would continue to require notice-and-comment rulemaking.

Standard Salary Level

The Department proposes to increase the standard salary level to $679 per week ($35,308 for a full-year worker). The proposed amount accounts for wage growth since the 2004 rulemaking, projected forward to January 1, 2020, the approximate date a final rule is anticipated to be effective. The Department proposes to update the standard salary level set in 2004 by applying the same method used to set that level in 2004 to current data—*i.e.*, by looking at the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South), and/or in the retail sector nationwide.

HCE Total Annual Compensation Requirement

The Department proposes to increase the total annual compensation requirement for highly compensated employees to $147,414 per year. This is an increase over the level of $100,000 set in 2004. To be exempt as an HCE, an employee must also receive at least the new standard salary amount of $679 per week on a salary or fee basis (without regard to the payment of nondiscretionary bonuses and incentive payments). The proposed HCE annual compensation level is set using the same method used in the 2016 final rule—*i.e.*, equivalent to the 90th percentile earnings of full-time salaried workers—projected forward to January 1, 2020.

Special Salary Levels for Employees in U.S. Territories and the Motion Picture Industry

The Department proposes to maintain a special salary level of $380 per week for American Samoa because minimum wage rates there have remained lower than the federal minimum wage. Additionally, the Department is proposing a special salary level of $455 per week for employees in Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands.

The Department also proposes to maintain a special "base rate" threshold for employees in the motion picture producing industry. Consistent with prior rulemakings, the Department proposes to increase the required base rate proportionally to the increase in the standard salary level test, resulting in a new base rate of $1,036 per week (or a proportionate amount based on the number of days worked).

Updating

Experience has shown that fixed earning thresholds can become substantially less effective over time. Accordingly, the Department is asking for public comment on the NPRM's language for periodic review to update the salary threshold. An update would continue to require notice-and-comment rulemaking.

Treatment of Nondiscretionary Bonuses and Incentive Payments

The Department also proposes to permit employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, they must make such payments on an

annual or more frequent basis. Additionally, the Department has invited comment on whether the proposed 10 percent cap is appropriate, or if a higher or lower cap is preferable.

If an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the Department permits the employer to make a "catch-up" payment within one pay period of the end of the 52-week period. This payment may be up to 10 percent of the total standard salary level for the preceding 52-week period. Any such catch-up payment will count only toward the prior year's salary amount and not toward the salary amount in the year in which it is paid.

For additional routine information outside of the rulemaking, visit our Wage and Hour Division Website: www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone,
1-866-4-USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

THE REGULAR RATE: 29 U.S.C. § 207(e)

(e) "Regular rate" defined. As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either,

(a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or

(b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or

(c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

U.S. Department of Labor

Wage and Hour Division

(March 2019)

Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Governing the Regular Rate under the FLSA

The U.S. Department of Labor (Department) is proposing to clarify and update the regulations governing the regular rate requirements under the Fair Labor Standards Act (FLSA). The FLSA generally requires overtime pay of at least one and one-half times the regular rate for hours worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates.

Part 778 constitutes the Department's official interpretation with respect to the meaning and application of the "regular rate" for purposes of calculating overtime compensation due under section 7 of the FLSA, 29 U.S.C. 207, including calculation of the regular rate. Part 548 of Title 29 implements section 7(g)(3) of the FLSA, which permits employers, under specific circumstances, to use a basic rate to compute overtime compensation rather than a regular rate. Parts 778 and 548 have not been significantly revised in over 50 years.

In this rulemaking, the Department proposes updates to a number of regulations, both to provide clarity and better reflect the 21st-century workplace. In doing so, these proposed changes would promote compliance with the FLSA; provide appropriate and updated guidance in an area of evolving law and practice; and encourage employers to provide additional and innovative benefits to workers without fear of costly litigation. The Department expects that the proposed rule will encourage some employers to start providing certain benefits that they may presently refrain from providing due to apprehension about potential overtime consequences, which in turn might have a positive impact on workplace morale, employee compensation, and employee retention. The Department was unable to quantify such potential benefits and invites comment from the public regarding the possible effects of the proposed rule.

* Key Provisions of the Proposed Rule *

The NPRM focuses primarily on clarifying whether certain kinds of perks, benefits or other miscellaneous payments must be included in the "regular rate" used to determine an employee's overtime pay. In relevant part, the Department proposes clarifications to the current regulations to confirm the following:

- that the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services may be excluded from an employee's regular rate of pay;
- that payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay;
- that reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate;

- that reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and meets other regulatory requirements may be excluded from an employee's regular rate of pay;
- that employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA; and
- that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

The Department also proposes to provide examples of discretionary bonuses that may be excluded from an employee's regular rate of pay under section 7(e)(3) of the FLSA and to clarify that the label given a bonus does not determine whether it is discretionary. The Department also proposes to provide additional examples of benefit plans, including accident, unemployment, and legal services, that may be excluded from an employee's regular rate of pay under section 7(e)(4) of the FLSA.

Additionally, the Department proposes to clarify that tuition programs, such as reimbursement programs or repayment of educational debt, could be excluded under several different provisions of section 7(e), and welcomes comments about how employers currently administer such programs.

Finally, the Department proposes two substantive changes to the existing regulations. First, the Department proposes to eliminate the restriction in §§ 778.221 and 778.222 that "call-back" pay and other payments similar to call-back pay must be "infrequent and sporadic" to be excludable from an employee's regular rate, while maintaining that such payments must not be so regular that they are essentially prearranged. Second, the Department proposes an update to its "basic rate" regulations. Under the current regulations, employers using an authorized basic rate may exclude from the overtime computation any additional payment that would not increase total overtime compensation by more than $0.50 a week on average for overtime workweeks in the period for which the employer makes the payment. The Department's proposal would update this regulation to change the $0.50 limit to 40 percent of the federal minimum wage—currently $2.90.. The Department welcomes comments on whether 40 percent is an appropriate threshold.

For additional information, visit our Wage and Hour Division Website: www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
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Contact Us

Wage and Hour Division (WHD)

Highlights of the Notice of Proposed Rulemaking (NPRM) on Regular Rate Under the Fair Labor Standards Act

General

Q. What is the subject of this proposed rule?

In this Notice of Proposed Rulemaking (NPRM), the Department proposes to clarify and update a number of the regulations interpreting the regular rate requirements under the Fair Labor Standards Act (FLSA). The regular rate determines how much nonexempt employees covered by the FLSA receive in overtime pay, as the Act generally requires overtime pay of at least one and one-half times the regular rate for time worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates.

The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. Because these regulations have not been updated in decades, the proposal would better define the regular rate for today's workplace practices.

Q. Where can I review, and how can I comment on, the Department's Notice of Proposed Rulemaking (NPRM)?

The Department's Notice of Proposed Rulemaking ("NPRM") is available at www.regulations.gov under Rule Identification Number (RIN) 1235-AA24. The Department encourages all interested parties to participate in the rulemaking process by submitting written comments regarding the NPRM through the online portal provided at www.regulations.gov.

Q. What is the "regular rate"?

The FLSA generally requires that covered, nonexempt employees receive overtime pay of at least one and one-half times their regular rate of pay for any hours worked in excess of 40 hours per workweek. An employee's regular rate includes all remuneration for employment, subject to eight exclusions outlined in section 7(e) of the FLSA.

Regular rate requirements define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates.

Q. Who is entitled to the minimum wage and overtime pay under the FLSA?

Most employees covered by the FLSA must be paid at least the federal minimum wage (currently $7.25 per hour) and overtime pay at least one and-one-half times their regular rate of pay for any hours they work beyond 40 in a workweek. However, the FLSA includes exemptions to the minimum wage and/or overtime pay requirements for certain employees.

Q. Why is the Department revising these regulations now?

The Department's regular rate regulations have not been significantly revised in over 50 years. At that time, typical compensation consisted predominantly of traditional wages; paid time off for holidays and vacations; and contributions to basic medical, life insurance, and disability benefits plans. Since then, the workplace and the law have changed.

First, employee compensation packages, including employer-provided benefits and "perks," have evolved significantly. Many employers, for example, now offer various wellness benefits, such as fitness classes, nutrition classes, weight loss programs, smoking cessation programs, health risk assessments, vaccination clinics, stress reduction programs, and training or coaching to help employees meet their health goals.

Similarly, both law and practice concerning more traditional benefits, such as sick leave, have evolved in the decades since the Department first promulgated part 778. For example, instead of providing separate paid time off for illness and vacation, many employers now combine these and other types of leave into paid time off plans. Moreover, in recent years, a number of state and local governments have passed laws requiring employers to provide paid sick leave.[1]

Recently, several states and cities have also begun considering and implementing scheduling laws.[2] Some of these laws expressly assert that the penalties are not part of the regular rate under state law, and employers may be confused as they try to determine how these and other penalties may affect regular rate calculations under federal law.

In this NPRM, the Department is updating the regulations to reflect these and other such developments in the 21st-century workplace.

Footnotes

[1] In 2011, for example, Connecticut became the first state to require private-sector employers to provide paid sick leave to their employees. Today, 11 states, the District of Columbia, and various cities and counties require paid sick leave, and many other states are considering similar requirements.

[2] In the last 5 years, for example, New York, San Francisco, Seattle, and other cities have enacted laws imposing penalties on employers that change employees' schedules without the requisite notice, and various state governments are considering and beginning to pass similar scheduling legislation.

Q. What are the proposed changes to the regulations?

The NPRM focuses primarily on clarifying whether certain kinds of perks, benefits or other miscellaneous payments must be included in the regular rate. In relevant part, the Department proposes clarifications to the current regulations to confirm the following:

- that the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services may be excluded from an employee's regular rate of pay;
- that payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay;
- that reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate;
- that reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System and meets other regulatory requirements may be excluded from an employee's regular rate of pay;
- that employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA; and
- that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

The Department also proposes to provide examples of discretionary bonuses that may be excluded from an employee's regular rate of pay under section 7(e)(3) of the FLSA and to clarify that the label given a bonus does not determine whether it is discretionary. The Department also proposes to provide additional examples of benefit plans, including accident, unemployment, and legal services, that may be excluded from an employee's regular rate of pay under section 7(e)(4) of the FLSA. Additionally, the Department proposes to clarify that tuition programs, such as reimbursement programs or repayment of educational debt, could be excludable under several different provisions of section 7(e).

Finally, the Department proposes two substantive changes to the existing regulations. First, the Department proposes to eliminate the restriction in §§ 778.221 and 778.222 that "call-back" pay and other payments similar to call-back pay must be "infrequent and sporadic" to be excludable from an employee's regular rate, while maintaining that such payments must not be so regular that they are essentially prearranged. Second, the Department proposes an update to its "basic rate" regulations, which is authorized under section 7(g)(3) of the FLSA as an alternative to the regular rate under specific circumstances. Under the current regulations, employers using an authorized basic rate may

exclude from the overtime computation any additional payment that would not increase total overtime compensation by more than $0.50 a week on average for overtime workweeks in the period for which the employer makes the payment. The Department's proposal would update this regulation to change the $0.50 limit to 40 percent of the federal minimum wage—currently $2.90.

Q. What is the estimated economic impact of the proposed rule?

The Department estimates that the proposed rule, if finalized, would result in one-time regulatory familiarization costs of $36.4 million. However, the proposed rule would not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance. Therefore, there are no other costs attributable to this deregulatory proposed rule.

The Department expects that the proposed rule will encourage some employers to start providing certain benefits that they may presently refrain from providing due to apprehension about potential overtime consequences, which in turn might have a positive impact on workplace morale, employee compensation, and employee retention. The Department was unable to quantify such potential benefits and invites comment from the public regarding possible effects of the proposed rule.

Beware the Blended Rate:
U.S. Dep't of Labor v. Fire & Safety Investigation Consulting Services, LLC
915 F.3d 277(4th Cir. 2019)

At 29 CFR § 778.309, the FLSA regulations allow an employer to pay a fixed amount to nonexempt employees who work a fixed number of overtime hours each week. That sounds like a greater deviation from the general rule than it is, for the regulation explains that the fixed overtime amount is determined the same way as overtime is usually calculated: by multiplying the employee's overtime rate by the number of overtime hours regularly worked.[1] Employers are sometimes led astray by this regulation when it comes time to determining what a particular employees hourly or regular rate is.

Any fixed amount paid to a nonexempt employee should be based on a starting hourly rate. Imagine an employee with a hourly rate of $10.00 who works a scheduled 50-hour workweek. Each week that employee earns $400 in straight-time compensation ($10.00 x 40 hours) and $150 in overtime compensation ($15.00 x 10 hours) for a total of $550 each week. An employer could set that person's compensation at the fixed rate of $550 per week with the understanding that it is based on the hourly rate of $10.00.

What happens during a week when the employee works not only less than the fixed schedule, but fewer than 40 hours that week, say 35 hours? If the employer is following the FLSA, it will pay the employee $10 per hour times 35 hours or $350 for that week. But what if over time, the employer loses track of the fact that the $550 per week salary is based on an hourly rate of $10? Suppose the forgetful employer now divides $550 by 35 to get the hourly rate. The employee's hourly rate will now be $15.72! It's great for the employee if the employer now pays $15.72 times 35 hours: the employee makes $550 instead of $350. It's not so good for the employer if that wasn't its intention.

But what is worse for the employer is that if it pays the employee $15.72 per hour, that means that is the regular hourly rate and that the overtime rate should be $23.58. Instead of a fixed salary of $550 per week, the employer needs to be paying the employee a fixed rate of $864.60.

This was the situation in *Fire and Safety Investigation*, where the employer used a blended rate like that in the paragraph above to compensate employees for both their straight time and overtime hours. Where a blended rate operates as the regular rate, the FLSA is violated.

Imagine that a nonexempt employee is paid an annual salary of $40,000. This figure is intended to compensate the employee for working 2,080 hours per year or 40 hours per week each

[1] *See* 29 CFR § 778.309.

of 52 weeks. This works out to a weekly salary of $769.23. To get the regular rate, the employer would divide $769.23 by 40, the number of hours it is intended to compensate the employee for working. The hourly rate is $19.23/hour. The overtime rate in a week in which there is be no additional compensation to be folded into the regular rate would be $28.85. This is pretty straightforward.

What concerns me is that I know there are employers out there who set an annual salary that includes expected overtime hours and then work backward to get an hourly rate. This occurs most frequently with law enforcement agencies using the 207(k) exemption and scheduling employees for 172 hours and with social service agencies whose child protective services employees also work scheduled overtime. When the salary is meant to compensate the employee for both straight time and overtime and the records do not show an hourly rate upon which the salary is based, the employer may find itself in a *Fire and Safety Investigation* situation when it tries to work backward to find a regular rate and then uses that rate to compensate an employee for straight time hours. ***Beware! And for nonexempt employees, establish your hourly rate first and base your annualized salary figures on it***. To do otherwise invites danger.

29 CFR § 791.2 JOINT EMPLOYMENT

(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

U.S. Department of Labor

Wage and Hour Division

U.S. Wage and Hour Division

(April 2019)

Fact Sheet: Notice of Proposed Rulemaking on Joint Employer Status under the FLSA

The U.S. Department of Labor is proposing to revise and clarify the responsibilities of employers and joint employers to employees in joint employer arrangements. The Fair Labor Standards Act (FLSA) generally requires employers to pay their employees at least the federal minimum wage for all hours worked and overtime for hours worked over 40 in a workweek. Under the FLSA, an employee may have—in addition to his or her employer—one or more joint employers. A joint employer is any additional individual or entity who is jointly and severally liable with the employer for the employee's wages. This proposal would ensure employers and joint employers clearly understand their responsibilities under the FLSA.

Part 791 of Title 29, Code of Federal Regulations, provides the Department's official interpretations for determining joint employer status under the FLSA. The Department has not meaningfully revised part 791 in over 60 years. Part 791 currently addresses two joint employer scenarios. In the scenario where an employee works one set of hours in the workweek for his or her employer, and that work simultaneously benefits another entity, the Department proposes a clear, four-factor test—based on well-established precedent—that would consider whether the potential joint employer actually exercises the power to:

- hire or fire the employee;
- supervise and control the employee's work schedules or conditions of employment;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records.

The proposal provides guidance on how to apply this multi-factor test; explains what additional factors should and should not be considered; and clarifies that a particular business model, certain business practices, and certain contractual agreements do not make joint employer status more or less likely. Regarding part 791's guidance for the other joint employer scenario under the FLSA—where the employee works separate sets of hours for multiple employers in the same workweek— the Department is proposing only non-substantive revisions that better reflect the Department's longstanding practice. The proposal also includes a set of examples that would further assist in clarifying joint employer status. See appendix.

The proposed changes are designed to reduce uncertainty over joint employer status and clarify for workers who is responsible for their employment protections, promote greater uniformity among court decisions, reduce litigation, and encourage innovation in the economy.

Major Features of the Proposed Rule

The Department proposes a number of revisions to the current regulation, including:

- eliminating the "not completely disassociated" standard for situations where an employee works one set of hours for an employer that simultaneously benefit another person, and replacing it with a four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency* that assesses whether the other person (that is, the potential joint employer):
    - hires or fires the employee;

    - supervises and controls the employee's work schedules or conditions of employment;
    - determines the employee's rate and method of payment; and
    - maintains the employee's employment records;
- explaining that additional factors may be used to determine joint employer status, but only if they are indicative of whether the potential joint employer is:
    - exercising significant control over the terms and conditions of the employee's work; or
    - otherwise acting directly or indirectly in the interest of the employer in relation to the employee;
- explaining that the employee's "economic dependence" on the potential joint employer does not determine the potential joint employer's liability under the FLSA, and identifying three examples of "economic dependence" factors that are not relevant to the joint employer analysis—including, but not limited to, whether the employee:
    - is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight;
    - has the opportunity for profit or loss based on managerial skill; and
    - invests in equipment or materials required for work or the employment of helpers;
- explaining that ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining joint employer status;
- clarifying that indirect action in relation to an employee may establish joint employer status;
- explaining that FLSA section 3(d) only, not section 3(e)(1) or 3(g), determines joint employer status;
- clarifying that a person's business model—for example, operating as a franchisor—does not make joint employer status more or less likely;
- explaining that certain business practices—for example, providing a sample employee handbook to a franchisee; allowing an employer to operate a facility on one's premises; jointly participating with an employer in an apprenticeship program; or offering an association health or retirement plan to the employer or participating in such a plan with the employer—do not make joint employer status more or less likely;
- explaining that certain business agreements—for example, requiring an employer to institute workplace safety measures, wage floors, or sexual harassment policies—do not make joint employer status more or less likely;
- making non-substantive clarifications to the "not completely disassociated" standard for situations where an employee works separate sets of hours for multiple employers in the same workweek;
- providing illustrative examples demonstrating how the Department's proposed regulation would apply. See appendix.

The Department welcomes comments on the proposed changes to part 791.
More information about the proposed rule is available at www.dol.gov/whd/flsa/jointemployment2019.

Appendix:

(1) **Example:** An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee. Are they joint employers of the cook?

Application: Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

(2) **Example:** An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

Application: Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

(3) **Example:** An office park company hires a janitorial services company to clean the office park building after-hours. According to a contractual agreement with the office park and the janitorial company, the office park agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees' pay rates or individual schedules and do not in fact supervise the workers' performance of their work in any way. Is the office park a joint employer of the janitorial employees?

Application: Under these facts, the office park is not a joint employer of the janitorial employees because it does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. The office park's reserved contractual right to control the employee's conditions of employment does not demonstrate that it is a joint employer.

(4) **Example:** A country club contracts with a landscaping company to maintain its golf course. The contract does not give the country club authority to hire or fire the landscaping company's employees or to supervise their work on the country club premises. However, in practice a club official oversees the work of employees of the landscaping company by sporadically assigning them tasks throughout each workweek, providing them with periodic instructions during each workday, and keeping intermittent records of their work. Moreover, at the country club's direction, the landscaping company agrees to terminate an individual worker for failure to follow the club official's instructions. Is the country club a joint employer of the landscaping employees?

Application: Under these facts, the country club is a joint employer of the landscaping employees because the club exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The country club directly supervises the landscaping employees' work and determines their

schedules on what amounts to a regular basis. This routine control is further established by the fact that the country club indirectly fired one of landscaping employees for not following its directions.

(5) **Example:** A packaging company requests workers on a daily basis from a staffing agency. The packaging company determines each worker's hourly rate of pay, supervises their work, and uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?

Application: Under these facts, the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by setting their rate of pay, supervising their work, and controlling their work schedules.

(6) **Example:** An Association, whose membership is subject to certain criteria such as geography or type of business, provides optional group health coverage and an optional pension plan to its members to offer to their employees. Employer B and Employer C both meet the Association's specified criteria, become members, and provide the Association's optional group health coverage and pension plan to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association's health and pension plans make the Association a joint employer of B's and C's employees, or B and C joint employers of each other's employees?

Application: Under these facts, the Association is not a joint employer of B's or C's employees, and B and C are not joint employers of each other's employees. Participation in the Association's optional plans does not involve any control by the Association, direct or indirect, over B's or C's employees. And while B and C independently offer the same plans to their respective employees, there is no indication that B and C are coordinating, directly or indirectly, to control the other's employees. B and C are therefore not acting directly or indirectly in the interest of the other in relation to any employee.

(7) **Example:** Entity A, a large national company, contracts with multiple other businesses in its supply chain. As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct. Does A qualify as a joint employer of B's employees?

Application: Under these facts, A is not a joint employer of B's employees. Entity A is not acting directly or indirectly in the interest of B in relation to B's employees—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B's rate or method of pay—although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees. Finally, because there is no indication that A's requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B's employees, this requirement has no bearing on the joint employer analysis.

(8) **Example:** Franchisor A is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. Franchisee B owns one of these hotels and is a licensee of A's brand. In addition, A provides B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment. Is A a joint employer of B's employees?

Application: Under these facts, A is not a joint employer of B's employees. A does not exercise direct or indirect control over B's employees. Providing samples, forms, and documents does not amount to direct or indirect control over B's employees that would establish joint liability.

(9) **Example:** A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Is the retail company a joint employer of the repair company's employees?

Application: Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.

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Wage and Hour Division (WHD)

Highlights of the Notice of Proposed Rulemaking (NPRM): Joint Employer Status Under the Fair Labor Standards Act (FLSA)

Q. What is the subject of this proposed rule?

In this NPRM, the Department proposes to revise and clarify the responsibilities of employers and joint employers to employees in joint employer arrangements. The FLSA requires a covered employer to pay a nonexempt employee at least the federal minimum wage for all hours worked and overtime for all hours worked over 40 in a workweek. The FLSA also contemplates situations where additional individuals or entities are joint employers—persons who are jointly and severally liable with the employer for the employee's wages. In 1958, the Department promulgated a regulation at 29 CFR part 791 to provide guidance on how to determine FLSA joint employer status. The Department has not meaningfully revised this regulation since that time.

Q. Where can I review, and how can I comment on, the NPRM?

The Department encourages any interested members of the public to submit comments about the proposed rule electronically at www.regulations.gov, in the rulemaking docket RIN 1235-AA26 once the proposal is published in the Federal Register on April 9, 2019. Comments must be submitted by 11:59 pm on June 10, 2019 in order to be considered. More information about the proposed rule is available at www.dol.gov/whd/flsa/jointemployment2019.

Q. What is "joint employer status"?

Under the FLSA, an employee may have—in addition to his or her employer—one or more joint employers. A joint employer is any additional individual or entity who is jointly and severally liable with the employer for the employee's wages.

Q. Why is the Department revising this regulation now?

The Department has not meaningfully revised this regulation since its promulgation over 60 years ago. Under the current regulation in part 791, multiple persons can be joint employers of an employee if they are "not completely disassociated" with respect to the employment of the employee. However, part 791 does not adequately explain what it means to be "not completely disassociated" in those situations where an employee performs work for an employer, and that work simultaneously benefits another person (for example, where the employer is a subcontractor, and the other person is a general contractor). In that scenario, the employer and the other person are almost never "completely disassociated." Part 791's "not completely disassociated" standard may therefore suggest—contrary to the Department's longstanding position—that this situation always results in joint liability. The Department's proposal would address this by providing a clear, four-factor balancing test, based on well-established precedent, for determining joint employer status.

The current regulation may also create uncertainty over what business practices result in liability as a joint employer, potentially impacting the willingness of organizations to engage in any number of business practices vis-à-vis another entity—such as contracting with a staffing agency; entering into a franchise arrangement; giving a franchisee a sample employee handbook; allowing an employer to operate a facility on one's premises (such as a "store within a store" arrangement); jointly participating with an employer in an apprenticeship program or an association health or retirement plan; or requiring an employer, as part of a business contract, to institute workplace safety practices, a wage floor, or sexual harassment policies. The proposed rule explains that these and certain other business practices do not make joint liability more or less likely under the Act, thereby promoting fairness, certainty, and innovation in business relationships.

Moreover, the current regulation does not clearly identify the statutory basis for joint employer status. This proposal explains that FLSA section 3(d) determines joint employer status, which will help to ensure that the Department's joint employer guidance is fully consistent with the text of the FLSA.

Q. What are the Department's proposed changes?

The Department proposes a number of revisions to the current regulation, including:

- eliminating the "not completely disassociated" standard for situations where an employee works one set of hours for an employer that simultaneously benefit another person, and replacing it with a four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency* that assesses whether the other person (that is, the potential joint employer):
  - hires or fires the employee;
  - supervises and controls the employee's work schedules or conditions of employment;
  - determines the employee's rate and method of payment; and
  - maintains the employee's employment records;

- explaining that additional factors may be used to determine joint employer status, but only if they are indicative of whether the potential joint employer is:
  - exercising significant control over the terms and conditions of the employee's work; or
  - otherwise acting directly or indirectly in the interest of the employer in relation to the employee;
- explaining that the employee's "economic dependence" on the potential joint employer does not determine the potential joint employer's liability under the FLSA, and identifying three examples of "economic dependence" factors that are not relevant to the joint employer analysis—including, but not limited to, whether the employee:
  - is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight;
  - has the opportunity for profit or loss based on managerial skill; and
  - invests in equipment or materials required for work or the employment of helpers;
- explaining that ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining joint employer status;
- clarifying that indirect action in relation to an employee may establish joint employer status;
- explaining that FLSA section 3(d) only, not section 3(e)(1) or 3(g), determines joint employer status;
- clarifying that a person's business model—for example, operating as a franchisor—does not make joint employer status more or less likely;
- explaining that certain business practices—for example, providing a sample employee handbook to a franchisee; allowing an employer to operate a facility on one's premises; jointly participating with an employer in an apprenticeship program; or offering an association health or retirement plan to the employer or participating in such a plan with the employer—do not make joint employer status more or less likely;
- explaining that certain business agreements—for example, requiring an employer to institute workplace safety measures, wage floors, or sexual harassment policies—do not make joint employer status more or less likely;
- making non-substantive clarifications to the "not completely disassociated" standard for situations where an employee works separate sets of hours for multiple employers in the same workweek; and
- providing illustrative examples demonstrating how the Department's proposed regulation would apply.

Q. What are some examples that would further assist in clarifying joint employer status?

(1) Example: An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee. Are they joint employers of the cook?

Application: Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

(2) Example: An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the

cook?

Application: Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

(3) Example: An office park company hires a janitorial services company to clean the office park building after hours. According to a contractual agreement with the office park and the janitorial company, the office park agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees' pay rates or individual schedules and do not in fact supervise the workers' performance of their work in any way. Is the office park a joint employer of the janitorial employees?

Application: Under these facts, the office park is not a joint employer of the janitorial employees because it does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. The office park's reserved contractual right to control the employee's conditions of employment does not demonstrate that it is a joint employer.

(4) Example: A country club contracts with a landscaping company to maintain its golf course. The contract does not give the country club authority to hire or fire the landscaping company's employees or to supervise their work on the country club premises. However, in practice a club official oversees the work of employees of the landscaping company by sporadically assigning them tasks throughout each workweek, providing them with periodic instructions during each workday, and keeping intermittent records of their work. Moreover, at the country club's direction, the landscaping company agrees to terminate an individual worker for failure to follow the club official's instructions. Is the country club a joint employer of the landscaping employees?

Application: Under these facts, the country club is a joint employer of the landscaping employees because the club exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The country club directly supervises the landscaping employees' work and determines their schedules on what amounts to a regular basis. This routine control is further established by the fact that the country club indirectly fired one of landscaping employees for not following its directions.

(5) Example: A packaging company requests workers on a daily basis from a staffing agency. The packaging company determines each worker's hourly rate of pay, supervises their work, and uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?

Application: Under these facts, the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by setting their rate of pay, supervising their work, and controlling their work schedules.

(6) Example: An Association, whose membership is subject to certain criteria such as geography or type of business,

provides optional group health coverage and an optional pension plan to its members to offer to their employees. Employer B and Employer C both meet the Association's specified criteria, become members, and provide the Association's optional group health coverage and pension plan to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association's health and pension plans make the Association a joint employer of B's and C's employees, or B and C joint employers of each other's employees?

Application: Under these facts, the Association is not a joint employer of B's or C's employees, and B and C are not joint employers of each other's employees. Participation in the Association's optional plans does not involve any control by the Association, direct or indirect, over B's or C's employees. And while B and C independently offer the same plans to their respective employees, there is no indication that B and C are coordinating, directly or indirectly, to control the other's employees. B and C are therefore not acting directly or indirectly in the interest of the other in relation to any employee.

(7) Example: Entity A, a large national company, contracts with multiple other businesses in its supply chain. As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct. Does A qualify as a joint employer of B's employees?

Application: Under these facts, A is not a joint employer of B's employees. Entity A is not acting directly or indirectly in the interest of B in relation to B's employees—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B's rate or method of pay—although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees. Finally, because there is no indication that A's requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B's employees, this requirement has no bearing on the joint employer analysis.

(8) Example: Franchisor A is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. Franchisee B owns one of these hotels and is a licensee of A's brand. In addition, A provides B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment. Is Franchisor A a joint employer of Franchisee B's employees?

Application: Under these facts, A is not a joint employer of B's employees. A does not exercise direct or indirect control over B's employees. Providing samples, forms, and documents does not amount to direct or indirect control over B's employees that would establish joint liability.

(9) Example: A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute

a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Is the retail company a joint employer of the repair company's employees?

Application: Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.

Q. What is the estimated economic impact of the proposed rule?

The Department estimates that the proposed rule, if finalized, would result in a one-time regulatory familiarization cost ranging from $320.7 million to $412.1 million. There are no other costs attributable to this proposed rule, which is expected to be deregulatory. The Department does not expect the proposed rule to generate transfers to or from workers. The Department expects that its proposal will promote certainty for employers and employees, reduce litigation, and encourage innovation in the economy. The Department was unable to quantify such potential benefits and invites comment from the public regarding the possible effects of the proposed rule.

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FMLA2019-1-A

March 14, 2019

Dear **Name***:

This letter responds to your request for an opinion on whether an employer may delay designating paid leave as Family and Medical Leave Act (FMLA) leave or permit employees to expand their FMLA leave beyond the statutory 12-week entitlement. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You represent that some employers "voluntarily permit[ ] employees to exhaust some or all available paid sick (or other) leave prior to designating leave as FMLA-qualifying, even when the leave is clearly FMLA-qualifying." You state that employers justify this practice by relying on 29 C.F.R. § 825.700, which provides in relevant part that "[a]n employer must observe any employment benefit or program that provides greater family and medical leave rights to employees than the rights provided by the FMLA." You ask whether it is indeed permissible under this provision for an employer to delay the designation of FMLA-qualifying paid leave as FMLA leave or to provide additional FMLA leave beyond the 12-week FMLA entitlement.

GENERAL LEGAL PRINCIPLES

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. 29 U.S.C. § 2612(a).[1] The employer may require, or the employee may elect, to "substitute" accrued paid leave (*e.g.*, paid vacation, paid sick leave, etc.) to cover any part of the unpaid FMLA entitlement period. *Id.* at § 2612(d)(2).[2]

The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee. 29 C.F.R. § 825.300(d)(1). WHD's regulations require employers to provide a written "designation notice" to an employee within five business days—absent extenuating circumstances—after the employer "has enough information to determine whether the leave is being taken for a FMLA-qualifying reason." *Id.*

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[1] Although employees are generally entitled to 12 weeks of leave, the FMLA provides that an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious illness or injury may take up to 26 weeks of leave during a single 12-month period to care for the servicemember. *See* 29 U.S.C. § 2612(a)(3). WHD refers to this type of leave as "military caregiver leave."

[2] Under the FMLA, "[t]he term substitute means that the paid leave provided by the employer … will run *concurrently* with the unpaid FMLA leave." 29 C.F.R. § 825.207(a) (emphasis added).

Failure to follow this notice requirement may constitute an interference with, restraint on, or denial of the exercise of an employee's FMLA rights. 29 C.F.R. §§ 825.300(e), 825.301(e).

Nothing in the FMLA prevents employers from adopting leave policies more generous than those required by the FMLA. 29 U.S.C. § 2653; *see* 29 C.F.R. § 825.700. However, an employer may not designate more than 12 weeks of leave—or more than 26 weeks of military caregiver leave—as FMLA-protected. *See, e.g.*, *Weidner v. Unity Health Plans Ins. Corp.*, 606 F. Supp. 2d 949, 956 (W.D. Wis. 2009) (citing cases for the principle that "a plaintiff cannot maintain a cause of action under the FMLA for an employer's violation of its more-generous leave policy"); *cf. Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) ("[T]he 12-week figure was the result of compromise between groups with marked but divergent interests in the contested provision.... Courts and agencies must respect and give effect to these sorts of compromises."); *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204–06 (11th Cir. 2001) ("Congress intended that the FMLA provide employees with a minimum entitlement of 12 weeks of leave, while protecting employers against employees tacking their FMLA entitlement on to any paid leave benefit offered by the employer.").

OPINION

An employer may not delay the designation of FMLA-qualifying leave or designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave.

First, an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. *See* 29 C.F.R. § 825.220(d) ("Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA."); *Strickland v. Water Works and Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204 (11th Cir. 2001) (noting that the employer may not "choose whether an employee's FMLA-qualifying absence" is protected or unprotected by the FMLA). Accordingly, when an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee's FMLA leave entitlement. *See* 29 C.F.R. § 825.701(a) ("If leave qualifies for FMLA leave ... the leave used counts against the employee's entitlement ...."); WHD Opinion Letter FMLA2003-5, 2003 WL 25739623, at *2 (Dec. 17, 2003) ("Failure to designate a portion of FMLA-qualifying leave as FMLA would not preempt ... FMLA protections ...").[3] Once the employer has enough information to make this determination, the employer must, absent extenuating circumstances, provide notice of the designation within five business days. 29 C.F.R. § 825.300(d)(1). Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation.

An employer is also prohibited from designating more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave. *See, e.g.*, *Weidner*, 606 F. Supp. 2d at 956; *cf. Ragsdale*, 535 U.S. at 93–94; *Strickland*, 239 F.3d at 1204–06. Of course, "[a]n employer must

[3] WHD therefore disagrees with the Ninth Circuit's holding that an employee may use non-FMLA leave for an FMLA-qualifying reason and decline to use FMLA leave in order to preserve FMLA leave for future use. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014).

observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." 29 C.F.R. § 825.700. But providing such additional leave outside of the FMLA cannot expand the employee's 12-week (or 26-week) entitlement under the FMLA. *See, e.g. Weidner*, 606 F. Supp 2d at 956. Therefore, if an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement.

We trust that this letter is responsive to your inquiry.[4]

Sincerely,

Keith E. Sonderling
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

[4] WHD rescinds any prior statements in previous opinion letters that are inconsistent with this opinion. *See* WHD Opinion Letter FMLA-67, 1995 WL 1036738, at *3 (July 21, 1995); WHD Opinion Letter FMLA-49, 1994 WL 1016757, at *2 (Oct. 27, 1994).