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Employment Practices Liability and Evolving Social Norms

I. INTRODUCTION

- A.** Today's EPL market is greatly influenced by changing social norms. While at their core these employment law issues are familiar – discrimination, FMLA leave, wrongful denial of benefits, maternity leave, religious freedom – the contexts and extent to which they are now being applied are expanding and evolving.

II. TRANSGENDER DISCRIMINATION

A. General Introduction

Transgender issues are the next frontier of the LGBT rights movement. Discrimination against transgender people - approximately 700,000 people nationwide - is real. Transgender workers report unemployment at twice the rate of the general population. These high levels of unemployment are due, in part, to a lack of protections for transgender men and women in the workplace. Despite growing awareness of transgender issues, transgender Americans do not have the same legal rights and protections in all 50 states. In recent years, there have been increasing efforts to broaden federal and state protections for transgender persons in the workplace, but many employers may be unaware of these protections and rights. It is therefore unsurprising that transgender people face unique legal challenges on the basis of their gender identities.

B. Current Legal Landscape of Transgender Rights

It is important to understand the current federal and state legal landscape that impacts transgender persons in the workplace. Currently, there is no express federal law that prevents discrimination in employment on the basis of sexual orientation or gender identity. Further, legal protections for transgender Americans, particularly in regard to employment protection and bathroom access, differ on a state-by-state basis.

Battles are erupting nationwide over gay rights and other social issues; fights that have pit social conservatives against some of the country's most prominent businesses. There have been some important legal rulings in recent months that work to bolster transgender rights. However, those developments have coincided with an upsurge of hostility from some conservative activists and an acknowledgment by transgender-rights leaders that they face distinct challenges in building support for their cause.

C. The Impact of Transgender Rights in Corporate America

It appears to have become the mainstream majority position in corporate America to side with LGBT rights, and to embrace and appreciate the many benefits of a pluralistic workforce. The subtext is simple: intolerance really is bad business. Further, it is important to take a wide-ranging approach to workplace diversity, including gender identity and expression.

As the legal, governmental and cultural landscape shifts for transgender citizens in particular, the workplace must adapt by developing strategies to face new challenges and take advantage of opportunities resulting from these changes. An ever-increasing number of companies have anti-discrimination policies that cover transgender people. There is increasing evidence that the private sector remains ahead of the political discussions. Corporate executives are changing their anti-discrimination policies, not only to attract transgender employees in particular, but also to attract employees who value inclusive corporate cultures. This also helps to position a company as a diversity leader within an industry or the community. The primary economic motivations behind adopting LGBT-friendly workplace policies included better recruitment and retention, ideas and innovation, customer service, employee productivity, employee relations and morale.

III. SAME-SEX MARRIAGE DISCRIMINATION

A. General Introduction

Federal employment law continues to evolve to reflect increasingly positive views about same-sex marriage. Over the last 10-15 years, the percentage of the U.S. population that supports same-sex marriage has swung from the minority to the majority, with the tipping point in 2011. State legislators on both sides of the fence are equally busy, ensuring that legislation reflecting the views of their state's constituents are memorialized by state statute. The Supreme Court's ruling in the landmark *Obergefell* case has, in many ways, polarized the views of those who desire the religious freedom to denounce same-sex marriage, both in the public and in the workplace, and those who wish to enforce equal rights for same-sex couples, both in the public and in the workplace.

B. Federal Statutory Law

While there is still no express ban on discrimination based on sexual orientation (only on “sex”), the EEOC and federal courts have interpreted Title VII to extend protection to LGBT employees. Meanwhile, those in Congress who support same-sex marriage are working to enact legislation to fill the void. In addition, the Department of Labor implemented a rule change, revising the definition of “spouse” in the Family Medical Leave Act, to include same-sex spouses.

C. The EEOC’s Approach

The EEOC has taken an aggressive approach to the issue, issuing a determination in July 2015 that discrimination against an employee based on sexual orientation falls within the purview of Title VII. The EEOC is bringing an increasing number of actions on behalf of LGBT employees, garnering large awards.

D. Civil Actions by Employees

In addition, civil class actions will no doubt continue to be filed by employees. Currently, the most publicized case is *Cote v. Walmart*, in which a Walmart employee is bringing a purported class action on behalf of all LGBT employees, alleging that Walmart violated Title VII by refusing to extend spousal health benefits to her spouse, who suffered from ovarian cancer. It is worth noting that LGBT advocacy organizations have an active involvement in the case, which is currently scheduled to go to trial in November 2016.

E. The Impact on Employers

In the current environment, it is essential for employers to ensure that their policies and procedures continue to conform to changes in both state and federal law. This presents a particular challenge for employers with employees in multiple states, as the applicable law may differ from jurisdiction to jurisdiction. The best course is to ensure that the company has in place a clear policy against discrimination on the basis of sexual orientation, and is extending benefits equally to same-sex employees and their spouses.

IV. EXPANDED PROTECTIONS FOR WOMEN/PARENTAL RIGHTS

Certain states and regulatory bodies have enacted or proposed sweeping new equal pay provisions that make it significantly more difficult to justify pay disparities and will increase transparency regarding pay. The Supreme Court’s decision in *Young v. UPS* makes it much more likely that pregnant women denied workplace accommodations will succeed in their legal claims against employers, and there continues to be concerted efforts on both the state and federal level to improve maternity leave provisions. Additionally, paternity leave is a new area of focus with it

becoming more commonplace for companies to offer paid leave to fathers, and men suing for discrimination when it is not.

A. Equal Pay

Equal pay for women remains a persistent problem in the United States. In 2014, women working full-time in the United States typically were paid just 79 percent of what men were paid—a gap of 21 percent. Additionally, the gap is worse in certain states and much more pronounced for women of color. The Equal Pay Act of 1963 prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions. However, since the Equal Pay Act was signed into law, the pay gap has closed at stubbornly slow rate of less than half-a-cent per year. Additionally, it contains no provisions for making wages transparent, defenses for wage differentials are very expansive, the penalties are viewed as relatively lenient, and retaliation for employee complaints or sharing wage information is not specifically prohibited.

Recognizing this persistent problem and the limitations of the Equal Pay Act, recently there has been a renewed push to enact stronger equal pay legislation and measures that encourage greater transparency in wage reporting. Signed into law by Governor Jerry Brown on October 6, 2015, California Equal Pay Law- SB 358 is now considered the most aggressive equal pay law in the nation. On October 21, 2015, New York Governor Andrew Cuomo signed into law a series of bills that expands the state's gender-based employment protections. The EEOC has also issued proposed reporting revisions that would increase the number of federal contractors mandated to publically report wage data.

Best practices for adapting to this rapidly shifting environment include close monitoring of changes in state law, and following the lead of many high profile companies by conducting proactive pay audits across locations and sites.

B. Pregnancy Discrimination

Currently, The Family and Medical Leave Act provides covered workers with a right to 12 weeks of job-protected, unpaid leave for medical appointments, childbirth, and bonding with a new child. The Americans with Disabilities Act does not recognize pregnancy itself as a disability, but pregnancy related impairments may qualify if they substantially limit a major life activity. The Fair Labor Standards Act provides nonexempt workers unpaid break time to express breast milk. Finally, The Pregnancy Discrimination Act prohibits discrimination on the basis of pregnancy, childbirth or any other pregnancy related conditions. The Supreme Court case *Young v. UPS* clarified that in nearly all situations if an employer accommodates certain groups of employees, it must provide those same accommodations to pregnant workers. However, even after *Young*, it is still somewhat of an open question as to if employers have affirmative obligations to provide reasonable accommodations to pregnant employees. While

progress remains largely stalled on the federal level, as of December 2015, sixteen states, the District of Columbia and four cities have passed laws requiring some employers to provide reasonable accommodations to pregnant workers. Additionally, the EEOC's "Enforcement Guidance on Pregnancy Discrimination and Related Issues" suggests that employers are required to accommodate pregnant and/or nursing employees.

Some of the most important issues to keep an eye on are policies that while appearing non-discriminatory have a disparate impact on pregnant women, changing state laws that require greater protections, and having policies that are consistent throughout the organization and comport with industry standards.

C. Paternity Leave

Only 17 percent of participating companies in a survey by the Society for Human Resource Management offered paid paternity leave. Three states- California, New Jersey and Rhode Island offer paid paternity leave benefits. The current Family and Medical Leave Act and the EEOC's "Enforcement Guidance on Pregnancy Discrimination and Related Issues" do provide that providing greater paid leave to mothers for the period following the completion of recovery from childbirth than it provides to new fathers is discriminatory. In that vein, there is a recent trend in fathers suing companies for failure to offer this leave or discrimination/retaliation for taking leave- and a good number have been successful.

Certain companies are now offering generous paid parental leave to new dads — firms such as Yahoo (8 weeks), Bank of America (12 weeks), and PwC (12-14 weeks to the primary care parent; non-primary care parents get 3). However, it is still questionable as to how often this leave is utilized, as according to the Harvard Business Review fathers with even a short work absence because of family obligations are recommended for fewer rewards, and receive lower performance ratings.

D. Best Practices for Employers and EPL Insurers

Employers are well advised to closely monitor all changes in state laws for new family leave provisions and revised equal pay standards. As opposed to waiting to be brought into a suit or investigation, companies should be pro-active in conducting internal pay audits with an eye towards gender discrepancies, policies that may inadvertently have a disparate impact on pregnant women, and evaluating maternity leave policies that may be viewed as discriminatory towards men.