



BEYOND THE EXECUTIVE ORDER: *“NON-OFCCP” LAWS AND REGS THAT IMPACT THE AFFIRMATIVE ACTION WORLD*

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Her practice is focused on representing government and non-government contractors in OFCCP matters, preparing for and defending OFCCP audits, and counseling employers on issues stemming from OFCCP regulations. Ms. Mitchell personally oversees the development of hundreds of AAPs each year and is intimately involved in the defense of numerous OFCCP audits. She also spends significant time counseling companies in connection with conducting pay equity analyses as well as government contractor employment obligations.





OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS



The Three Regulatory “Stars” of OFCCP Compliance

- **Executive Order 11246**
 - Race, color, religion, gender, sexual orientation, gender identity, national origin
- **Section 503 of the Rehabilitation Act**
 - Individuals with disabilities
- **Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA)**
 - “Protected veterans”

Each law prohibits discrimination and requires affirmative action



Hypothetical

- A senior programmer at Company XYZ was known for lightening the mood on team Zoom calls, often because his husband appeared in the background making humorous observations about working from home. Prior to the pandemic, the employee never openly discussed his sexual orientation and many coworkers were not aware he was gay. He did, however, have two years of poor performance reviews and was on a performance improvement plan for the quality of his work. The quality further declined during remote work and he was terminated.
- He filed complaints with OFCCP and his state civil rights agency, saying he was fired because he was gay. Company XYZ wants to understand its liability. Specifically, what are his remedies? Do they include traditional Title VII liability?

Title VII Updates and Implications for Federal Contractors

- ***Bostock v. Clayton County, Georgia*** (SCOTUS – June 2020)
 - Title VII prohibits discrimination based on sexual orientation and gender identity
 - How did SCOTUS get there?
 - “When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex”
 - **Note:** “[T]he plaintiff’s sex need not be the sole or primary cause of the employer’s adverse action” for Title VII to apply
- Takeaways?

Hypothetical

- Female night club employee is 47 years old. She has been employed at the night club in various roles for nearly 15 years. Over the years, she has had minor attendance issues but has never had any significant disciplinary infractions or performance issues. Without warning, she is terminated, as are a handful of other female employees in their 40s. Neither male employees nor younger female employees are terminated.
- She brings a “sex-plus-age” claim under Title VII, alleging she was terminated because the club owner discriminated against women over 40. Is her “sex-plus-age” intersectional claim viable under Title VII?

Title VII Updates and Implications for Federal Contractors (cont'd)

- ***Frappied v. Affinity Gaming Black Hawk LLC*** (10th Cir., July 2020)
 - Female gaming employees alleged they were terminated on the basis of age + sex and brought claims under, among other laws, Title VII
 - 10th Circuit recognizes that workers can bring “sex-plus-age” claims
 - But, age claims under Title VII? What about the ADEA?
 - “Unique discrimination” faced by older women
 - *Bostock*’s influence?
 - Consider: Will Title VII’s reach extend to intersectional claims involving *disability* (ADA)?
- Advice for federal contractors?



Hypothetical

- Janitorial employee was hired by and is on the payroll of Company A. However, he does not perform any janitorial services for Company A; rather, he is contracted out to Company B to provide evening janitorial services Monday through Friday for one year. The terms of his contract make explicit that he is not an employee of Company B.
- Due to family obligations, janitorial employee begins showing up late to his scheduled shift. He rushes through his duties and consistently fails to complete his required tasks each evening. Company B's Office Manager, who has observed his performance on site most days, gives the janitorial employee a verbal warning. When his performance does not improve, this escalates to a written warning. Eventually, Company B elects to terminate janitorial employee.
- Is Company B a joint employer of Company A's janitorial employee?

NLRA & Joint Employment

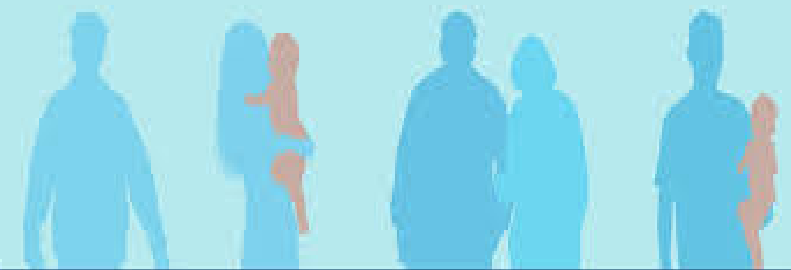
- NLRB Restores Pre-***Browning-Ferris*** Standard (Effective 4/27/20)
 - For Joint Employment, a business must possess and exercise substantial direct and immediate control over at least one essential term and condition of employment of another employer's employee
 - Substantial Direct and Immediate Control: Actions that have a “*regular or continuous consequential effect*” on one of the 8 core aspects (below) of a worker's job
 - Essential terms and conditions of employment:
 - Wages
 - Benefits
 - Hours of Work
 - Hiring
 - Discharge
 - Discipline
 - Supervision
 - Direction

NLRA & Joint Employment (cont'd)

- An update on *Browning-Ferris*
 - Retroactive application of the new standard would be “manifestly unjust”
 - All-Republican labor board reinstated 2013 finding against joint employment
- Consider the risks of misclassification
 - FLSA considerations
- Importance for federal contractors
 - Who should be included in your workforce?
 - OFCCP Jurisdiction and your AAP
 - All “employees” must be included
 - EEO-1, VETS reporting

“Conflict” Between Labor & EEO Laws

- ***Constellium Rolled Products Ravenswood v. NLRB*** (D.C. Cir., Dec. 2019)
 - Background: In 2018, split NLRB ruled the Company violated the NLRA when it suspended and later fired EE after who wrote “whore board” on an OT sign-up sheet during an ongoing labor dispute over the Company’s new sched. System
 - Protected activity?
 - What about other legal obligations? E.g., non-discrimination, anti-harassment, EEO
 - D.C. Cir.: NLRB wrongly ignored Company’s legal responsibility to *maintain a harassment-free workplace* when it found the company illegally fired a protesting EE
 - “Potential conflict” in employment statutes
 - NLRB failed to analyze the possible clash between the way in which it construed the NLRA and the Company’s various EEO obligations



Family and Medical Leave Act

Hypothetical

- Tax accountant requests intermittent FMLA leave to care for her husband who is undergoing cancer treatments, and her boss approves it. When she tries to exercise this leave, her boss tells her that she is being inconsiderate to her colleagues because the firm is already short-staffed and, as she knows, it is “busy season.”
- She realizes her boss has a point and worries about her colleagues becoming overwhelmed with covering her workload while she is out. She takes some, but not all, of her planned leave.
- Does the accountant have an actionable claim under the FMLA?

FMLA Causes of Action

- *Interference*

- Prohibits employers from interfering with, restraining, or denying the exercise of, or the attempt to exercise, any right provided by the FMLA
 - Proof of intent?
 - Are words to dissuade/discourage enough, even if the leave was ultimately approved and exercised?

- *Retaliation/Discrimination*

- Prohibits employers from discharging/discriminating against employees for “opposing any practice made unlawful” by the FMLA
 - Common Examples:
 - *Intermittent FMLA*: Unreasonable full-time workload on a part-time schedule; salary decrease due to reduced schedule; demotion
 - *Full-time FMLA*: Demotion; loss of seniority; ineligibility for promotion; not given prestigious accounts, additional responsibilities due to your leave

Things to Consider – FMLA

- OFCCP's increased scrutiny re: accommodations/leave
 - Caution against “chilling” an employee's desire to take FMLA
- Executive Order 13706 – Paid Sick Leave
- Impact of COVID-19
 - Sick, or caring for sick family members?
 - Staying home to avoid exposure?
 - Time off for parents/caregivers due to school closures?



Hypothetical

- Company hires employee who, for three years, is a model employee and regularly exceeds expectations. The employee's behavior takes a turn. She begins missing deadlines, her work is riddled with mistakes, and she's often late to work and takes frequent breaks. The employee confides to a coworker that she suffers from major depression and that recent problems at home have made her condition worse. She explains that her tardiness is due to therapy appointments, and that she takes long, frequent breaks because she is unable to concentrate. The coworker encourages the employee to request to alter her work schedule so that she can consistently attend therapy and take breaks when needed, but the employee is reluctant and decides to wait.
- At her next performance review, the employee's supervisor points out her poor performance, as well as what he perceives as a lack of effort and commitment to her job. The employee then reveals her condition and "floats" the idea of a modified work schedule. Her supervisor is dismissive, skeptical that she's simply making excuses for poor performance.
- Does the employee have any recourse?

Reasonable Accommodation:

Section 503, ADA

- What is an Accommodation?
 - Change to application or hiring process, job/way the job is done, or work environment that allows a qualified individual with a disability to perform the essential functions of that job
 - “Reasonable” if it does not create an undue hardship
- Required by both Section 503 and the ADA
 - Be sure to engage in the interactive process promptly
- Examples include:
 - Providing written materials in accessible formats (large print, Braille)
 - Adjusting/modifying work schedules
 - Service animals
 - Providing readers or sign language interpreters
 - Providing/modifying equipment and devices
 - Changing work environment in ways that improve accessibility

Recent EEOC Guidance – COVID-19 and Beyond

- Consider:
 - Evolution of remote work as an accommodation
 - Additional accommodation needed at home office?
 - Jobs that can only be performed at the workplace
 - Accommodation to mitigate exposure to high risk family member?
 - Pre-existing illness exacerbated by pandemic-related stress
 - “Undue hardship” on employers to accommodate due to pandemic
 - Temperature testing at the workplace
 - Confidentiality/privacy concerns?

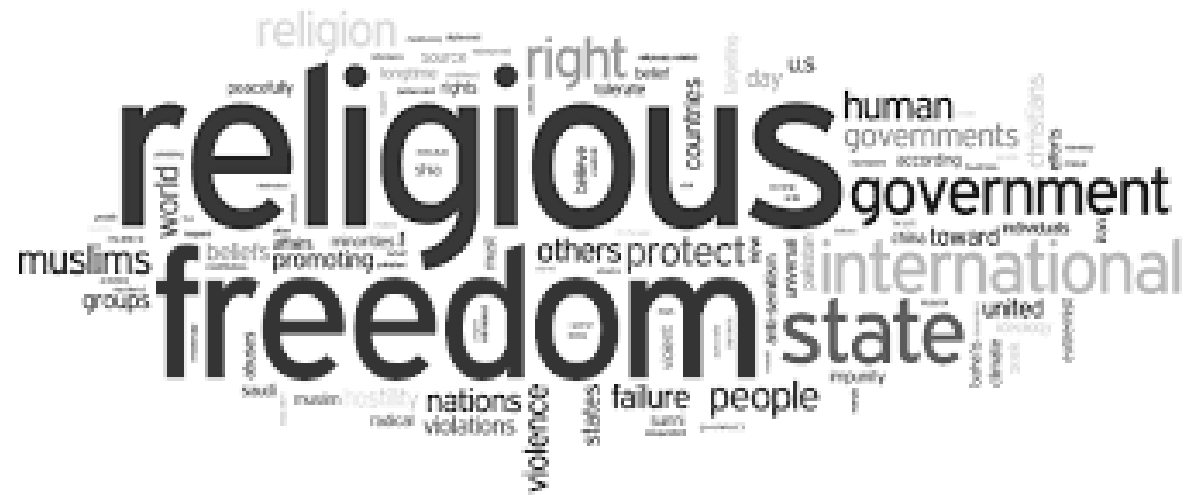


FLSA – Important Updates

- ***DOL Final Rule (effective 1/1/20)***
 - Annual salary level for exec, admin, and professional exemptions will increase to \$35,568 (or \$684 per week)
 - 50% higher than the current level
 - Annual minimum compensation for highly compensated EEs (HCEs) will increase to \$107,432
 - Employers will be permitted to use *nondiscretionary* compensation, including commissions, to satisfy up to 10% of the new standard salary level
 - No changes to the duties test, no automatic increases

Implications of Final Rule for Fed Contractors

- Beware of potential exposure in compensation adjustments due to employee reclassification, new salary levels
 - OFCCP & its focus on compensation disparities
 - Pay equity issues
- Be sure to test your proposed adjustments



Employers and Religious Freedom

- Recent Decisions – July 2020
 - ***Our Lady of Guadalupe School v. Morrissey-Berru***
 - Claims brought by 2 religious school teachers against their employers
 - Court finds “ministerial exception” forecloses federal employment discrimination claims
 - Exception’s purpose is to protect religious institutions’ autonomy re: internal mgmt. decisions essential to the institution’s mission
 - ***Little Sisters of the Poor Saints Peter and Paul Home v. PA***
 - Challenge to religious and moral exemptions to the ACA’s contraceptive mandate
 - Court ultimately *upholds* regulatory exemption for employers with religious and conscientious objections to the contraceptive mandate
- Implications for Federal Contractors?
- Conflict with non-discrimination obligations?

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