Labor & Employment Law Update

March 2016

In This Issue

Gender Identity Discrimination Claims on the Rise at State and Federal Levels 2

From Paris to San Bernardino: World Events Keep Focus on Religious Discrimination and Accommodations 4

Up in Smoke: Federal Court Rejects Claim that Employer Failed to Accommodate Medical Marijuana Use 5

California Corner: Things You Need to Know in 2016 7

VedderPrice℠

Gender Identity Discrimination Claims on the Rise at State and Federal Levels

While gender identity is not expressly protected under Title VII of the Civil Rights Act of 1964, an increasing number of states, cities and counties are enacting or amending their anti-discrimination laws to prohibit discrimination against transgender employees. For example, the New York City Human Rights Law provides that it is unlawful to discriminate on the basis of a person's gender and defines "gender" to include "a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth." While New York State's analogous Human Rights Law does not in itself contain provisions that expressly identify gender identity as a protected characteristic, the New York State Division of Human Rights recently adopted regulations that define discrimination and harassment against transgender people as discrimination on the basis of sex. In California, the Fair Employment and Housing Act prohibits harassment and discrimination in employment because of, *inter alia*, sex, gender, gender identity, gender expression and sexual orientation. The Illinois Human Rights Act, which prohibits discrimination based on sexual orientation, recognizes claims that include "gender-related identity, whether or not traditionally associated with the person's designated sex at birth." Joining these and other states, Washington, DC amended its Human Rights Act to include gender identity as a protected class.

Many states, cities and counties are amending their anti-discrimination laws to prohibit discrimination against transgender employees. Proactive employers should consider reviewing their policies and update them as needed due to this protected characteristic.

In the absence of a comparable federal law explicitly barring discrimination based on sexual orientation and/or gender identity, the U.S. Equal Employment Opportunity Commission (EEOC) has filed several claims pursuant to Title VII taking the position that the law's prohibition against gender discrimination permits claims based on gender identity. In April 2015, the EEOC took the position for the first time in *Lusardi v. McHugh* that a male-to-female transgender employee faced illegal sex discrimination when she was told that her use of a common women's restroom was making coworkers uncomfortable and that she should use a unisex bathroom instead. Then, in June 2015, the EEOC filed suit in federal court in Minnesota against an employer, Deluxe Financial, that allegedly refused to allow a transgender employee to use the restroom of the gender with which she identified. According to a recent press release, the case settled for $115,000. Meanwhile, the Eleventh Circuit Court of Appeals, in *Chavez v. Credit Nation Auto Sales LLC*, recently held that a Title VII case must proceed to trial to determine whether

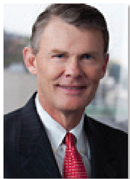
gender bias was a motivating factor behind an employer's decision to terminate a transgender employee for sleeping on the job. These cases are a clear indication that every employer, including those in states that do not treat gender identity as a protected characteristic, should take care when dealing with transgender employees as well as any employee who does not conform to traditional gender roles.

Presumably, avoiding disparate-treatment claims surrounding the hiring, promotion, compensation, discipline and/or discharge of transgender employees will not unduly vex most employers; the spate of new laws and reinterpretation of old laws simply adds another protected class of which to be cognizant. While some employers may struggle initially in their efforts to ensure that individuals are not subject to different terms of employment because of their actual or perceived status as a transgender person, those that take proactive measures—such as determining how to handle restroom access—should fare well when the issues actually arise. In the end, cases may turn on less obvious matters such as coworkers (or even managers) refusing to use a transgender employee's preferred name, pronoun and/or prefix, as such unaddressed forms of disrespect may tip the scale against an employer. Further, refusing access to a bathroom or imposing grooming standards based on an employee's biological sex or gender will undoubtedly be cited as examples of discriminatory intent.[1]

Going forward, employers should review their policies and update them as needed to ensure that gender identity is included as a protected characteristic. To the extent EEO training is provided—and we certainly recommend that you do—it should include a segment on transgender employees, addressing issues such as bathroom usage, dress code and the use of the transgender employee's preferred name and pronoun.

If you have any questions about how your company can stay at the forefront of compliance with these emerging issues, or to schedule employee training that would cover all the topics discussed above, please call **Aaron R. Gelb**, **Brendan G. Dolan**, **Amy L. Bess** or **Daniel J. LaRose**.

Amy L. Bess
Shareholder
+1 (202) 312 3361
abess@vedderprice.com



Brendan G. Dolan
Shareholder
+1 (415) 749 9530
bdolan@vedderprice.com

Aaron R. Gelb
Shareholder
+1 (312) 609 7844
agelb@vedderprice.com

Daniel J. LaRose
Associate
+1 (212) 407 6989
dlarose@vedderprice.com

[1] Some local laws, such as the New York City Human Rights Law, prohibit requiring any different uniforms or grooming standards based on sex or gender. Under federal law, differing standards based on sex or gender are permitted as long as they do not impose an undue burden.

From Paris to San Bernardino: World Events Keep Focus on Religious Discrimination and Accommodations

With its victory in the Supreme Court last year, the U.S. Equal Employment Opportunity Commission (EEOC) appears poised to continue focusing on ensuring appropriate religious accommodations and combating religious discrimination in the workplace.

In June of last year, the Supreme Court, in an 8-1 decision, held that an employer violated Title VII when it failed to hire an applicant who wore a headscarf to her interview. The employer believed that the applicant wore the headscarf for religious purposes but never confirmed that with the applicant. Instead, the employer decided not to hire the applicant because the headscarf would violate the company's "Look Policy" that prohibited most headwear, religious or otherwise. The EEOC then sued the employer on behalf of the applicant, claiming that the employer's refusal to hire the applicant violated Title VII.

Geopolitical developments and global issues surrounding religious practices have brought about the need for certain modifications to employee accommodations and anti-discrimination policies.

The employer argued that an applicant cannot show intentional discrimination without the employer having "actual knowledge" of an applicant's need for an accommodation. The Supreme Court disagreed, stating that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

As an example, the Supreme Court stated, "suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII."

Recently, the EEOC, in the wake of tragic events including the attacks in Paris and San Bernardino, California, issued a statement to address workplace discrimination issues against individuals who are, or are perceived to be, Muslim or Middle Eastern. In the statement, the EEOC encouraged all employers to "remain vigilant and to communicate their commitment to inclusive workplaces" to their employees at all levels of their organizations.

The EEOC also released two sets of question-and-answer documents—one for employers and one for employees—describing scenarios related to hiring and other employment decisions, harassment, religious accommodations and background investigations of individuals who are, or are perceived to be, Muslim or Middle Eastern. The EEOC encourages employers to remind their managers and employees that religious discrimination is not tolerated and to train (or retrain) employees involved in the hiring process about hiring standards that emphasize objective, job-related criteria. Additionally, the EEOC encourages employers to have a written confidential complaint mechanism for employees to report any perceived harassment. The guidance also reminds employers of the need to evaluate accommodation requests in an objective manner.

It bears noting that the EEOC stated that "[r]eactions in the workplace to world events demand increased efforts by employers to prevent discrimination." While there is no legal requirement that employers plan training around geopolitical developments—whether in Paris or in San Bernardino—the advice is sound. These issues are not going to fade away any time soon, and ignoring them or hoping that your workplace is immune to them is a recipe for problems down the road. Employers, instead, should take a proactive approach, educating and training their personnel to ensure lawful treatment of all employees, regardless of their religious beliefs.

If you have any questions about strategies to prevent discrimination, appropriate accommodation responses or any other issues related to the equal treatment of employees, please call **Jonathan A. Wexler** or **Benjamin A. Hartsock**.

Benjamin A. Hartsock
Associate
+1 (312) 609 7922
bhartsock@vedderprice.com

Jonathan A. Wexler
Shareholder
+1 (212) 407 7732
jwexler@vedderprice.com

Up in Smoke: Federal Court Rejects Claim that Employer Failed to Accommodate Medical Marijuana Use

As more states legalize marijuana for medicinal and recreational use, the interplay among such laws, accommodation requirements under the Americans with Disabilities Act (ADA) or equivalent state laws, and employers' drug-free workplace policies is playing out in the courts.

With regard to medicinal marijuana use and the ADA, employers are faced with a challenging and novel question regarding whether they are required to accommodate marijuana use for medicinal purposes that otherwise would violate their drug-free workplace policies.

This article discusses the challenges employers face regarding whether or not they are required to accommodate marijuana use for medicinal purposes that otherwise would violate their drug-free workplace policies with regard to medicinal marijuana use and the Americans with Disabilities Act.

This question was addressed most recently by a federal court in New Mexico. In *Garcia v. Tractor Supply Co.*, the court considered whether an employer acted lawfully when it terminated an employee who failed the mandatory drug test for all new employees as a result of his prescription use of medical marijuana. Critically, New Mexico's Compassionate Use Act, which legalized the medicinal use of marijuana, does not expressly require employers to accommodate medicinal marijuana use. However, hoping to defeat the company's motion to dismiss, the plaintiff argued that, because the use of marijuana for medicinal purposes was supported by New Mexico's public policy, employers should be required to accommodate the medical use of marijuana related to a serious health condition. The plaintiff sought a ruling that the employer's failure to accommodate his use of marijuana for medicinal purposes was a violation of the state equivalent of the ADA, which protects employees with disabilities from discrimination and mandates that employers provide reasonable accommodations to such employees.

The court, however, was not convinced. It pointed to two recent cases in Colorado federal courts which opined that employers are not required to excuse employee conduct in violation of company policies (here, marijuana use) simply because that misconduct relates to or treats the underlying disability. The court also found that the plaintiff was not terminated as a result of his serious medical condition, which would have constituted a violation of the state's ADA equivalent statute. The plaintiff suffers from HIV/AIDS and, as the court pointed out, "using marijuana is not a manifestation of HIV/AIDS."

Notably, the court also relied heavily on the fact that federal law continues to criminalize marijuana use. Were marijuana use to be decriminalized at the federal level, or if the medicinal use of marijuana were lawful under federal law, the court likely would have reached a different conclusion. Likewise, the court might have reached a different decision if New Mexico's Compassionate Use Act expressly required employers to accommodate employees' lawful medicinal marijuana use. Currently, only two states (Connecticut and Delaware) have passed medicinal marijuana statutes that mandate employer accommodations. Thus, employers in those states should be mindful of the obligations imposed by these laws and revise their drug-free workplace policies and practices accordingly.

Additionally, employers in states in where marijuana has been legalized for recreational purposes should review their current policies preventing employees from reporting to work under the influence of drugs or alcohol. Such policies should be revised to prohibit employees from reporting to work while under the influence of illegal drugs, marijuana and/or alcohol.

If you would like to discuss how your company's drug-free workplace policies would be affected by the changing landscape, please contact **Heather M. Sager** or **Sadina Montani**.

Sadina Montani
Associate
+1 (202) 312 3363
smontani@vedderprice.com

Heather M. Sager
Shareholder
+1 (415) 749 9510
hsager@vedderprice.com

California Corner: Things You Need to Know in 2016

Brendan G. Dolan
Shareholder
+1 (415) 749 9530
bdolan@vedderprice.com

Thomas H. Petrides
Shareholder
+1 (424) 204 7756
tpetrides@vedderprice.com

Heather M. Sager
Shareholder
+1 (415) 749 9510
hsager@vedderprice.com

Ayse Kuzucuoglu
Associate
+1 (415) 749 9512
akuzucuoglu@vedderprice.com

Lucky Meinz
Associate
+1 (415) 749 9532
lmeinz@vedderprice.com

Brittany A. Sachs
Associate
+1 (415) 749 9525
bsachs@vedderprice.com

Zachary Scott
Associate
+1 (415) 749 9535
zscott@vedderprice.com

With the new year underway, California employers are no doubt busy reviewing their policies to keep up with the state's new labor and employment laws. As many laws have expanded the scope of risk, we recommend that all California employers consult with experienced employment counsel to ensure compliance. Below are several important new laws employers should be aware of in 2016.

California Fair Pay Act (CFPA)

The CFPA targets gender-based wage differentials by relaxing the standards necessary to show a violation and shifting the burden of proof to employers to "affirmatively demonstrate" that a disparity is based entirely on a valid factor (e.g., seniority system, merit system, production-based earning system, bona fide factor other than sex). The law allows employees to disclose, discuss and inquire about wages and also provides a private right of action for retaliation or discharge in violation of the CFPA.

Private Attorneys General Act (PAGA) and the Opportunity to Cure

AB 1506 allows employers a limited right to cure wage statement violations that involve failure to provide itemized wage statements containing (1) pay period dates and (2) the name and address of the legal entity, before individuals can bring civil suits for such alleged violations.

Leave Law Expansion

SB 579 expands child-related employee leave, allowing time off to find a school or child care provider and time off to address child care or school emergencies. AB 583 expands the list of employees eligible for California's military leave protections.

Discrimination, Retaliation and Whistleblower Protections

AB 1509 extends whistleblower protections to an employee who is a family member of a person engaged in protected conduct. AB 987 prohibits discrimination or retaliation against employees who request an accommodation for a disability or religion, regardless of whether the request is granted. Under AB 560, the immigration status of a minor is irrelevant to liability, remedies and recovery under applicable labor laws, except for employment-related injunctive relief that would violate federal law.

Watch this space—new UK rules forthcoming for references for financial services employees

In March 2016, new accountability regimes will be established in the UK for individuals in regulated firms in the banking and insurance sectors (the "Senior Managers Regime" and the "Senior Insurance Managers Regime").

As part of this, the FCA (the Financial Conduct Authority) and the PRA (the Prudential Regulation Authority) have been deliberating over the new requirements for regulatory references, which will change the way some firms in the financial sector seek and provide employee references for candidates in certain regulated roles. The final rules have been delayed and are now expected in summer 2016. We will be sure to update you on these, and how to comply with them. If you have any questions about the new regime, employee references or any other matter in relation to employment law in the UK or EU, please contact **Jonathan Maude** (jmaude@vedderprice.com) or **Esther Langdon** (elangdon@vedderprice.com) of the London office.

Expanded Labor Commissioner Enforcement Powers

SB 588 allows the Labor Commissioner to place liens on employer property to remedy nonpayment of wages and to issue stop orders preventing employers from continuing business. It also allows for personal liability for individuals who violate the Labor Code on behalf of employers. AB 970 allows the Labor Commissioner to investigate and enforce wage laws and to issue citations for failure to reimburse employees for expenses.

Use and Misuse of E-Verify Authorizations

AB 622 prohibits misuse of E-Verify (the federal electronic workers' authorization system). The law imposes penalties of $10,000 per violation and requires compliance with notification protocols upon receipt of notice that E-Verify information does not match federal records.

If you have any questions regarding the topics discussed in this article, please contact **Heather M. Sager** or **Zachary Scott**, or any of our California Labor & Employment attorneys located in our San Francisco or Los Angeles offices.

Recent Accomplishments

Bruce R. Alper and **Emily C. Fess** obtained summary judgment in federal court on all claims in a multicount religion, national origin, disability discrimination and retaliation case for a Chicago-area hospital client.

Thomas M. Wilde and **Cara J. Ottenweller** obtained summary judgment in the U.S. District Court for the Eastern District of Michigan on behalf of an international manufacturing company. The plaintiff claimed he was terminated in retaliation for complaining about alleged discrimination.

Patrick W. Spangler successfully negotiated a four-year collective bargaining agreement with IUOE Local 399 on behalf of a hospitality client.

Thomas M. Wilde and **Cheryl A. Luce** obtained early dismissal of a lawsuit filed against a national retailer. The plaintiff alleged pay discrimination, failure to pay minimum wage and various tort claims.

Labor & Employment Law Group Members

Chicago

Name	Phone
Thomas M. Wilde (Chair)	+1 (312) 609 7821
Aaron R. Gelb (Editor)	+1 (312) 609 7844
Thomas G. Abram	+1 (312) 609 7760
Bruce R. Alper	+1 (312) 609 7890
Nicholas Anaclerio	+1 (312) 609 7538
Mark I. Bogart	+1 (312) 609 7878
Steven P. Cohn	+1 (312) 609 4596
Christopher T. Collins	+1 (312) 609 7706
Thomas P. Desmond	+1 (312) 609 7647
Emily C. Fess	+1 (312) 609 7572
Elizabeth N. Hall	+1 (312) 609 7795
Steven L. Hamann	+1 (312) 609 7579
Thomas G. Hancuch	+1 (312) 609 7824
Benjamin A. Hartsock	+1 (312) 609 7922
J. Kevin Hennessy	+1 (312) 609 7868
John J. Jacobsen, Jr.	+1 (312) 609 7680
Edward C. Jepson, Jr.	+1 (312) 609 7582
Cheryl A. Luce	+1 (312) 609 7872
Philip L. Mowery	+1 (312) 609 7642
Joseph K. Mulherin	+1 (312) 609 7725
Margo Wolf O'Donnell	+1 (312) 609 7609
Michelle T. Olson	+1 (312) 609 7569
Cara J. Ottenweller	+1 (312) 609 7735
Robert F. Simon	+1 (312) 609 7550
Patrick W. Spangler	+1 (312) 609 7797
Kenneth F. Sparks	+1 (312) 609 7877
Kelly A. Starr	+1 (312) 609 7768
Mark L. Stolzenburg	+1 (312) 609 7512
Charles B. Wolf	+1 (312) 609 7888

New York

Name	Phone
Kaitlyn E. Fallon	+1 (212) 407 7779
Daniel C. Green	+1 (212) 407 7735
Ashley Huddleston	+1 (212) 407 7793
Neal I. Korval	+1 (212) 407 7780
Daniel J. LaRose	+1 (212) 407 6989
Marc B. Schlesinger	+1 (212) 407 6935
Jonathan A. Wexler	+1 (212) 407 7732

Washington, DC

Name	Phone
Amy L. Bess	+1 (202) 312 3361
Sadina Montani	+1 (202) 312 3363

London

Name	Phone
Esther Langdon	+44 (0)20 3667 2863
Jonathan Maude	+44 (0)20 3667 2860

San Francisco

Name	Phone
Brendan G. Dolan	+1 (415) 749 9530
Ayse Kuzucuoglu	+1 (415) 749 9512
Lucky Meinz	+1 (415) 749 9532
Brittany A. Sachs	+1 (415) 749 9525
Heather M. Sager	+1 (415) 749 9510
Zachary Scott	+1 (415) 749 9535

Los Angeles

Name	Phone
Christopher A. Braham	+1 (424) 204 7759
Thomas H. Petrides	+1 (424) 204 7756

VedderPrice℠

Labor & Employment Law Group

Vedder Price aligns workforces for better performance. We've been a leader in the field since our founding in 1952. Today, 50+ professionals are dedicated solely to workplace law and are consistently ranked as top-performing lawyers.

Stay Connected

This communication is published periodically by the law firm of Vedder Price. It is intended to keep our clients and other interested parties generally informed about developments in this area of law. It is not a substitute for professional advice. For purposes of the New York State Bar Rules, this communication may be considered ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.

Vedder Price P.C. is affiliated with Vedder Price LLP, which operates in England and Wales, and with Vedder Price (CA), LLP, which operates in California.

© 2016 Vedder Price. Reproduction of this content is permitted only with credit to Vedder Price. For additional copies or an electronic copy, please contact us at info@vedderprice.com.