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Legal and Labor Update



YOUR WORKPLACE IS OUR WORK.®

Presented by

Whitney Brown

Lehr Middlebrooks Vreeland & Thompson, P.C.

November 10, 2022

Your Workplace is our Work®



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About Your Presenter



wbrown@lmvtlaw.com
(205) 323-9274

Education

Vanderbilt University Law School, J.D.
Birmingham-Southern College, B.A.

Bar Admissions

Alabama, Mississippi, and related federal admissions

Selected Awards

Rising Stars, *Super Lawyers*; Top Women Attorneys, *B-Metro Magazine*; Top Attorneys, *Birmingham Magazine*

Recent(ish) Writing and Speaking

Panelist, HR Works Podcast: No Vaccine or I Quit,

<https://hrdailyadvisor.blr.com/podcast/hr-works-no-vaccine-or-i-quit/>

Refusal to Participate in Investigation Bars ADA Claim, Mar. 2019, SHRM,

<https://bit.ly/2kqGm4G>.



Agenda

- Supreme Court Update
- EEOC Update
- DOL Update
- NLRB/Union Organizing Update
- Federal Contractor Update
- Odds & Ends



U.S. SUPREME COURT: A NEW JUSTICE AND CASES AHEAD



New Supreme Court Nominee

Judge Ketanji Brown Jackson:

- Served as a judge on both federal trial (8 years) and appellate courts (2 years).
- Practiced with multiple large corporate firms.
- Also worked as a federal public defender.





The Conservative Supermajority

- Skepticism of agency issued regulations
- Protection of individual religious views over group rights
- Narrow view of role of courts in enforcing rights
- Swinging for fences in consecutive terms



Employment Cases on the Docket

- Only employment case decided by SCOTUS (other than vaccine mandate decisions) in 2021 concerned a relatively niche issue/application of the Computer Fraud and Abuse Act.
- One case argued and decided in 2022 explores the intersection of employer and employee religious expression.
- Two education affirmative action cases likely to shape discussion, debate, and (mis)perception



Employment Cases on the Docket

- *Kennedy v. Bremerton Sch. Dist.* -
 - H.S. football coach prayed with players. Fearing an Establishment Clause suit, his school district asked him to stop. He refused and went to the media to support his cause.
 - He was suspended.
 - District Court and Ninth Circuit sided with the School District; ***SCOTUS sided with the Coach.***
 - Argued 4/25/22; decided 6/27/22



Affirmative Action on the Docket

- *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and UNC*
 - Prior baseline (1978): race cannot be the determinative factor, but may be a factor used in admissions decisions.
 - District Court and First Circuit sided with Harvard; District Court and Fourth Circuit sided with UNC.
 - Argued 10/31/22; most expect SCOTUS to side with SFFA.



EEOC UPDATE



Charge Handling Statistics

Contains	2000	2010	2018	2019	2020	2021
All	79,896	99,922	76,418	72,675	67,448	61,331
Race	28,945	35,890	24,600	23,976	22,064	20,908
	36.2%	35.9%	32.2%	33.0%	32.7%	34.1%
Race & Harassment	6,643	8,563	8,533	8,682	8,291	7,755
	8.3%	8.6%	11.2%	11.9%	12.3%	12.6%
Sex	25,194	29,029	24,655	23,532	21,398	18,762
	31.5%	29.1%	32.3%	32.4%	31.7%	30.6%
Sex Harassment	N/A	7,944	7,609	7,514	6,587	5,581
	N/A	8.0%	10.0%	10.3%	9.8%	9.1%
Retaliation (All)	21,613	36,258	39,469	39,110	37,632	34,332
	27.1%	36.3%	51.6%	53.8%	55.8%	56.0%
Disability	15,864	25,165	24,605	24,238	24,324	22,843
	19.9%	25.2%	32.2%	33.4%	36.1%	37.2%



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What Are Employers Missing With Respect to Harassment?

- Failing to complete quality and regular training
 - Or, training and policies focused exclusively on *quid pro quo* sexual harassment
- Failing to respond to harassment from third parties or outside the work setting
- Allowing protected class joking to fester
- Managers/supervisors/owners who are completely disengaged from or adversarial to other race or other gender issues



What Are Employers Missing With Respect to Disability?

- Employee physician requests:
 - Too soon
 - Too general
- Refusing to make policy modifications
- Automatic termination provisions
- “No light duty” or “light duty for workers’ comp only”
- All forms of MFN-status for workers’ comp



What Are Employers Missing With Respect to Retaliation?

- Suddenly enforcing previously existing policies against “problem” employees.
- Failing to conduct quality investigations.
- Failing to confirm no retaliation occurring.
- Failing to document promises and confirmation of non-retaliation.



EEOC's Transgender Guidance Enjoined

- EEOC Chair Burrows unilaterally published *Bostock* anniversary website with a “summary” of the Court’s decision that ... didn’t accurately summarize the Court’s decision. It expressed positions on bathrooms, pronouns, attire, and healthcare that weren’t considered or were specifically reserved by the *Bostock* decision.
- The EEOC has been enjoined from “enforcing” this documents on a national basis as of October 2022, but it’s still online (with notes as to its ineffectiveness).

<https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>



DEPARTMENT OF LABOR UPDATE



Independent Contractor Proposed Rule

- 6 factor test
 - Opportunity for profit or loss depending on managerial skill
 - Investment by worker vs. business
 - Permanence of relationship
 - Nature and degree of control
 - Work an integral part of business
 - Role of worker's skill and initiative
- Published 10/13/22; open for comment until 12/13/22.
- 87 Fed. Reg. 62218



NATIONAL LABOR RELATIONS BOARD and LABOR UPDATE



NLRB Update

General Points

- NLRB is deliberately political; a five-member Board made up of three members of the President's party and two members of the opposition party.
- Board now 3-2 Democrat since 2021.



Priorities

- Broadening definition of joint employment, narrowing definition of independent contractor
- More expansive definition of protected, concerted activity
- *Weingarten* rights for non-union workplaces
- More aggressive pursuit of different remedies in settlement.
- Accelerated election timelines
- Make it harder for union members to withdraw and for employer to withdraw recognition of existing unions
- More access to employer sites and resources (including email)



Public Support for Unions in Theory, but not Reality

- 68% of Americans approve of unions, but union membership continues its decline.
- Only about 6% of private sector employees are union members.
- 33.9% of public sector employees are union members.
- Union membership in Alabama declined from 8% in 2020 to 5.9% in 2021.



Union Organizing Developments

Trend: Focus on Safety, Hours, Respect

- COVID-specific: employees want to be recognized and respected with robust safety rules, incentive **pay** beyond time-and-a-half, protection from unsafe third parties, applicable PPE.
- Post-Pandemic World: Labor shortages, inflation, **pay**, targeting consumer-oriented businesses (Starbucks, Apple).



Union Organizing Developments

Trend: Focus on Safety, Hours, Respect

- General: **pay**; short/infrequent breaks; forms of searches and surveillance; lack of access to management; irregular scheduling and one-sided scheduling changes; favoritism.



FEDERAL CONTRACTOR UPDATE



OFCCP – Contractor Portal

- OFCCP Contractor Portal will put OFCCP in possession of its own list of federal contractors and subcontractors.
- Requires registrants to certify their Plan status; no longer requires Registrants to promise not to edit their Plan during the Plan year.
- OFCCP's Carrot/Stick approach



OFCCP – Directive 2022-01

Pay Equity Directive

- Section 60-2.17(b)(3) requires contractors make an internal pay equity audit.
- OFCCP Directive 2022-01 operates on the assumption that the audit will be a documented statistical analysis (instead of a complaint and resolution procedure).
- Directive 2022-01 also states that if the only written analysis available is prepared by an attorney, then it will not honor any claim of work product confidentiality or attorney client privilege.



OFCCP – Directive 2022-02

Auditor Directives

- OFCCP Directive 2022-02 implores Agency auditors to demand audit responsive documents within 30 days, absent extreme extenuating circumstances.
- It also encourages auditors to “[e]mpower[] and listen[] to workers to understand their experiences” by seeking direct interviews with non-managerial employees and applicants.



Notice of Proposed Rule Making

- OFCCP published a Notice of Proposed Rule Making on March 21, 2022, that would shelve the Trump Administration's November 2020 Pre-Determination Notice standards in favor of more flexible and less transparent pre-determination notices.
- It would also limit the OFCCP's conciliation obligation to match the EEOC's minimal bar as set by the *Mach Mining* decision.



The FOIA Request

- OFCCP asked contractors if they objected to a FOIA request by the Center for Investigative Reporting for all Type 2 Consolidated Employer Information Reports, Standard Form 100 (EEO-1) filed by federal contractors from 2016-2020.
- Deadline to object was Oct. 19 (extended).



The Vaccine Requirement

- The Eleventh Circuit struck down the nationwide injunction of the Safer Federal Workforce Task Force effective October 18.
- Injunction remains pending in 22 states.
- Oct. 19 OMB guidance is to stand down:

“Despite the lifting of the nationwide bar to enforcement on October 18, 2022, at this time agencies should not: (1) take any steps to require covered contractors and subcontractors to come into compliance with previously issued Task Force guidance; or (2) enforce any contract clauses implementing Executive Order 14042.”



ODDS and ENDS



Priority: Pay Equity

- NLRB Section 7: can't limit rank & file employees from discussing pay.
- EEOC enforcement priority.
- EEOC's EEO-1 Component 2 pay data: everyone expects its return, but may be stymied by failure to secure confirmation of Kotalgal as third Commissioner.
- OFCCP's invasive directive about pay audits.
- California pay data reporting.



Hiring Practices and A.I.

- EEOC and OFCCP in joint effort to focus on hiring equity; concerned about impact of A.I.
- Potential good uses of technology to anonymize resumes.



Weapons and the Workplace

- *NY State Rifle & Pistol Ass'n. v. Bruen*
 - Found NY's "may issue" unrestricted concealed carry license scheme unconstitutional.
 - SCOTUS focused on historical understanding of 2nd Amendment and rejecting balancing public interest.
 - Majority decision silent as to workplace and private property rights.



Antitrust Focus in Labor Market

- 10/27/22: First successful Labor Market Criminal Antitrust Prosecution
 - VDA OC LLC (contract nursing services provider) pleaded guilty in DOJ prosecution to conspiracy with a competitor to allocate employee nurses and fix their wages.
- DOL and NLRB each have MOUs related to referring antitrust/no poaching/wage-fixing scenarios to DOJ.



New Poster – Know Your Rights



Know Your Rights: Workplace Discrimination is Illegal

The U.S. Equal Employment Opportunity Commission (EEOC) enforces Federal laws that protect you from discrimination in employment. If you believe you've been discriminated against at work or in applying for a job, the EEOC may be able to help.

Who is Protected?

- Employees (current and former), including managers and temporary employees
- Job applicants
- Union members and applicants for membership in a union

What Organizations are Covered?

- Most private employers
- State and local governments (as employers)
- Educational institutions (as employers)
- Unions
- Staffing agencies

What Types of Employment Discrimination are Illegal?

Under the EEOC's laws, an employer may not discriminate against you, regardless of your immigration status, on the bases of:

- Race
- Color
- Religion
- National origin
- Sex (including pregnancy and related conditions, sexual orientation, or gender identity)
- Age (40 and older)
- Disability
- Genetic information (including employer requests for, or purchase, use, or disclosure of genetic tests, genetic services, or family medical history)
- Retaliation for filing a charge, reasonably opposing discrimination, or participating in a discrimination lawsuit, investigation, or proceeding.

What Employment Practices can be Challenged as Discriminatory?

All aspects of employment, including:

- Discharge, firing, or lay-off
- Harassment (including unwelcome verbal or physical conduct)
- Hiring or promotion
- Assignment
- Pay (unequal wages or compensation)
- Failure to provide reasonable accommodation for a disability or a sincerely-held religious belief, observance or practice
- Benefits
- Job training
- Classification
- Referral
- Obtaining or disclosing genetic information of employees
- Requesting or disclosing medical information of employees
- Conduct that might reasonably discourage someone from opposing discrimination, filing a charge, or participating in an investigation or proceeding.

What can You Do if You Believe Discrimination has Occurred?

Contact the EEOC promptly if you suspect discrimination. Do not delay, because there are strict time limits for filing a charge of discrimination (180 or 300 days, depending on where you live/work). You can reach the EEOC in any of the following ways:

Submit an inquiry through the EEOC's public portal:
<https://publicportal.eeoc.gov/Portal/Login.aspx>

Call 1-800-669-4000 (toll free)
1-800-669-6820 (TTY)
1-844-234-5122 (ASL video phone)

Visit an EEOC field office (information at www.eeoc.gov/field-office)

E-Mail info@eeoc.gov

Additional information about the EEOC, including information about filing a charge of discrimination, is available at www.eeoc.gov.



EMPLOYERS HOLDING FEDERAL CONTRACTS OR SUBCONTRACTS

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces the nondiscrimination and affirmative action commitments of companies doing business with the Federal Government. If you are applying for a job with, or are an employee of, a company with a Federal contract or subcontract, you are protected under Federal law from discrimination on the following bases:

Race, Color, Religion, Sex, Sexual Orientation, Gender Identity, National Origin

Executive Order 11246, as amended, prohibits employment discrimination by Federal contractors based on race, color, religion, sex, sexual orientation, gender identity, or national origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

Asking About, Disclosing, or Discussing Pay

Executive Order 11246, as amended, protects applicants and employees of Federal contractors from discrimination based on inquiring about, disclosing, or discussing their compensation or the compensation of other applicants or employees.

Disability

Section 503 of the Rehabilitation Act of 1973, as amended, protects qualified individuals with disabilities from discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment by Federal contractors. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship to the employer. Section 503 also requires that Federal contractors take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment, including the executive level.

Protected Veteran Status

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, prohibits employment discrimination against, and requires affirmative action to recruit, employ, and advance in employment, disabled veterans, recently separated veterans (i.e., within three years of discharge or release from active duty), active duty wartime or campaign badge veterans, or Armed Forces service medal veterans.

Retaliation

Retaliation is prohibited against a person who files a complaint of discrimination, participates in an OFCCP proceeding, or otherwise opposes discrimination by Federal contractors under these Federal laws.

Any person who believes a contractor has violated its nondiscrimination or affirmative action obligations under OFCCP's authorities should contact immediately:

The Office of Federal Contract Compliance Programs (OFCCP)
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
1-800-397-6251 (toll-free)

If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services. OFCCP may also be contacted by submitting a question online to OFCCP's Help Desk at <https://ofccphelpdesk.dol.gov/sf/>, or by calling an OFCCP regional or district office, listed in most telephone directories under U.S. Government, Department of Labor and on OFCCP's "Contact Us" webpage at <https://www.dol.gov/agencies/ofccp/contact>.

PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Race, Color, National Origin, Sex

In addition to the protections of Title VII of the Civil Rights Act of 1964, as amended, Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color or national origin in programs or activities receiving Federal financial assistance. Employment discrimination is covered by Title VI if the primary objective of the financial assistance is provision of employment, or where employment discrimination causes or may cause discrimination in providing services under such programs. Title IX of the Education Amendments of 1972 prohibits employment discrimination on the basis of sex in educational programs or activities which receive Federal financial assistance.

Individuals with Disabilities

Section 504 of the Rehabilitation Act of 1973, as amended, prohibits employment discrimination on the basis of disability in any program or activity which receives Federal financial assistance. Discrimination is prohibited in all aspects of employment against persons with disabilities who, with or without reasonable accommodation, can perform the essential functions of the job.

If you believe you have been discriminated against in a program of any institution which receives Federal financial assistance, you should immediately contact the Federal agency providing such assistance.



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QUESTIONS & ANSWERS





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