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# General Counsel Employment Law Report

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# Married on Sunday, Fired on Monday: The Supreme Court Addresses LGBT Rights

To say the three cases addressing LGBT rights before the Supreme Court today are significant is an understatement. More than 70 friend-of-the-court briefs dividing states, religious orders and members of Congress have been filed. The EEOC's opinion is at odds with the Department of Justice (DOJ). More than 200 of the nation's largest employers are supporting the workers in the two cases involving homosexual discrimination. The three cases stem from employees who were fired for being gay (2) and one who transitioned to a woman. (*Bostock v. Clayton County*, *Altitude Express v. Zarda* and *Harris Funeral Homes v. EEOC*)

**What is at stake and why now?**

**Legal History**: Cultural acceptance of the LGBTQ community is at a high. Yet less than half the states have laws granting protection to LGBT workers, and these laws are uneven. The federal law, interpreted by courts across the country, is unsettled because of one word: sex. Under Title VII of the Civil Rights Act of 1964, discrimination "because of sex" (as well as race) is prohibited. For 50 years, the term was interpreted to protect women in the workplace, which is how the Trump Administration and the Justice Department believe it should be applied. In 1964 sex was viewed as a biological definition and homosexual activity was largely illegal. The lower courts have lined up in the usual way: liberal v conservative areas of the country. Reflecting the reality of the workplace and the country, many courts have found that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination. In other words, to extricate sex from discrimination based on sexual orientation or transgender status is impossible: the behavior stems from sex and set ideas about sex. On the other side are courts that have rejected this view for the traditional biological meaning of male or female.

**Issue**: The legal issue: is it the text of the law or the intention of the legislators which is controlling? Textualism makes for strange bedfellows. For instance, when ruling against homosexual discrimination in 1998, the famously conservative Justice Scalia wrote:

- "It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed," adding that same-sex harassment need not be "the principal evil Congress was concerned with."

Proponents of LGBT protections under Title VII are espousing Scalia's view here. With the new makeup of the Court, it is a wide open question how they will rule. While these cases factually involve employment, the protections they seek could impact housing, education, public accommodations and more.

**Workplace Impact**: If your state grants protections to LGBT employees, the ruling will have little impact on your workplace obligations. Companies like Apple, Facebook, Uber, Walt Disney and Coca-Cola have told the Court that a ruling that Title VII bans discrimination based on sexual orientation would not be "unreasonably costly or burdensome" for employers. In fact, they argue, making clear that Title VII prohibits sexual-orientation discrimination would create benefits for businesses, from providing "consistency and predictability" nationwide to making it easier to "recruit and retain top talent." You do not have to be as big as these companies to know attracting and retaining talent is easier when your workplace does not discriminate.

**Decision Timeline**: The Supreme Court does not act quickly. We will let you know the minute these cases are decided, which could be as late as May or June of 2020. In the meantime, contact us for any employment law questions that arise in your place of business. We can help.

# It May Be Rude but It Is Not Illegal: Hostile Work Environment Unpacked

A colleague and I were discussing the requirements to satisfy a hostile work environment claim when she said: If a manager is going to be a jerk he needs to be a jerk to everyone. While we are not encouraging bad behavior in the work place, her comment is sort of funny but sort of true. Here is why:

**A stray comment, no matter how rude, is not proof of a hostile work environment**. Courts have consistently ruled this way. Just this week a Massachusetts court found that a manager banging on a closed bathroom door and screaming while the plaintiff was inside does not rise to a hostile work environment. This same manager had told the plaintiff to "be quiet" during a meeting. The court found that there was no anti-discrimination animus behind the actions. In other words, jerks just being jerks without targeting a protected class.

### What constitutes a hostile work environment then?

There are four elements that must be shown:

1. the employee was subject to unwelcome harassment;
2. the harassment was based on a reason forbidden by Title VII (race, gender);
3. the harassment was so severe or pervasive that it altered the conditions of employment and created a hostile or abusive working environment; and
4. there is a basis for employer liability.

### Phew I don't have to worry about rude managers, right?

It is always better to head off potential claims before they occur. Your workplace may not rise to the legal definition of a hostile work environment but don't wait for that to be tested by a court. Nobody likes working with a jerk, even an equal opportunity one.

Questions? We can help.

# October Immigration Law Snapshot: News for Busy People

### Are Visa Holders Entitled to Paid Leave under State Programs?

As more states enact laws to offer wage replacement for eligible individuals for family and medical leave purposes, employers rightfully question who is a covered individual. On one hand is whether visa holders should have contributions deducted from their pay to help fund the state program. Depending on the state in which the business operates and the employee works, temporary visa holders (H-1B, L-1, O-1, F-1, J-1, etc.) may be required to contribute to a state plan for paid leave. In Massachusetts, for example, all temporary foreign visa workers are considered covered individuals, and employers are required to withhold and remit Paid Family and Medical Leave (PFML) contributions on their behalf. Employers should review the state rules, if they operate in a state that offers paid family and medical leave through a public program, and ensure that they are deducting the proper contributions from foreign workers' pay.

On the other hand is whether a foreign temporary worker is eligible to take the leave once benefits are available. Again, the answer is, it depends. In this case, it depends on the status of the temporary worker. Most workers must have continuous employment, but there is not a requirement to pay a certain wage. However, if an employer must file a Labor Condition Application ("LCA") to employ a temporary worker, as they must for H-1B and E-3 workers, the employer must list the wage, and that wage must be higher than the prevailing wage set by the Department of Labor (DOL).

As a condition for hiring an H-1B or E-3 worker, the employer agrees that they will pay the worker the wage listed on the LCA for the duration of the employment. If an H-1B or E-3 worker is paid through state benefits that amount to only a portion of his/her salary, the employer can no longer provide that wage as listed. Moreover, an employer cannot "bench" an H-1B worker, meaning the worker cannot go unpaid by the employer, except for in certain circumstances.

Relevant authorities have made it clear that H-1B workers are entitled to FMLA leave on the same terms as U.S. citizens, whether the leave is paid or unpaid under the employer's policies. So, an H-1B worker can request and be approved for an unpaid FMLA leave on the same terms as the employer's U.S. workers. The same individual also is protected by the Americans with Disabilities Act, so leave as a reasonable accommodation under the ADA must be considered in the same way it would for a U.S. national.

It goes to reason that the same would apply for unpaid leave from a company to receive wage replacement from the state for family or medical leave. Look out for our next issue, where we tackle how receiving pay from the state may be considered a public benefit, thereby disqualifying certain individuals from becoming permanent resident.

## Final Version of Public Charge Forms Expected to go Into Effect in Mid-October

Only two short weeks before a complex new immigration policy is set to take effect, the Department of Homeland Security (DHS) issued significant corrections to the final version of the "public charge" rule, including fixes to substantive errors in the August version. The public charge rule has been a major priority of this administration as it seeks to limit legal immigration to the US, as we blogged about in August.

Some fundamental clarifications include the following:

- The rule makes nonimmigrants who have received designated public benefits for more than 12 months in the aggregate within any 36-month period generally ineligible for change of status and extension of stay.
- In limited circumstances, an alien who wants to adjust their status may post a bond for no less than $8,100 and obtain adjustment of status, despite being determined inadmissible on public charge grounds. The actual bond amount would be dependent on the alien's circumstances.
- The new rule will only be applied to applications and petitions postmarked (or, if applicable, submitted electronically) on or after October 15, 2019.
- In addition, regardless of whether the application or petition was filed before, on, or after the effective date, DHS will not consider receipt of public benefits previously excluded from consideration, for example, Supplemental Nutrition Assistance Program [SNAP] and Medicaid, unless such benefits are received on or after Oct. 15, 2019.

Of course, lawsuits have been filed to halt the implementation of the lengthy new form for immigrants to document their financial situation and benefits history. Usually, DHS provides 60 days advance notice for even minor changes to USCIS forms, and giving only two weeks without even a preview of the form is hasty and unusual.

We can strategize on other employment authorization options now in the event that an employee is not eligible to become a permanent resident in the future because of receiving a public benefit. Call us. We're here to help.

## Immigrants Will be Denied Visas if They Cannot Prove That They Have Health Insurance

Would-be immigrants will need to show they'll be covered by health insurance within 30 days of entering the country or have the financial resources to pay their medical bills, the Trump administration announced on Friday, October 4th. The rule would apply to the spouses and parents of U.S. citizens. That could have an impact on families who are trying to bring their parents to the U.S., and is the latest sign that the Trump administration is trying to move away from a family-based immigration system.

As released, the proclamation only affects new immigrants (those issued an immigrant visa on or after November 3, 2019, the effective date of the proclamation). It does not cover those entering on any temporary visa, including H-1B visa holders, L-1 intracompany transferees, international students and scholars, visitors for business, tourists or entries for any other temporary purpose. It also does not cover refugees, though the number of new refugees being admitted to the United States will be set at its lowest level ever for next year through a separate action.

Because immigrant visa issuance is over 80% family-based immigrants, the proclamation will disproportionately impact those immigrating based on family ties, rather than employment-based immigrants, since those individuals usually adjust status inside the United States. Another significant impact will be on winners of the Diversity Visa Lottery, who are predominately from African countries, as most of those selected through that program enter the United States with immigrant visas rather than being able to adjust status in the United States. The new proclamation also provides a de facto ban to new immigrants from their Congressionally-mandated eligibility for premium support through the Affordable Care Act when they purchase private insurance.

**We recommend that anyone who is able to adjust status from within the United States, rather than filing for an immigrant visa, should do so, because adjustment of status is outside the scope of the proclamation. Also, anyone able to get their immigrant visa this month should not delay their application and should review their documentary qualification with an immigration lawyer to be sure they can receive their visa before November 3.**

**We can help. Contact our immigration lawyer, Cassie Ramos.**

# There Are No Magic Words to Request ADA Accommodation

As we all know, the Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations for employees with disabilities unless the employer would suffer an undue hardship as a result. Once an employee has requested an accommodation, employers must engage in the interactive process to identify possible accommodations. But what if the employee does not formally request an accommodation? Must the employee use the term ADA? Disability? Accommodation? How is an employer to know?

A federal court just ruled that the actions and language of an employee must be considered for ADA requests, even without using the "magic words." Dollar General ignored an employee's actions and language at their peril. Dollar General knew the employee in question suffered from medical issues. The employee asked about leave on four separate occasions, which was denied. Her supervisor testified that he would have considered FMLA leave but she did not qualify. He did not consider ADA accommodation–and did not engage in an interactive dialogue to explore options–because the employee did not request "accommodation." That was a mistake. Now the case is going to trial, where Dollar General does not have a good track record (a diabetic employee's request to keep orange juice at her cashier station was denied and she was awarded $700,000 last year–that is a lot of dollars).

Training front line managers to have the ADA obligations on their minds is key here. From there:

- When an employee is requesting leave, pay attention to their request and actions.
- Explore the employee's needs and work duties, schedule: that is the interactive dialogue.
- Managers and the employee then communicate to determine a reasonable accommodation.
- Document each interaction.
- Once an effective accommodation is agreed upon–which does not have to be the employee's preferred one–follow up to see if it is working.
- If the accommodation is not working, pursue a new one with input from the employee and immediate supervisor.

If you have an employee with a medical issue who is missing work and requesting leave, that is an ADA discussion. Failing to engage in the interactive dialogue can be evidence of discrimination, plus that dialogue gets to the root of a solution. Finally, an accommodation can be the Chevy and not the Cadillac–it has to be effective but not an undue burden.

Questions? Training? We can help.

# General Counsel's Office Hours

## Special Member Benefit

All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

Click here for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Mike's bio.