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Quiet Changes to Employment Laws: Federal Agencies Recognize Sexual Orientation and Gender Identity Discrimination

By Ami J. Patel*

In June, the U.S. Supreme Court issued a landmark decision in *Obergefell v. Hodges*, holding that all states must issue marriage licenses to same-sex couples and recognize same-sex marriages validly performed in other states. The legalization of same-sex marriage affects the way employers provide benefits to same-sex employees. Marriage is not the only front on which LGBT rights are evolving. With much of the public and the media's spotlight on changes in the law regarding same-sex marriage, people may not realize that several federal agencies already interpret anti-discrimination laws to prohibit discrimination on the basis of sexual orientation and gender identity.

The Equal Employment Opportunity Commission ("EEOC"), the Department of Labor ("DOL"), and the Department of Justice ("DOJ") all take the position that statutes and orders prohibiting sex discrimination, such as Title VII of the Civil Rights Act of 1964, prohibit discrimination on the basis of gender identity (e.g., identifying as transsexual or transgender). These federal agencies reason that discrimination on the basis of gender identity is a form of sex discrimination. The EEOC and the DOL have stated further that prohibitions against sex discrimination protect discrimination on the basis of sexual orientation as well. Therefore, an individual may file a charge of discrimination with the EEOC on the basis of sexual orientation or gender identity, as a form of sex discrimination. Indeed, the EEOC has reported an increase in sexual orientation and gender identity-based charges, from 765 filed in 2013 to 1,093 filed in 2014.

Ohio's anti-discrimination laws prohibit discrimination on the basis of sex, but Ohio courts have yet to interpret state law to prohibit sexual orientation discrimination. While Ohio courts generally interpret Ohio's discrimination law to match federal anti-discrimination protections, Ohio's 10th district appellate court ruled in its 2014 decision in *Burns v. Ohio State Univ. College of Veterinary Med.*, 2014-Ohio-1190, 2014 Ohio App. LEXIS 1101 (10th App. Dist. 2014), that the state's prohibition of sex discrimination does not extend to sexual orientation discrimination. Given the rapidly changing legal landscape regarding LGBT rights, Ohio courts' stance may soon shift. Regardless, employers should be aware that employees experiencing sexual orientation or sexual identity discrimination may seek recourse with state or federal agencies or the court system.

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How Much Is That Doggie In the Window? Or, Rather, How Much Do Employers Have to Pay Police Officers To Care For Those Police Doggies

By Brad E. Bennett*

Years ago, we watched with bated breath as the French mastiff Hooch helped Detective Scott Turner (Tom Hanks) apprehend a murderer. Sadly (*spoiler alert*), Hooch died in the film's final minutes. However, had he lived and Detective Turner continued to use Hooch in police work, the Cypress Beach Police Department may have faced a question now facing many police departments, officers, and courts – should police departments pay for off-the-clock time spent caring for police dogs?

The Fair Labor Standards Act ("FLSA") generally requires employers to compensate employees for all hours worked. "Work" includes "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944). In addition, the FLSA requires that employers compensate employees for activities performed before or after the employee's regular work shift if the "activities are an integral and indispensable part of the principle activity" for which the employee is employed. *Steiner v. Mitchell*, 350 U.S. 247 (1956).

Courts and the Department of Labor have concluded that time spent off-the-clock caring for police dogs constitutes work and an "integral and indispensable part" of the officer's principle activity of employment. Specifically, time spent training the dog at home and the dog's "care" are compensable. *U.S. Dept. of Labor Wage and Hour Opinion Letter August 11, 1993*. "Care" includes: bathing, brushing, exercising, feeding, grooming, related cleaning of the dog's kennel or transport vehicle, administering medicine for illness, and transporting the dog to and from the veterinarian. So how much time must an employer compensate law enforcement personnel for these activities and at what rate?

TIME SPENT OFF-THE-CLOCK CARING FOR POLICE DOGS CONSTITUTES WORK AND AN "INTEGRAL AND INDISPENSABLE PART" OF THE OFFICER'S PRINCIPLE ACTIVITY OF EMPLOYMENT.

Generally, employers must pay employees a rate of at least one and one-half times the employee's regular rate of pay for hours worked in excess of 40 hours in a week. 29 U.S.C. §207(a)(1). However, employers may calculate law enforcement personnel overtime over a longer time-period, up to 171 hours in 28-day period. 29 U.S.C. §207(k). In addition, the FLSA allows employers and employees to agree upon different straight-time hourly rates where the employee performs "two or more kinds of work." 29 U.S.C. §207(g). In the event an employer agrees upon a different straight-time hourly rate for dog-care, it must ensure that it only pays that different rate for dog-care and not law enforcement activities.

How much time a police department must compensate its personnel to care for police dogs varies by court. In one case, the court concluded the District of Columbia had to pay its officers 30-minutes per day (seven days/week) for "the care, feeding, and grooming" of the police dogs. *Levering v. District of Columbia*, 869 F. Supp. 24 (D.C. Cir. 1994). However, another court upheld the City of Cincinnati's agreement, reached through a collective bargaining agreement, to compensate its canine officers for 17 minutes of straight-time per day. *Brock v. City of Cincinnati*, 236 F.3d 793 (6th Cir. 2001). There, in finding the agreement Cincinnati reached with its police union reasonable, the court considered the following additional benefits the City provided (among others): take-home vehicles; concrete-based fenced dog kennel at the officer's home; payment of food and veterinary care; and the benefit of having a highly trained police dog as a family pet.

Employers that maintain police department canine units should review their compensation system to ensure they are properly compensating those caring for the canines. When determining what constitutes proper payment, in addition to an hourly rate, employers may consider other benefits provided. Employers should attempt to reach an agreement with personnel on a reasonable amount of compensation and contact counsel with questions.

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My Employee Said What on Facebook?

By Drew C. Piersall*

"Ok we got Bin Laden . . . let's go get Kasich next . . . who's with me?" "[C]an't believe what a snake my boss is. . . . he needs to keep his [creepy] hands to himself . . . just an all around d-bag!!" "If you are on public assistance, you may not have additional children and must be on birth control (e.g. an IUD)." These are statements that employees made on Facebook for which they received discipline, yet courts and an arbitrator reached different conclusions regarding the appropriateness of the discipline.

The decisions raise many questions. Can employers discipline employees for comments, posts, etc. that employees make while off-duty on non-employer social media sites? What standards apply to employee off-duty conduct? The arbitrator evaluating whether the Ohio Department of Rehabilitation and Correction had just cause to terminate the employee who made the Bin Laden comment above considered these issues. *State of Ohio, Ohio Dep't of Rehab. and Corr.*, (Pincus, Mar. 6, 2013). There, four employees who worked in the same correctional institution "liked" the corrections officer's Bin Laden Facebook comment, which he posted off-duty. The officer's Facebook profile included his job location and public employee status. Once the employer learned of the comment, it investigated and ultimately discharged the officer. However, the arbitrator concluded that the officer's statement was nothing more than empty words. In addition, the employer's "E-mail, Internet, and On-line Services Use" policy did not place the employee on notice that the policy covered his off-duty conduct. As a result, the arbitrator concluded that while officer's alleged threat justified a 14-month suspension, the employer did not have just cause to terminate his employment.

The First Amendment protects a public employee's right "to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410 (2006). A public employee must show the following to establish the First Amendment protected his or her speech: (1) the employee spoke as a private citizen rather than pursuant to official duties; (2) the speech involved a matter of public concern; and (3) the employee's "interest as a citizen" in commenting on the matter outweighed the State's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees." *Westmoreland v. Sutherland*, 662 F.3d 714 (6th Cir. 2011).

Employees have raised the First Amendment as a defense to their social media posts in a number of contexts with varying results. For example, the court affirmed the discharge of the children's services worker who made the above (and many other) comments about people who received public assistance. *Shepherd v. McGee*, 986 F.Supp. 2d 1211 (D. Or. 2013). The court reasoned that since her comments were banter "rather than speech intended to help the public actually evaluate the performance of a public agency," they stood "on the periphery of First Amendment protection." The court also emphasized the heightened government interest that existed since the employee held a "public contact role." In addition, the employee's statements impaired her ability to do her job – testify at proceedings, since her statements raised credibility issues for prosecutors.

In evaluating employee conduct, discipline, and social media use, it is helpful for employers to have social media and computer use policies. However, employers must be cautious about the content and prohibitions included in such policies. The National Labor Relations Board ("NLRB") analyzes whether employers violate Section 7 of the National Labor Relations Act ("NLRA"), which guarantees employees the right to join unions and engage in "concerted activity" for the purposes of "mutual aid or protection." 29 U.S.C. §157. In the social media context, the NLRB considers whether an employee could reasonably construe a rule or policy to chill the employee's exercise of their Section 7 rights.

The NLRB has shown it will go to great lengths to protect employee speech. In *Three D, LLC v. NLRB*, the Second Circuit affirmed the NLRB's ruling that an employee's Facebook post that the employer was "[s]uch an asshole" was concerted, protected activity. No. 14-3284, 2015 U.S. App. LEXIS 18493 (2d Cir. Oct. 21, 2015). The NLRB found the activity concerted because it involved multiple employees and protected because it involved workplace complaints about tax withholdings. Furthermore, the statements were within the NLRA's protection because the comment at issue did not mention, let alone disparage, the employer's products. Therefore, at least according to the NLRB, an employee may call their boss an "asshole" on social media without repercussion.

Beyond controlling and responding to employee use of social media, the prevalence of social media bleeds into the hiring process. Social media provides employers with another forum to post jobs and conduct background checks. However, employers should engage in social media checks with caution.

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First, employers should consider the accuracy of the information (e.g., potential for false profiles or accounts). In addition, by viewing a prospective employee's social media account, the employer may incidentally obtain information regarding the individual's race, gender, national origin, religion, age, disability, or genetic background. This knowledge could expose the employer to claims of discrimination. Therefore, any employer who chooses to review prospective employees' social media accounts should take the following precautionary steps: (1) ensure the person reviewing social media accounts is wholly uninvolved in making the hiring decision; (2) only review publicly available social media; and (3) do not request social media account passwords during the hiring process.

The growing prevalence of social media has created a host of potential issues for employers. Given social media's fast-paced growth and ever-changing nature, employers should constantly keep abreast of the current status of the law.

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Employment Practices Liability Insurance – Do Not Wait to Notify Carrier of Claims

By Stephen S. Zashin*

Employers that wait too long to report claims to an Employment Practices Liability Insurance ("EPLI") carrier may lose coverage. A federal court recently determined that an employer violated its EPLI policy when it waited nearly two years to notify its insurance carrier of an Equal Employment Opportunity Commission ("EEOC") Charge of Discrimination ("Charge"). *E. Dillon Co. v. Travelers Cas. & Sur. Co. of Am.*, No. 1:14-cv-00070, 2015 U.S. Dist. LEXIS 76295 (W.D. Va. June 12, 2015). As a result, the insurance carrier did not have to provide coverage for the EEOC Charge and subsequent litigation.

The employer twice waited too long to provide notice of claims to its EPLI carrier. First, the employer waited almost 23 months after it received notice of a pending EEOC Charge (Apr. 4, 2011) before notifying the insurance carrier (Feb. 28, 2013). During that time, the EEOC dismissed the Charge (Apr. 28, 2012), reversed course and found reasonable cause to believe the employer violated the Americans with Disabilities Act (Sept. 27, 2012) and scheduled mediation (Mar. 14, 2013). Later, the employer waited approximately five months after it was served with a lawsuit related to the Charge (Sept. 9, 2013) to notify the insurance carrier of the lawsuit (Feb. 3, 2014). The employer provided notice of the lawsuit eight days before court-scheduled mediation was to occur.

The insurance carrier denied both claims after it concluded the employer failed to provide timely notice. The insurance policy covered any "Employment Claim," which specifically included EEOC proceedings, and required the employer to provide written notice of claims "as soon as practicable." The insurance carrier concluded that the employer's decision to wait nearly 23 months and five months respectively to provide notice of the claims violated the "as soon as practicable" requirement.

The court agreed and concluded that the employer's failure to provide timely notice constituted a material breach of the insurance agreement. The employer's notification delay was unreasonable because the insurance agreement specifically defined "Employment Claim" to include EEOC proceedings. In addition, the delay prejudiced the insurance carrier, because the carrier: lost the chance to investigate the claims, to direct the employer's defense, and to attempt to resolve the matter before the EEOC found reasonable cause; and the EEOC's proposed Conciliation Agreement ($178,000 payment) diminished any settlement leverage the insurance company may have possessed. The court concluded the length of delay alone was sufficient to find that the employer materially breached the insurance agreement. In reaching this conclusion, the court considered other court cases which held that any delay beyond 75 days, without reasonable excuse, was unreasonable.

Upon receipt of a potential claim, employers should carefully review their EPLI policy's reporting requirements and work with their brokers to avoid losing coverage for failing to timely report. Finally, all employers should consider whether to purchase an EPLI policy.

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EEOC to Change Genetic Information Nondiscrimination Act Regulations on Wellness Programs

By Patrick Hoban*

On October 30, 2015, the Equal Employment Opportunity Commission ("EEOC") released a Notice of Proposed Rulemaking setting forth proposed changes to the regulations governing employer wellness programs in relation to Title II of the Genetic Information Nondiscrimination Act ("GINA"). GINA is a federal law that, in part, protects employees and applicants from discrimination based upon genetic information, including that of their family members. The proposed rule seeks to clarify the circumstances under which employers may offer inducements (i.e., wellness program incentives) in exchange for health-status information of employee spouses who participate in the employer's group health plan.

A wellness program is "a program offered by an employer that is designed to promote health and prevent disease." 42 U.S.C. 300gg-4(j)(1)(a). Wellness programs include a wide range of employer-sponsored services, from smoking cessation to workout programs to health assessments. Under GINA, wellness programs cannot condition employee inducements upon employee genetic information. "Genetic information" includes, among other things, information about employees and their family members' (including spouses) genetic tests and family medical history.

Employers covered by GINA (i.e., those with 15 or more employees) are prohibited from requesting, requiring, or purchasing employee genetic information, unless a statutory exception applies. One exception allows employers to obtain genetic information as part of employer-provided voluntary health or genetic services, including wellness programs. This exception only applies if: (1) the provision of genetic information is actually voluntary (i.e., employees are not required to provide the genetic information and there is no penalty for not providing it); and (2) the individual provides "prior knowing, voluntary, and written authorization." 29 C.F.R. 1635.8(b)(2)(i).

The EEOC's proposed rule adds an additional requirement that an employer's wellness program must be "reasonably designed to promote health or prevent disease." This means the wellness program "must have a reasonable chance of improving the health of, or preventing disease in, participating individuals, and must not be overly burdensome, a subterfuge for violating [GINA] or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease."

The EEOC's proposed rule explains that, under GINA, employers can offer limited inducements for information about the current or past health status of an employee's spouse covered by the employer's group health plan. The provision of this information must be part of a "health risk assessment," (e.g., medical questionnaire or examination to detect high cholesterol) conducted in connection with the spouse's receipt of health or genetic services as part of the employer's wellness program. The wellness program inducements may take various forms, from discounts or rebates to the avoidance of a premium surcharge. The total inducements offered under the wellness program may not exceed 30 percent of the total annual costs of coverage. To be valid, the provision of the spouse's information must meet the requirements of GINA's wellness program exception discussed above (i.e., voluntary and with prior written authorization). Furthermore, the information provided in exchange for the inducement must be limited to current and past health status and cannot include genetic information such as results of genetic tests.

The proposed exception for inducements is limited to employee spouses who are covered under the employer's group health plan. Employers may not provide inducements in exchange for employee genetic information or their biological or non-biological child's genetic information or current or past health status. Employers may offer inducements for completion of health risk assessments that ask questions about family medical history and other genetic information; however, the employer must make it clear that the inducement will be available regardless of whether the specific genetic information questions are answered.

Prior to announcing the proposed rule, the EEOC initiated litigation taking issue with multiple employers' wellness programs. *See, e.g., EEOC v. Honeywell Int'l. Inc.*, N0. 0:14-cv-04517 (D. Minn. 2014); *EEOC v. Orion Energy Systems, Inc.*, N0. 1:14-cv-01019 (E.D. Wis. 2014). In *Honeywell*, the EEOC sought a temporary restraining order and preliminary injunction preventing the company from imposing surcharge penalties on employees and spouses that did not participate in biometric testing for health data including cholesterol and nicotine levels. The EEOC argued that the wellness program violated GINA and the Americans with Disabilities Act. The court denied the EEOC's motion, but noted that "great uncertainty persists in how the [Affordable Care Act], [Americans with Disabilities Act] and other federal statutes such as GINA are intended to interact," with respect to wellness programs.

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The EEOC's proposed GINA rule comes on the heels of an April 2015 proposed rule (discussed by Z&R here) addressing, in part, amendments to the EEOC's regulations and guidance on the Americans with Disabilities Act relating to employer wellness programs. The comment period for the proposed Americans with Disabilities Act rule closed in June. The EEOC may make revisions in light of the comments before voting on the final rule. The EEOC is accepting comments on its proposed GINA rule until January 28, 2016. Employers can anticipate continued developments, and litigation, in this nascent area of employment law.

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Zashin & Rich is pleased to congratulate the following 2016 Super Lawyers:

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Lisa is a legal and human resources professional with 20+ years of experience in employment law across multiple industries including retail, healthcare, municipal, professional services, construction and manufacturing. Lisa has worked in-house as a human resources executive and senior employment counsel at Jo-Ann Stores. Lisa was a Certified Specialist in Labor and Employment Law. Lisa devotes her practice to providing practical strategies for proactive workforce management as well as vigorous defense of employee claims and litigation.

Brad E. Bennett Joins Z&R Columbus

Brad has 18 years of employment law experience as an attorney and human resources professional across multiple industries including healthcare, aviation, retail, public sector and construction. He represents public and private sector employers in all aspects of labor and employment law. In addition to his litigation practice, Brad represents public sector employers in collective bargaining, grievance arbitrations, and impasse proceedings. Additionally, Brad has drafted civil service rules for municipalities, represents public sector employers before the State Personnel Board of Review (SPBR), and counsels public employers regarding compliance with Ohio's Open Meetings Act and Public Records Act. Brad is an OSBA Certified Specialist in Labor and Employment.