EMPLOYMENT LITIGATION UPDATE AND TRIAL CONCERNS

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I. GROWING CONCERNS AND THREATS TO EMPLOYERS

A. Sexual Orientation and Gender Identity – These are two very different concepts. The status of protection for either is not entirely clear. One thing that is clear, however, is that they are not the same for purposes of employment protection.

1. In 2015, the U.S. Supreme Court upheld marriage equality in *Obergefell v Hodges*, 135 SCt 2584 (2015). While this landmark decision held that nontraditional couples may marry, it did not address the status of their protection in the workplace.

2. The Equal Employment Opportunity Commission ("EEOC") has held that workplace discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964. *Complainant v Fox*, EEOC Appeal No. 0120133080 (2015).

a. According to this decision, Title VII precludes discrimination based on gender, but not specifically sexual orientation or gender identity.

b. In reaching this decision, the EEOC determined that discrimination based on sexual orientation is akin to discrimination based on gender because it allows an employer to treat one employee less favorably than another because of that employee's gender.

3. EEOC determinations, however, are not binding on Federal Courts. The 11th Circuit addressed this issue in March 2017 in *Evans v Georgia Regional Hospital et al.*, 11 Cir Docket No. 15-15234. The

court held that sexual orientation is not a protected characteristic under Title VII.

a. Plaintiff was a female security guard who wore a male uniform and "failed to match female stereotypes." While she did not expressly tell people she was a lesbian, her employer felt her sexual orientation was apparent.

b. The court allowed plaintiff to proceed on a claim of discrimination based on failing to meet gender stereotypes, but not expressly as to sexual orientation. This could be interpreted as allowing a gender identity based claim, but not an express sexual orientation claim.

B. Hostile Work Place Claims and EEOC Harassment Guidelines

1. In January 2017 the EEOC issued proposed guidelines relative to potential unlawful harassment claims.

a. Employers have always had the obligation to respond to complaints of discrimination or hostile workplace environment by conducting internal investigations. These investigations often include interviews of other employees and potential witnesses.

b. The proposed guidelines clarify the duty of an employer to affirmatively respond to employee conduct that may result in an enforceable legal claim even if the conduct itself does not constitute such a claim.

c. Under these guidelines, the EEOC may pursue claims based on "perceived" membership in a protected class, even if that perception is wrong. The Agency may also pursue claims where harassment exists, although it is not aimed directly at

the complainant. It may even pursue claims of harassment that occur outside the workplace.

C. Joint Employer Status

1. This continues to be a troublesome issue. In August 2015, the NLRB held that Browning Farris Industries was required to negotiate with a union representative representing workers employed by Leadpoint, a staffing agency that contracted with BFI to provide workers for its recycling plant. This decision was particularly significant because the NLRB ruled that a company can be a "joint employer" if it merely has the **right** to control an employee, even if it does not actually exercise any such control. *Browning Farris Industries of Ca, Inc.,* NLRB Case 32-RC-109684.

2. The Board previously ruled that McDonald's USA, LLC was a joint employer along with its franchisees for purposes of alleged unfair labor practices. That matter arose from complaints that McDonald's retaliated against employees of multiple franchisees who participated in demonstrations protesting working conditions and demanding a higher minimum wage. McDonald's claimed that it was not a "joint employer" along with its franchisees. The Board noted, however, that McDonald's retained certain elements of control over all franchisees.

3. The court recently addressed this issue in *Dunn v Pratt Industries, Inc.*, 2017 WL 1405356. In April 2017, the court upheld the lower court's denial of defendant's motion for summary judgment in which it argued that it was not a "joint employer" and therefore took no "adverse employment action" against plaintiff. The court found that plaintiff was not formally employed by the defendant, but defendant controlled important aspects of his work. Therefore, defendant could be held liable under Title VII and 42 USC Sec. 1981.

D. A Post 2016 Administration and Other Considerations

1. Speculation has ranged widely regarding the effect of the new administration on the actions of the EEOC, NLRB and other Federal agencies. One area of concern appears to be requirements for immigration status. Employers should be cognizant of compliance with all immigration requirements. Particular care should be given when hiring foreign employees, especially those with temporary status. In some cases, penalties for noncompliance can be strict and financially severe to an employer.

II. LITIGATION BEGINS, BUT WHERE?

There are generally three potential forums for employment litigation – Federal court, state court or arbitration.

A. Federal Court

1. If a party wishes to pursue a matter under Title VII, Section 1981 or several other Federal statutes, it must first exhaust its administrative remedies. This means, generally, discrimination claims pursuant to Federal law will first be brought before the EEOC.

2. The EEOC will investigate and determine if reasonable cause exists to pursue a matter against a particular employer. The agency may bring the action in its own name. If it does, the matter becomes more complicated than a claim brought solely by an individual.

3. If the EEOC finds no reasonable cause, it will dismiss the claim and issue a right to sue letter. A plaintiff must pay close attention to this letter, as it specifically sets forth the timeframe in which an action

may be brought in Federal court. The plaintiff will have 90 days to bring that action. Additionally, a claimant may request a right to sue letter if a matter has been pending before the EEOC for 180 days without the Agency making a determination.

B. State Court

1. A claimant may bring an action in a Michigan state court without first proceeding to the EEOC or another Federal agency. In doing so, however, the claims must be based exclusively on state law. A plaintiff cannot bring claims based on Federal law, such as Title VII, directly into state court. Generally, a state law action will be brought pursuant to the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

2. Many of the remedies permissible under state law are similar to those under Federal law. From an employer's perspective, the most significant is likely recovery of attorney fees by the plaintiff. If plaintiff prevails at all, even one dollar, the employer may be responsible for those fees. Remember the old adage – "A little discrimination goes a long way."

C. Arbitration

1. Employment contracts often contain arbitration clauses. These clauses are also often present in consumer contracts, which has been subject to attack by the Consumer Finance Protection Bureau.

2. Arbitration has often been a favored forum because many people believe it is faster and less expensive than litigation. This may or may not be so. Arbitration may proceed before a panel of three arbitrators or a single individual. Either way, those arbitrators are being compensated for their time, which is cost to the parties.

3. Additionally, many arbitration clauses contain a cost splitting clause. This states that the parties will share equally in the arbitration costs. There is a strong Federal policy in favor of enforcing arbitration agreements, although not necessarily cost sharing agreements. These agreements are often the result of the arbitration process where there is an inequity between the bargaining power of the employer and employee. *Morrison v Circuit City Stores, Inc.*, 317 F3rd 646 (6th Circuit 2003; *Moore v Farrell Gas, Inc.*, 533 FSupp 2nd 740 (WD Mich 2008)).

III. LITIGATION CONCERNS AND EVIDENTIARY ISSUES

A. While a lawsuit may have a lengthy life cycle from complaint through trial, there are several points at which the parties may settle or file a motion to dismiss.

1. Preservation of evidence – A party should preserve all evidence at the first possible sign of litigation, well before a claim is actually made. This includes not only tangible items, but also discontinuing destruction of any data or electronic backup. *Zubulake v UBS Warburg, LLC*, 229 FRD 422 (SD NY 2004).

2. Employees and internal witnesses should be contacted as soon as possible. Statements should be obtained and any potential problems identified early.

3. Document exchange and interrogatories may be voluminous. This is another reason it is critical to preserve any evidence that may be even remotely relevant to plaintiff's claim.

4. Depositions will be taken of key company personnel. It is important to keep in mind that part of plaintiff's discovery will focus on identifying other individuals who have potentially experienced discrimination, even if they did not make formal claims. Initial

discovery will involve questions about prior litigation and employment charges. It will also seek identification of individuals similarly protected in a class.

B. Admissibility of evidence – An EEOC determination can be admitted into evidence at trial for certain purposes, although not in order to prove the truth of the allegations. *Alexander v CareSource*, 576 F3rd 551 (6th Cir 2009). Some courts have noted, however, that "while the EEOC report may fall within the business records hearsay exception, the same cannot be said of the entire EEOC file." *EEOC v Sharp Manufacturing Company of America*, 2008 WL 189847 (WD Tenn 2008)

IV. RESOLUTION AND REASONABLE ACCOMMODATION

A. The majority of litigated matters are resolved and never find their way to a courtroom, especially with the growth of alternative dispute resolution.

1. The parties may agree at any point to resolve their dispute. The determination of what accommodations are "reasonable" is often a subject of dispute. The claimant may also demand reinstatement, back pay and front pay, particularly when the claim is brought by a governmental agency.

2. Other noneconomic relief may be subject to the resolution. This may include re-training of certain employees and posting of notices.