



# Legal & Regulatory Conference

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A background image showing a group of people in a professional setting, likely a conference. The image is semi-transparent and overlaid with a blue tint. It shows the profiles and faces of several individuals, including a man in a suit on the left and a woman with blonde hair in the center.

*Examine Together*



# HOT EMPLOYMENT ISSUES: WHAT YOU NEED TO KNOW

2018 APPA Legal & Regulatory Conference  
Charleston, South Carolina  
October 7-10, 2018

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# Who's Who At The DOL?



Secretary of Labor,  
R. Alexander Acosta



Solicitor of Labor,  
Kate S. O'Scannlain



Acting WH Administrator,  
Bryan Jarrett

# DOL Business-Friendly Initiatives



- Office of Compliance Initiatives – help businesses comply with the more than 100 wage, safety and benefits laws DOL administers.
  - [www.employer.gov](http://www.employer.gov) – answer frequently asked questions on pay, safety, and discrimination.
- Wage Hour Division Opinion Letters – [www.dol.gov/whd/opinion/flsa.htm](http://www.dol.gov/whd/opinion/flsa.htm).
- PAID (Payroll Audit Independent Determination) Program (6 mo. trial run) – employers self-report FLSA violations – DOL calculate how much employees owed and receive back pay in exchange for release of FLSA claims.
- Revise FLSA definition of “regular rate” for purposes of overtime, potentially eliminate bonuses and other factors.

# Who's Who At The EEOC?



Victoria Lipnic (R)  
Acting Chair



Charlotte Burrows (D)  
Commissioner



Chai Feldblum (D)  
Commissioner



# Who's Who at the EEOC?

Nominated: Janet Dhillon (Chair)  
Daniel Gade (Commissioner)  
Chai Feldblum (to serve another term)



# EEOC's Accomplishments in FY 2017 – 1<sup>st</sup> Year of Trump Administration

- Obtained \$484 million for workers
  - \$356 million for private sector & state employees through administrative enforcement
  - \$42 million through litigation
  - \$86 million for federal employees & job applicants
- Filed 184 lawsuits (double that of 2016)
- Reduced inventory of charges



## EEOC's 2018-2022 Strategic Plan (approved Feb. 2, 2018)

- Strategic application of law enforcement authorities (Strategic Enforcement Plan – 2017-2021)
- Prevent employment discrimination through education and outreach
  - EEOC Training Institute
  - Technical Assistance Program Seminars (TAPS)
- Management by objective
  - Increased use of technology: take initial inquiries and requests for intake interviews online in 5 cities
  - Collaboration with other federal agencies, e.g., OFCCP



# EEOC's Focus on Enforcement

Follow Strategic Enforcement Plan for FY 2017-21, with focus on strategic impact cases in following areas:

- ✓ Eliminating barriers in recruitment and hiring, including criminal background checks;
- ✓ Protecting immigrant, migrant, and other vulnerable workers;
- ✓ Addressing emerging and developing issues, including those involving LBGT, ADA, and pregnancy-related issues;
- ✓ Enforcing equal pay laws;
- ✓ Preserving access to the legal system, including overly broad waivers of liability and mandatory arbitration; and
- ✓ Preventing harassment through systemic enforcement and targeted outreach.

# What to Expect From EEOC



## —New Harassment Guidance

- 2017 – EEOC released draft Guidance
- 2018 – EEOC submits revised Guidance to OMD
- Final Guidance – (1) comprehensive summary of law, replace prior EEOC enforcement guidance; (2) define harassment and provide best practices; (3) unknown: is sexual orientation/gender identity protected?

## —Guidance on “Big Data” Tools

—More focus on age discrimination

—Less focus on nationwide class suits



# Developments in Discrimination Law

## —Accommodation of Religious Beliefs

- *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm.*, No. 16-111 (June 4, 2018) (Kennedy, J.) (7-2)
- *Arlene's Flowers, Inc. v. Washington*, No. 17-108 (S.C. June 27, 2018) – Vacated and remanded for consideration based on *Masterpiece Cakeshop*



- Sexual Orientation Discrimination
- Uncertainty of Federal Protections
  - ✓ Seventh & Second Circuits – protections – *Zarda v. Altitude Express* (2d Cir. 2018) (*en banc*); *Hively v. Ivy Tech Cmty. Coll.* (7<sup>th</sup> Cir. 2017)
  - ✓ Eleventh Circuit – no protection – *Bostock v. Clayton County Bd. of Comm.* (11<sup>th</sup> Cir. 2018)
- State Law Protections: 22 states prohibit discrimination on basis of sexual orientation
- Transgender Rights/Protections
  - ✓ Sixth Circuit says “yes”: *EEOC v. R.G. & G.R. Harris Funeral Homes* (6<sup>th</sup> Cir. 2018).



## —Equal Pay

- *Rizo v. Yovino*, No. 16-15372 (9<sup>th</sup> Cir. Apr. 9, 2018) – Prior salary, standing alone or in combination with other factors, cannot justify wage differential between men and women. However, prior salary may have role in individual salary negotiation.

Note: Many states and localities prohibit prospective employer from asking about prior salary.

## —Accommodating Pregnancy Under Title VII & ADA

- *Hostettler v. College of Wooster*, No. 17-3406 (6<sup>th</sup> Cir. 2018) – Remanded for trial issue of whether employee’s inability to work full-time due to pregnancy complications prevented her from performing essential functions of job. Should College have accommodated employee under ADA and Title VII with part-time schedule?

## —Developing ADA Issues

### ➤ Medical Exams

- ✓ EEOC settles case challenging nerve conduction testing, which disqualified job applicants with carpal tunnel syndrome, for \$4.4 million – *EEOC v. Amsted Rail Co.*, No. 3:14-cv-01299 (S.D. Ill., July 9, 2018).
- ✓ *EEOC v. BNSF Rwy. Co.* (9<sup>th</sup> Cir. Sept. 12, 2018) – employer must pay for any follow-up medical testing because, where an employer requests a follow-up test at the applicant’s cost “only from persons with a perceived or actual impairment or disability, the employer is imposing an additional financial burden on a person with a disability because of that person’s disability” and, hence, engaging in disability discrimination.

## —Developing ADA Issues

### ➤ Medical Exams

- ✓ *Freelain v. Vill. Of Oak Park* (7<sup>th</sup> Cir. 2018) – proper for a municipality to require a police officer to undergo a psychological evaluation before returning to work where the officer had taken twenty days of sick leave to deal with migraine headaches and other medical conditions, which the officer attributed to stress.

### ➤ Rotating Shifts

- ✓ *Sepúlveda-Vargas v. Caribbean Rests., LLC* (1<sup>st</sup> Cir. 2018) – working a rotating shift was essential job function of assistant manager of fast food restaurant since it was necessary for the equal distribution of work among the restaurant's managerial staff.

## — Developing ADA Issues

### ➤ Telecommuting

- ✓ *EEOC v. Ford Motor Co.* (6<sup>th</sup> Cir. 2015) (en banc) - employee with irritable bowel syndrome requested accommodation to work from home up to 4 days a week. Ford had a telecommuting policy, but denied employee's accommodation request because her job as a resale steel buyer required her to frequently interact face-to-face with coworkers. Court ruled in favor of Ford because attendance at the job site was an essential function and employee's disability-related absences meant she was not a "qualified" individual under the ADA.

## —Developing ADA Issues

### ➤ Telecommuting

- ✓ *Credeur v. State of Louisiana* (5<sup>th</sup> Cir. 2017) – state attorney general not required to accommodate a litigation attorney, who developed serious health problems due to complications from a liver transplant, and wanted to work from home. Litigation attorneys engaged in an interactive and team-oriented approach, which could not be accomplished when an employee was working from home. Additionally, the attorney’s working at home resulted in the employee’s cases being reassigned to other attorneys.

## —Developing ADA Issues

### ➤ Telecommuting

- ✓ *Mosby-Meachem v. Memphis Light, Gas & Water Div.* (6<sup>th</sup> Cir. 2018) – upholding jury verdict that in-house attorney entitled to work from home while on 10 weeks of bed rest due to pregnancy complications. Evidence was that attorney had not needed to take a deposition or try a case in 8 years.

## ➤ Leave as Accommodation

- ✓ EEOC settles for \$1 million suit challenging employer's attendance and leave policies, which did not accommodate disability related absences or allow extra time off. *EEOC v. Mueller Indus.*, No. 2:18-cv-05729 (D.C. Cal., July 16, 2018).



## ➤ Leave as Accommodation

- ✓ *Severson v. Heartland Woodcraft, Inc.* (7<sup>th</sup> Cir. 2017) – employer did not violate the ADA by failing to provide a three month leave of absence to an employee who had undergone back surgery after the employee’s FMLA leave had expired. Court contrasted FMLA, which grants eligible workers the right to take job protected leave, with ADA, which the court emphasized as “an antidiscrimination statute, not a medical leave entitlement.” “An employee who needs long term medical leave cannot work and this is not a ‘qualified individual’ under the ADA” entitled to the statute’s protections.



## ➤ Leave as Accommodation

- ✓ *Hostettler v. College of Wooster* (6<sup>th</sup> Cir. July 17, 2018) – Although regular and predictable attendance usually will be considered a necessary element of virtually every job, “full time presence at work is not an essential function.”

## ➤ ADA/GINA Wellness Rules

- ✓ August, 2017 – U.S. District Court for D.C. invalidated rules issued in May, 2016 – *AARP v. EEOC*, No. 1:16-cv-02113 (D.D.C.)
- ✓ January, 2019 – Rules will expire
- ✓ No new regs until Congress confirms Janet Dhillon (Chair) and Daniel Gade

# Marijuana in the Workplace



- ADA – no obligation to allow or accommodate marijuana use.
- State Laws – 30 states and D.C. have legalized medical or recreational marijuana use.
  - Most states (e.g., CA, CO, MT, NM, OH, WA, FL – no obligation of employers to accommodate)
  - Some states (e.g., AZ, DE, MN) – employers required to accommodate legal out-of-work marijuana use, unless affect safe performance of job duties.
  - Court decisions require accommodation of off-site use: CT, MA, RI
  - State laws protecting lawful off-duty use (e.g., tobacco).
- Employer response – eliminate marijuana from drug testing.

# Is medical marijuana reimbursable treatment under workers' comp?

—Yes: CT, DE, MA, MN, NJ, NM

—No: FL, ND, ME

## Best Practices

—Keep abreast of marijuana legislation/court decisions;

—Adopt policies that :

- Bar use/sale of marijuana on premises;
- Bar employee intoxication (under the influence) at work;
- Limit marijuana testing for reasonable suspicion/post-accident.

# Opioids in the Workplace

## —Prevention & Response

- Large employers spent \$2.6 billion in 2016 on treatment (Peterson Center on Health & Kaiser Family Foundation)
- Assess the Risks
  - ✓ Geographic location
  - ✓ Demographics of workforce
  - ✓ Nature of work

# Opioids in the Workplace (cont'd)



## —Develop Drug-Use Policy

- Prohibit employees from being under influence
- Explain process for detection of abuse (random testing, reasonable suspicion, post-accident, etc.)
- Employee obligation to notify of drug or medication that could affect safe performance of job
- Ramifications of violation

## —Train your managers to recognize impairment/abuse

## —Investigate Treatment Controls

- Check group health policy as to
  - ✓ Step treatment (non-addictive medications first)
  - ✓ Dosage limits (prescription benefit managers)
  - ✓ Preauthorization requirements
- EAP
- Leave for treatment

## —Employee Education

- Adhere to prescription when using medications
- Medications that present addiction risk
- Dangers of over utilization
- Storage & disposal of medications
- Employer resources

# Dealing With the Opioid Crisis



## CAUTION: DRUG-FREE WORKPLACE POLICIES

- *Stewart v. Snohomish Cty.* (W.D. Wash. 2017) (awarding employee \$1.8 million for failing to accommodate use of opioids prescribed for migraine headaches).
- *EEOC v. Steel Painters*, No. 1:18-cv-00303 (E.D. Tex., filed June 27, 2018)
  - EEOC claims company violated ADA by terminating employee taking methadone as part of drug treatment
  - Company failed to assess employee's ability to work
- *EEOC v. Foothills Child Development Center*, CA No. 6:18-cv-01255 (D.S.C., filed May 7, 2018)
  - School terminated teacher who used prescription drug to treat opioid dependence
  - School settled with agreement to conduct individualized assessment

# Dealing With the Opioid Crisis



- *EEOC v. M.G. Oil Company d/b/a Happy Jack's, CA*  
16-cv-04131 (D.S.D., filed 2016)
  - Casino withdrew job offer for cashier position following positive prescription drug test
  - Casino settled for \$45,000 with agreement to require disclosure of prescription drugs only if medication affects job performance.

# Dealing With the Opioid Crisis



- EEOC v. Norfolk Southern Corp.*, No. 2:17-cv-01251 (W.D. Pa., filed Sept. 27, 2017)
- Challenges pre-employment and return-to-work exams as violating ADA by disqualifying persons with disabilities without considering whether person could do job safely.
  - Medical tests excluded persons with past drug addiction and drug addiction treatment, including those who had not reached 1 yr. post-treatment threshold without relapse.
  - Sept. 12, 2018 – court denied employer’s partial motion to dismiss and time period could go back to Dec., 2008.



# Dealing With the Opioid Crisis

## Best Practices

- May ask about current illegal drug use
- Ask only about prescription drug use that adversely affects employee's ability to safely perform essential job functions
- Perform individualized assessment based upon most current medical information
- Consult EEOC Guidance at <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>

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Mr. Mook frequently counsels employers on issues involving compliance with the ADA and accommodating disabled employees, as well as other employment related matters. Mr. Mook is a member of the Editorial Advisory Board of Employment Law 360 (LexisNexis). He also is a co-editor of the Virginia Employment Law Letter and is a regular contributor to several legal publications, including Bender's Labor & Employment Bulletin. He is included in Best Lawyers in America (2018 ed.) for employment law.

Mr. Mook is a member of the Virginia and District of Columbia Bars, and is a member of the Labor & Employment Law Section of the District of Columbia Bar and has been a member of the Alexandria Commission on Persons with Disabilities. He earned his Juris Doctor from Yale Law School.

Mr. Mook was a speaker on "Labor and Employment Law Developments" at APPA's 2015 and 2016 Legal and Regulatory Conferences.