Advisory

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Important Regulatory Changes on the Horizon

2016 has certainly started out to be an active year for employers. Of particular note, New York lawmakers and regulators, as well as the Equal Employment Opportunity Commission ("EEOC"), have been busy promulgating impactful new employment-related regulations. The EEOC recently released a proposal to expand reporting obligations on EEO-1 forms and guidance on the agency's interpretation of federal anti-retaliation provisions. Meanwhile, New York City regulators and legislators have been hard at work updating the New York City Human Rights Law ("NYCHRL") to provide additional insight on gender-based discrimination claims, employment actions against "caregivers," and contracting with freelancers.

EXPANDED REPORTING OBLIGATIONS ON EEO-1 FORMS

The EEOC recently proposed a new regulation for the stated purpose of aiding in identifying and combatting pay inequality, particularly across industry and occupational lines. Specifically, on January 26, 2016, the EEOC issued a notice of proposed rulemaking as the first step toward adoption of a rule that would require federal contractors and employers with more than 100 employees to report pay data on the annual EEO-1 report. The EEO-1 already requires an employer to provide information detailing the breakdown of its workforce in terms of race, ethnicity, and gender. As the EEOC sees it, the pay data disclosures would also "allow EEOC to compile and publish aggregated data that will help employers in conducting their own analysis of their pay practices to facilitate voluntary compliance." Of course, the EEOC also plans to "use this pay data to assess complaints of discrimination, focus agency investigations, and identify existing pay disparities that may warrant further examination."

Of particular concern, however, is that the raw pay data the EEOC seeks to compile necessarily fails to take into account the myriad of perfectly legitimate factors that typically influence compensation decisions (*e.g.*, experience, seniority, education, job performance, etc.). Compiling the data may also be difficult due to the wide range of considerations affecting an employee's reported income, such as decisions regarding tax and retirement withholdings. Reporting pay data also has other concerning features that a mere disclosure of racial and gender data does not, including the possibility of alerting competitors to compensation practices. Public comment on the proposed changes will be accepted until April 1, 2016.

NEW EEOC GUIDANCE ON RETALIATION CLAIMS

On January 21, 2016, the EEOC issued a draft proposal that would modify the agency's longstanding guidance on employee retaliation claims. This action on the EEOC's part was ostensibly driven by a surge in retaliation claims across the nation, to the point that retaliation is now the most frequently reported claim raised before the EEOC. The newly proposed guidance accounts for relatively recent

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Supreme Court cases further defining the scope of retaliation claims, namely, *Burlington Northern and Santa Fe Railway v. White*, 548 U.S. 53 (2006), holding that a suspension without pay constituted an adverse employment action sufficient to implicate Title VII's anti-retaliation clause; *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), recognizing the viability of a Title VII retaliation claim in favor of a non-employee third party; and *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), finding that a Title VII plaintiff's relatives may also be victims of unlawful retaliation by "association." The proposed guidance provides a comprehensive, in-depth analysis of significant case law developments in the area of workplace retaliation, and offers the EEOC's interpretation of the current state of the law in light of these precedents. To be expected, the EEOC takes an expansive view as to the scope of protection afforded by the anti-retaliation provisions found in Title VII, the ADA, and other federal employment laws.

For example, the EEOC has taken the position that even where an employer points to legitimate, non-discriminatory motivations for an adverse employment action, the accusing employee can still get to a jury by piecing together a combination of evidence that, while unconvincing when viewed separately, could cumulatively create an inference of retaliatory intent. This interpretation will undoubtedly induce plaintiffs to use a "kitchen sink" approach as a strategy for avoiding summary judgment and convincing juries of liability, cobbling together seemingly disconnected evidence of purported disparate treatment, deviations from company policy and practice and the like in an effort to prove a claim for retaliation. The proposed guidance also focuses, in some instances, on circuit court decisions that advocate the EEOC's expansive view of retaliation claims without acknowledging competing views. As one stark illustration, the proposed guidance cites exceedingly liberal interpretations of anti-retaliation provisions by the Sixth and Eighth Circuits that recognize as protected activity a supervisor's refusal of a managerial directive that the supervisor reasonably believes requires him or her to carry out unlawful discrimination. However, the guidance fails to mention rulings in other circuits that take the opposite view. The EEOC also rejects a substantial body of case law holding that an employee does not engage in statutorily protected activity when he or she is simply performing a job function, such as in the case of a human resources professional identifying a potential statistical disparity in selection rates between males and females in the context of a reduction-in-force. As such, the proposed guidance, in some ways, propounds a single, biased theory of interpreting retaliation claims and defenses.

The proposed guidance does purport to assist the employer community by recommending some basic, common-sense actions employers can take to avoid retaliation claims, including establishing written anti-retaliation policies, providing retaliation-related training to all employees, enhancing company practices in regard to the handling of retaliation complaints, proactively following up with individuals who complain of workplace discrimination and the like to ensure they are not victimized by acts of retaliation, and

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carefully reviewing and vetting all proposed adverse employment actions before implementation. If ultimately adopted, the new guidance, while not carrying the force of law, will no doubt be relied upon by the EEOC and plaintiffs' lawyers in litigation as support for an expansive interpretation of the anti-retaliation statutes.[1]

MODIFICATIONS OF THE NEW YORK CITY HUMAN RIGHTS LAW

On December 21, 2015, the NYC Commission on Human Rights (the "Commission") issued new guidance focused on prohibitions in the NYCHRL restricting employers from taking adverse employment action against individuals due to their actual or perceived gender, gender identity, or gender expression (clearly encapsulating transgender and gender non-conforming workers as well as their gay and heterosexual counterparts) or altering the terms and conditions of employment due to actual or perceived gender. For example, the guidance suggests that all company policies regarding appearance and uniform should be gender-neutral and that companies should not prescribe assigned titles (Mr., Ms., etc.) or single sex facilities (e.g., bathrooms, locker rooms, etc.) to individuals without their assent. Furthermore, companies must provide gender-neutral health benefits, which include benefit plans that cover transgender care. Penalties for violating an individual's right to be free of gender-discrimination, in addition to compensatory and punitive damages, can range from $125,000 to $250,000, depending on the nature of the employer's conduct (willful, wanton, or malicious acts are penalized more severely).

Additionally, the New York City Council passed an amendment to the NYCHRL on December 16, 2015, prohibiting employers from taking adverse employment action against employees due to their actual or perceived status as a caregiver. Caregivers are individuals who provide care for children under the age of 18 or "care recipients," including certain disabled relatives or persons that reside in the caregiver's home.

Unrelated, but no doubt of greater importance to the business community, the Council also proposed new legislation that would create administrative and legal remedies for independent contractors (freelancers) who are not paid in a timely fashion. The legislation would require all companies employing freelancers to create a contract detailing (1) the rate and method of compensation; (2) the services to be provided; and (3) the date payment is due. This would apply to all contracts for services in an amount equal to or greater than $200.

*[1] The EEOC proposed guidance on retaliation claims can be viewed by **clicking here.***