

# EMPLOYMENT LAW UPDATE

2014

HOLLAND & HART<sup>LLP</sup>



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# EMPLOYMENT LAW UPDATE

# 2014

Key Developments in Employment Law for 2014

HOLLAND & HART<sup>LLP</sup>



# Panelists

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# Overview

- **Employment Litigation Trends/Statistics**
- **U.S. Supreme Court Decisions**
- **Changes in Colorado Employment Laws**
- **New EEOC Guidance**
- **NLRB Developments**
- **Updates on Use of Social Media and Separation Agreements**
- **Federal Contractor News**
- **Predictions for 2015**



# Employment Litigation Trends

## EEOC Statistics – FY 2013

- 93,727 charges filed in U.S.
- Down from the 99,000+ charges filed in each of FY 2010 - 2012





# EEOC Charges – By Type of Claim

Of total charges filed in FY 2013, percentages based on type of claim alleged:

- Retaliation (all statutes) – 41.1%
- Race – 35.3%
- Sex – 29.5%
- Disability – 27.7%
- Age – 22.8%

\* Claimants may allege more than one type of claim



# EEOC Charges - Colorado

- 2,058 total EEOC charges filed in CO in FY2013
- Up slightly from 1,956 in FY2012 and 1,986 in FY2011
- Percentages of Colorado EEOC charges by claim:
  - Retaliation (all statutes) - 45.9%
  - Disability - 33.5%
  - Sex - 32.4%
  - Age - 29.3%
  - Race - 23.4%





# Colorado CRD Statistics

- FY 12-13: 601 total charges filed with CCRD
- FY 11-12: 516 total charges
- FY 10-11: 575 total charges



**Dora**

Department of Regulatory Agencies  
Civil Rights Division



# CCRD Charges By Type of Claim

Of the 601 total charges filed with CCRD in FY 12-13:

- Retaliation - 334 charges = 55.6%
- Sex - 301 charges = 50.1%
- Disability - 283 charges = 47.1%
- Age - 163 charges = 27.1%
- Race - 144 charges = 24.0%
- Sexual orientation - 66 charges = 10.0%

\* Claimants may allege more than one type of claim



# CCRD Findings – FY12-13

- 291 No Probable Cause
- 15 Probable Cause



# CCRD Alternative Dispute Resolution

## FY 12-13 ADR Statistics:

- Mediations:

80 of 116 mediations settled; \$578,045 total

- Conciliations:

4 of 25 conciliations settled; \$21,510 total



# Trends

What we see in our practice





# **U.S. SUPREME COURT CASES AFFECTING EMPLOYERS**



# Retaliation

- “But for” causation standard
  - *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. \_\_\_\_ (2013)
- Applies to retaliation claims under Title VII
- Different standard than for Title VII discrimination claims
- Heightened standard should make it harder for employees to establish retaliation





# Employer liability for “supervisor” harassment

- “Supervisor” is limited to those with the authority to make tangible employment actions against the affected employee. *Vance v. Ball State Univ.*, 570 U.S. \_\_\_\_ (2013).
- Need the power to discipline, fire, promote, transfer, etc. – not just oversee daily activities



## Why it matters?

- Employer liability for Title VII harassment hinges on whether the alleged harasser is a “supervisor” or a “co-worker”
- Supervisor harassment resulting in a tangible adverse employment action = employer liability
- Supervisor harassment without a tangible employment action – employer may be liable unless can meet *Faragher/Ellerth* defense
- Co-worker harassment – no liability unless employer was negligent; knew/should have known and failed to correct





**CHANGES IN  
COLORADO LAWS  
AFFECTING EMPLOYERS**

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## Colorado Anti-Discrimination Statute

- C.R.S. §24-34-402: same protection as federal law, *plus* sexual orientation, creed, ancestry and marriage to another employee (with exceptions) – 26 or more employees
- 6 month filing deadline
- Disability discrimination & harassment – state law is different

Enforced by the Colorado Civil Rights Division



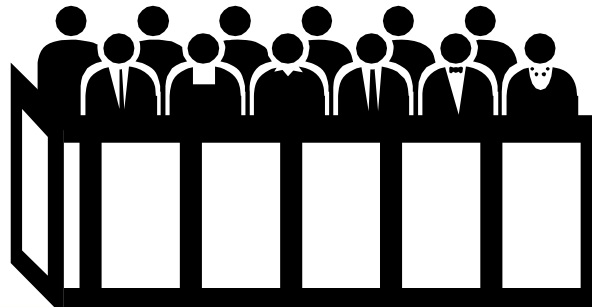
# Job Protection and Civil Rights Enforcement Act of 2013

- Age 70 cut-off eliminated
- Compensatory damages, including emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary loss
- Punitive damages for malice or reckless indifference to rights of the plaintiff



# Job Protection and Civil Rights Enforcement Act of 2013 con't

- Compensatory and punitive damages *not* available for disparate impact cases
- Either party may demand jury trial
- Costs and atty's fees to prevailing plaintiff; to defendant only if frivolous, groundless or vexatious
- Applies to claims that accrue on or after January 1, 2015



# **Job Protection and Civil Rights Enforcement Act of 2013 con't**

**Caps on total compensatory and punitive damages:**

**1-4 employees: \$10,000**

**5-14 employees: \$25,000**

**>15 employees: same as federal caps:**

**15-100 employees: \$50,000**

**101- 200 employees: \$100,000**

**201 – 500 employees: \$200,000**

**>500 employees: \$300,000**





# Result of Colorado Changes

## What to Expect



# Impact of Changes to Colorado's Anti-Discrimination Statute

- Potential for increased employment claims and state court lawsuits: WHY?
  - Summary Judgment – less likely in state court?
  - Comfort level in state vs. federal court
  - Fewer judicial resources
  - Overcrowded dockets
  - Discovery
  - Caselaw not yet established
  - Damages available in state court that are not available in federal court (e.g., for sexual orientation discrimination)



# Credit Reports

**Colorado Employment Opportunity Act (C.R.S. §8-2-126) – restricts the use of consumer credit information by employers unless “substantially related” to the individual’s current or prospective job.**



# “Substantially Related”

## Exception applies to positions that:

- 1) Constitute executive or management personnel or officers or employees who constitute professional staff to executive and management personnel, *and* the position involves:
  - A) Setting the direction or control of a business, division, unit or an agency of a business;
  - B) A fiduciary responsibility to the employer;
  - C) Access to customers’, employees’, or the employer’s personal or financial information (other than information ordinarily provided in a retail transaction); or
  - D) The authority to issue payments, collect debts or enter into contracts; OR
- 2) Involves contracts with defense, intelligence, national security or space agencies of the federal government.



# Consent and Disclosures

Consent - required if requesting information about the employee's credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers as a condition of employment unless:

- 1) The employer is a bank or financial institution;
- 2) The report is required by law; or
- 3) The report is substantially related to the employee's current or potential job *and* the employer has a *bona fide* purpose for requesting or using information in the credit report and is disclosed in writing to the employee.

Disclosures – required for number 3 above and adverse action notice required if rejecting or firing candidate based on credit information

NOTE – FCRA obligations also apply!



## If Using Credit Reports . . .

- Review background check policy and procedures
- Analyze whether credit information is “substantially related” to each position
- Identify specific exception that allows for credit report – no “gut feeling”
- Obtain employee/applicant consent
- Provide written disclosure to employee/applicant describing *bona fide* purpose
- If rejecting individual, provide adverse action notices



# Background Checks

- EEOC suing employers for use of neutral background checks
- Allege disparate impact on African-Americans and other protected classes
- Kaplan case
  - 2014 win for employer
  - EEOC used flawed methodology
- Dollar General and BMW cases ongoing
  - employers pointing to EEOC's own use of background checks





# Ban-the-Box Laws

States and municipalities have enacted laws to prohibit employers from asking about criminal history on employment applications, including:

- Hawaii (1998)
- Massachusetts (2010)
- Minnesota (effective Jan. 1, 2014)
- Rhode Island (effective Jan. 1, 2014)
- Illinois (effective Jan. 1, 2015)
- New Jersey (effective March 1, 2015)
- Over 60 cities (*e.g.*, Seattle, Newark, Baltimore, San Francisco)

(Not an exhaustive list)





# **DEVELOPMENTS IN FEDERAL EMPLOYMENT LAWS**

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# FMLA Leave – Civil Union and Domestic Partners

- Colorado Family Care Act – C.R.S. §8-13.3-201 *et seq.*
- Effective August 7, 2013
- Extends federal FMLA leave to employees to care for their civil union partner or domestic partner with a serious health condition
- Must meet eligibility requirements under FMLA
- Potential “double dipping” if employee uses leave for this purpose and still has federal leave remaining



## FMLA Leave – *Windsor* decision

- June 26, 2013 - U.S. Supreme Court struck down portion of the Defense of Marriage Act (DOMA) defining marriage as between one man and one woman – *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013)
- Following 2013 *Windsor* decision, DOL clarified that “spouse” for FMLA purposes was based on employee’s state of residence
  - if employee resides in a state that recognizes same-sex marriages and employee is legally married, then “spouse” includes same-sex spouse
- Created disparity – some same-sex spouses included, some not – depending on law where employee lives



# FMLA Rulemaking

- **June 2014 – DOL Proposed Rule Making**
- **Change regulation defining “spouse” to Place of Celebration**
  - if employee was legally married in a state that recognizes such marriage, employee’s spouse is recognized for FMLA purposes
- **Law in state of residence no longer relevant**



# New EEOC Guidance

- **Religious Garb and Grooming**
  - issued March 2014
  - Question and Answer Guide
  - Fact Sheet
  - describes accommodations (*e.g.*, dress codes, beards, head scarfs, etc.) for religious practices
  - “sincerely held belief” required



# Religious Discrimination

- **EEOC v. Abercrombie & Fitch – Headed to Supreme Court**
- **In 2013, Tenth Circuit ruled that an applicant who wore a head scarf to her job interview had to have requested a religious accommodation to exempt her from Abercrombie’s “Look Policy”**
- **Conflicts with other circuit court decisions**
- **Supreme Court will hear case this term**





# New EEOC Guidance

- **Pregnancy Discrimination Enforcement Guidance**
  - issued July 2014
  - addresses Pregnancy Discrimination Act, disparate impact and ADA concerns
  - provides 22 examples of workplace situations
  - offers best practices for employers



## **EEOC Activity**

**What will be the impact of  
these additional EEOC guidance  
documents?**



# NLRB Targeting Employer Policies

- All private sector employers must beware – not just union employers
- NLRB concern: language that might have a chilling effect on employees' right to engage in “protected concerted activities” under Section 7
- When investigating an unfair labor practice charge, NLRB aggressively looking at all policies in employee handbook and elsewhere



## Possibly chilling language

- Preventing employees from discussing wages or other terms and conditions of employment with each other or third parties
- Prohibiting employees from posting pictures and videos of the workplace
- Restricting employees from speaking to the media or third parties (which could include gov't agencies)
- Preventing employees from disparaging the company or its executives, managers and directors



## Possibly chilling language cont.

- Overly broad confidentiality language that could limit employees' right to discuss employment terms and conditions
- Prohibiting employees from discussing complaints, investigations or concerns about the workplace
- Prohibiting the wearing of union insignia or slogans
- Adverse consequences for going outside the “chain of command” on workplace issues



# Policies Being Targeted

- Confidentiality Policy or Agreement
- Non-Disparagement Policy
- Social Media Policy
- No Media Contact Policy
- “No Gossip” Policy
- Dress Codes
- Employee Behavior and Conduct Policy





# NLRB Quickie Rule

- Feb. 2014 – NLRB proposed (again) new election rules to speed up existing union election process
- Identical rule had gone into effect briefly in April 2012 – struck down in May 2012 because Board lacked quorum when adopted
- Would shorten time from petition to vote
- Waiting for adoption of final rules





# Use of Employer E-Mail System

- NLRB's General Counsel and CWA ask Board to overrule *Register Guard*
- Would permit employees to use their employer's email system for Section 7 activity, including union organizing
- Subject only to maintaining production and discipline
- *Purple Communications, Inc.:* Punted



# Franchisor as Joint Employer

- McDonald's Corp. treated as "joint employer" with franchisees in dozens of ULP cases
- Reasoning: McDonald's asserts high level of control over franchise operators
- NLRB's General Counsel decided this treatment; will likely go before the Board
- Implications for all industries using franchises
  - union elections and collective bargaining
  - possible extension to discrimination cases?



# NLRB Reform Act

- Introduced in Senate Sept. 2014
- Would increase number of Board members from 5 to 6 (3 Republican, 3 Democrat)
- Would require 4 votes to make decisions
- Would allow review of General Counsel's complaints with discovery rules
- Allow for court appeal if Board fails to make decision in 1 year



## **NLRB Activity**

**What impact does this NLRB activity  
have on employers?**



## Social Media and the Workplace Law

- Employer access to personal electronic communication devices restricted
  - C.R.S. §8-2-127
- Effective May 11, 2013
- May not request or require user names, passwords or other access to personal online accounts
- Prohibits requiring employee “friend” employer
- Prohibits requiring change of privacy settings



# Social Media and the Workplace Law

- Does not prohibit:
  - requesting access to employer’s internal systems or devices
  - conducting investigation to ensure compliance with securities and financial laws or related to unauthorized downloading of employer’s proprietary information – investigation must be based on receipt of information about the use of personal account for these improper purposes



## Social Media and the Workplace Law

- Aggrieved individual may file complaint with the CDLE
- CDLE will investigate and may hold hearing
- Penalties up to \$1,000 for first offense; up to \$5,000 for each subsequent offense





# Use of Social Media By Employers

What do social media laws mean for recruiting, investigations and workplace policies?



# Separation Agreements

- EEOC suing employers over use of separation agreements
- At issue: standard separation and release language that EEOC claims “chills” employees’ right to file charge or participate in proceedings
  - CVS case – dismissed Sept. 2014
  - College America case



# Legalized Marijuana

- Amendment 20 – offers affirmative defense to criminal prosecution for medical marijuana use (eff. June 1, 2001)
- Amendment 64 – legalized recreational use of marijuana by adults age 21 and older (passed Nov. 2012)



# Positive Drug Tests – Employee Challenges in Colorado

- Amendments do not compel employers to allow the use or possession of marijuana
- Employees have challenged positive drug tests in court:
  - Constitutional right
  - Employers cannot regulate off-duty use – only impairment at work
  - Fired for underlying disability in violation of ADA/CADA
- More to come later in the day: Drugs in the Workplace



# Federal Contractor Developments

## Executive Orders

- Increase minimum wage to \$10.10
- Prohibit discrimination based on sexual orientation or gender identity
- Protect workers who share/discuss wages and terms of employment
- Require disclosure of labor violations which can affect award of contracts



# Predictions?

What can employers expect in 2015?



**Thank You!**

**QUESTIONS?**

