Employer Update

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When Agreeing May Be Disagreeable: Antitrust Guidance for H.R. Professionals

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In This Issue

Human resources functions are often overlooked when it comes to antitrust compliance. However, compliance officials view the U.S. labor market as they would any other product market, with employees selling their services on the market and employers acting as consumers that compete to buy these services. In fact, Assistant U.S. Attorney General and head of the DOJ's Antitrust division, Makan Delrahim, recently revealed that the DOJ would announce the criminal prosecution of a number of employment-related agreements in the coming months. Delrahim's comments signal that current DOJ leadership intends to continue the Obama administration's focus on employment-related antitrust offenses. Accordingly, below we outline a number of potentially problematic employment-related practices, recent legal occurrences in this sector, and our recommendations for keeping H.R. departments from running astray of antitrust laws.

Problematic Practices

Generally, employers should avoid four potential employment-related antitrust pitfalls: no-poaching agreements; wage-fixing agreements; periodic exchanges of wage information; and invitations to collude.

No-Poaching Agreements

No-poaching agreements are agreements between companies whereby individuals at the companies refuse to solicit or hire each other's employees. Under the umbrella of no-poaching agreements fall no-recruiting agreements, no-solicitation agreements, no-cold-calling agreements, no-hire agreements, or any other agreement among competitors that limits employee mobility. Antitrust authorities have declared "naked no-poaching agreements," or no-poaching agreements that are separate from or not reasonably necessary to a larger legitimate collaboration between companies, as *per se* illegal. In other words, these naked agreements are deemed illegal without any inquiry into their effects on competition. They may be prosecuted criminally by the DOJ.

Since 2010, the DOJ has brought three civil enforcement actions against employers for entering into no-poaching agreements. These actions ended in consent judgments, and led to two high-profile civil class actions. In 2013, a class action lawsuit was brought on behalf of over 64,000 employees of Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar, who alleged that their wages were repressed due to unlawful agreements between their

employers not to hire employees from competitors. Plaintiffs alleged that senior executives at the defendant companies entered into six separate bilateral agreements (i) not to recruit or cold-call each other's employees; (ii) to notify each other when making an offer to another's employees; and/or (iii) not to increase compensation offers to a prospective employee when their current employer made a counteroffer. These agreements were enforced through "Do Not Call Lists" and instructions to H.R. personnel. The defendant companies ultimately settled for $435 million. In 2014, a different class action lawsuit was brought against several animation studios, including Disney, Dreamworks, Lucasfilm, and Pixar. The lawsuit alleged that the studios illegally agreed not to poach each other's animators and software engineers. In 2016, a California federal court certified the plaintiffs' class. The lawsuit was ultimately settled for more than $165 million. Recently, a number of civil lawsuits were filed against chain restaurants, including McDonald's and Carl's Jr., alleging that the chains colluded to suppress wages through no-hire and no-solicitation agreements that expressly prohibited franchisees from employing managers who worked for other franchisees. Samsung and LG also face an active civil class action lawsuit in the Northern District of California for allegedly entering into agreements not to recruit or directly hire each other's employees. Additionally, a class was recently certified in a civil lawsuit brought against Duke University and the University of North Carolina. The suit alleges that the universities' senior administrators and deans entered into an express agreement not to hire or attempt to hire certain of each other's staff with the express purpose of suppressing employee compensation and restricting employee mobility.

Wage-Fixing Agreements

Wage-fixing agreements are agreements between companies about fixing employee salary or other terms of compensation, either at a specific level or within a range. They include agreements affecting *any* element of compensation. As with naked no-poaching agreements, "naked wage-fixing agreements," or wage-fixing agreements that are separate from or not reasonably necessary to a larger legitimate collaboration between companies, are *per se* illegal and may be prosecuted criminally.

In 2007, a class action lawsuit was brought on behalf of all per diem or traveling nurses that provided services in Arizona from as early as 1997 against a trade association and more than a dozen Arizona hospitals. The Arizona Hospital and Healthcare Association (AzHHA), through a subsidiary, ran a registry program and contracted with nursing agencies to provide temporary nursing services for most Arizona hospitals. In 1997, the AzHHA imposed a uniform bill rate that each participating nursing agency was required to offer each participating hospital. In July 2009, a federal court certified a plaintiff class of per diem nurses. The lawsuit was later settled for roughly $22.5 million.

Exchange of Wage Information

The exchange of competitively sensitive information can serve as evidence of an illegal agreement, despite the absence of an explicit understanding to fix terms of employment. Specifically, a periodic exchange of current wage information in an industry with few employers can constitute an antitrust violation. This antitrust risk remains for participants in joint ventures or proposed mergers who share information about terms and conditions of employment. These information exchanges are evaluated by weighing anticompetitive effects against procompetitive benefits, and the DOJ has civilly prosecuted unlawful exchanges in the past.

Recently, a class action lawsuit was brought on behalf of broiler chicken growers against a number of companies that operate as chicken broiler processing plants. In addition to a no-poach agreement, the lawsuit alleges that the processing plants shared detailed information on a frequent and contemporaneous basis through a company called AgriStats. That information was allegedly then used to set compensation levels for the growers.

Invitations to Collude

Invitations to collude generally involve improper communications to competitors that a party is ready

and willing to coordinate on terms of competition. These invitations can range from direct requests to agree to certain terms of compensation to signaling to competitors about these terms through press releases. According to the FTC, explicit or implicit communications between competitors may constitute invitations to collude if the communication sets forth proposed terms of coordination, which, if accepted, would constitute a *per se* antitrust violation. Proof that a competitor actually accepted the invitation is not required to constitute a violation.

Advice

- Include H.R. professionals within the scope of antitrust compliance.
- Do not enter into or invite others to enter into agreements regarding any terms of employment with colleagues at companies that you compete against for employees.
- Do not communicate current employment or compensation policies with competing employers, unless they are a part of a legitimate collaboration.
- Be sure benchmarking or compensation surveys in which you participate follow DOJ/FTC guidelines:
    1. A neutral third-party manages the exchange or survey (*e.g.*, a purchaser, government agency, trade association, consultant, or academic institution);
    2. Information exchanged or provided is more than three months old;
    3. The information is aggregated to protect the identity of the underlying sources; and
    4. Enough sources are aggregated to prevent competitors from linking particular data to an individual source.

Federal Appeals Courts Hold That Title VII Prohibits Discrimination on the Basis of Sexual Orientation and Gender Identity

By Jonathan Gartner

Almost thirty years after the U.S. Supreme Court first held that Title VII of the Civil Rights Act prohibits "sex stereotyping" as a form of unlawful sex discrimination, two federal circuit courts added to the deepening circuit split on Title VII's applicability to discrimination on the basis of sexual orientation and transgender status. In February, the U.S. Court of Appeals for the Second Circuit held, in *Zarda v. Altitude Sys., Inc.*,[1] that Title VII prohibits sexual orientation discrimination. Earlier this month, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,[2] the U.S. Court of Appeals for the Sixth Circuit held that Title VII also prohibits discrimination on the basis of transgender status. These rulings indicate a trend, coming less than a year after the Seventh Circuit created a circuit split with its groundbreaking holding, in *Hively v. Ivy Tech. Cmty. Coll. of Ind*.,[3] that Title VII prohibits discrimination on the basis sexual orientation. Last December, the U.S. Supreme Court declined the opportunity to resolve the circuit split on this area of law,[4] meaning that these new decisions create binding precedent and growing uncertainty over the reach of Title VII's protections against discrimination on the basis of sex.

In this article, we review how federal courts historically have interpreted Title VII's protections against sex discrimination, and discuss the recent extension of those protections to sexual orientation and gender identity. Additionally, we offer suggestions for practical steps that employers may wish to take in light of this growing trend.

Background

Over the past fifty years, courts have offered varying interpretations of what it means to discriminate against an employee "because… of sex" under Title VII of the Civil Rights Act. For decades, federal courts held that the term "sex," as used in Title VII, was

synonymous with "gender," and did not encompass "gender identity" or "sexual orientation." In 1989, the U.S. Supreme Court added a new wrinkle to Title VII's protections when it held, in *Price Waterhouse v. Hopkins*,[5] that Title VII prohibits employers from discriminating against an individual for his or her failure or unwillingness to conform to traditional gender stereotypes. Almost a decade later, the Supreme Court further expanded Title VII's scope to prohibit discrimination on the basis of sex against members of the same gender. [6] While recognizing that discrimination against members of the same gender was "not the principal evil congress was concerned with when it enacted Title VII," the Court explained that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[7]

Growing Disagreement Regarding Sexual Orientation Discrimination

Despite the Supreme Court's longstanding precedent that Title VII protects against "sex stereotyping" and "reasonably comparable evils," federal courts consistently held that Title VII did not prohibit discrimination on the basis of sexual orientation[8] or gender identity.[9] As recently as March 2017, the U.S Court of Appeals for the Eleventh Circuit tested this view, holding, in *Evans v. Georgia Regl. Hosp.*,[10] that binding Eleventh Circuit precedent precluded an employee's Title VII claim that she had endured workplace discrimination on the basis of her sexual orientation. The court explained that under its "prior precedent rule," the Eleventh Circuit is bound to follow binding precedent "until it is overruled by this court *en banc* or by the Supreme Court."[11]

In April 2017, however, the U.S. Court of Appeals for the Seventh Circuit created a circuit-split when it became the first federal circuit court to hold that Title VII prohibits discrimination on the basis of sexual orientation.[12] In an 8-3 *en banc* decision, the Seventh Circuit relied on *Price Waterhouse* and *Oncale* to hold that the plaintiff represented "the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual."[13] The Seventh Circuit concluded, based on "common-sense reality" and Supreme Court precedent, "that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."[14]

This past December, the Supreme Court had an opportunity to resolve the circuit split on Title VII's applicability to sexual orientation claims, but declined to hear an appeal of the Eleventh Circuit's *Evans* decision.[15] Through its inaction, the Supreme Court left the circuit split in place and created uncertainty regarding Title VII's reach moving forward.

Second and Sixth Circuits Deepen the Circuit Split

Although the Supreme Court declined to resolve the circuit split on Title VII's applicability to discrimination on the basis of sexual orientation, two federal circuit courts have followed the Seventh Circuit's lead in holding that Title VII extends to protect against sexual orientation discrimination. "Taking note of the persuasive force" of the Seventh Circuit's decision, on February 26, 2018, the Second Circuit overturned its own existing precedent and held that Title VII prohibits discrimination on the basis of sexual orientation. In *Zarda v. Altitude Sys., Inc.,* the Second Circuit explained that sexual orientation discrimination is inherently premised upon a sex-stereotype that men and women should be attracted to individuals of the opposite sex, noting as an example that "a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women."[16] Thus, the Second Circuit opined that "because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected."[17]

Less than two weeks after the Second Circuit's *Zarda* decision, on March 7, 2018, the Sixth Circuit explicitly held that Title VII protects against discrimination on the basis of an employee's gender identity. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, a funeral home terminated a transitioning transgender woman

for violating the funeral home's sex specific dress code for men, because the employee was "no longer going to represent himself as a man" and "wanted to dress as a woman," even though the employee intended to fully comply with the funeral home's sex-specific dress code for women.[18] The court noted that the plaintiff "obviously" would not have been fired had they been a biological woman who sought to comply with the women's dress code. Because transgender or transitioning individuals are by definition "gender non-conforming," the Sixth Circuit reasoned that discrimination on the basis of transgender and transitioning status violates Title VII, because "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."[19]

Advice for Employers

In light of the trend towards a more expansive interpretation of Title VII's prohibition against sex discrimination, employers may wish to review their employment policies. In particular, employers may wish to review their equal opportunity and harassment policies to ensure that sexual orientation is covered as a protected category. Employers also may wish to review any dress code, grooming and bathroom policies they may have.

Although neither the Second nor Sixth Circuits expressly held that other sex-specific policies, such as dress codes and grooming guidelines, violate Title VII, both courts suggested that such policies could be vulnerable to challenges under Title VII. In *Zarda*, the Second Circuit acknowledged, but did not address, the possibility that sex-specific bathroom and grooming policies could violate Title VII if the policies impose disadvantageous terms or conditions upon an employee on the basis of sex.[20] Likewise, the Sixth Circuit implied that an employer's sex-specific policies could violate Title VII, stating that an employer engages in unlawful sex-stereotyping "even if it expects both biologically male and female employees to conform to certain notions about how each should behave."[21]

As federal circuit courts trend towards a more expansive reading of Title VII's prohibitions discrimination on the basis of sex, the growing circuit split on this area of law will likely remain unsettled until the Supreme Court provides clarification. Many states and localities already have their own laws prohibiting discrimination on the basis of sexual orientation and gender identity, but all employers should continue to monitor this area closely to ensure that they remain in compliance with their legal obligations and appropriately address any complaints of sexual orientation or gender identity discrimination.

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[1] 883 F.3d 100 (2d Cir. 2018) (*en banc*).

[2] — F.3d —, 2018 WL 1177669 (6th Cir. Mar. 7, 2018).

[3] 853 F.3d 339, 351-52 (7th Cir. 2017) (*en banc*).

[4] *See Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138. S. Ct. 556 (2017).

[5] 490 U.S. 228 (1989).

[6] *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (2013).

[7] *Id.* at 79.

[8] *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation"); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit and in all others to have reached the question that .... Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("It is clear, however, that Title VII does not prohibit discrimination based on sexual orientation."); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) ("[I]t is true Title VII does not afford a cause of action for discrimination based upon sexual orientation."); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII . . ."); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) ("[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII."); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (holding that "Title VII does not prohibit discrimination against homosexuals."); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002) ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII."); *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections [] do not extend to

harassment due to a person's sexuality."); *U.S. Dept. of Hous. & Urb. Dev., Washington D.C. v. Fed. Lab. Rel. Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992) ("Title VII does *not* cover sexual orientation") (emphasis in original).

[9] *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (finding that the court was "constrained to hold that Title VII does not protect transsexuals"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII"); *Johnson v. Fresh Mark, Inc.*, 98 F. App'x 461, 461 (6th Cir. 2004) (affirming district court's dismissal of a complaint from a pre-surgical transgender woman who was terminated for using the restroom of the opposite gender).

[10] 850 F.3d at 1255.

[11] *Id.* at 1255.

[12] *Hively*, 853 F.3d at 351-52.

[13] *Id.* at 346.

[14] *Id.* at 351.

[15] *Evans*, 850 F.3d 1248, *cert. denied*, 138. S. Ct. 556.

[16] *See Zarda*, 883 F.3d at 119.

[17] *Id.*

[18] *R.G. & G.R. Harris Funeral Homes*, 2018 WL 1177669, at *1.

[19] *Id.*, at *8.

[20] *See Zarda*, 883 F.3d at 119.

[21] *R.G. & G.R. Harris Funeral Homes*, 2018 WL 1177669, at *7.

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