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## 2018 Trends Assessment: What to Expect in Employment Law

*By Weil's Employment Litigation Practice Group*

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Due to a range of high-impact legislative, judicial, and social developments, employers should proactively address and plan for a variety of complex employment law matters over the course of 2018 and beyond. Below, we have outlined our impressions and recommendations in a few discrete areas.

### Sexual Harassment

As a result of the sexual harassment claims brought against Fox News in 2016 and the subsequent revelations about Harvey Weinstein and dozens of other high-profile figures in various industries in late 2017, workplace harassment issues remain at the forefront of the minds of all employers. There they will likely stay. Social media, has facilitated powerful campaigns such as the #MeToo movement, and amplified the fervor surrounding this issue – which has existed in some form since the Clarence Thomas hearings in the early 1990s – to appreciably higher levels, where women (and men) will be more emboldened to report workplace harassment as either a victim or a bystander. Companies will be embarking on more frequent and more probing internal investigations, even where such misconduct may not be facially evident, but based on the mere hint or rumor of inappropriate workplace conduct. Moreover, sexual harassment training will now have an entirely different color and hue, and will include topics that ordinarily receive short shrift, such as what to do as a “bystander” and how to create a more “civil” (and not just harassment free) work environment. Senior management and boards of directors also need to reemphasize and reinforce their roles in emphasizing adherence to written statements of core values, and consider additional steps to train and promote leaders who will work to create a more inclusive and trusting culture.

### Equal Pay

Closing the pay disparity between men and women remained a policy priority at the state and local level throughout 2017. Several states have sought to expand the scope of existing equal pay laws by, for example, requiring employers to pay men and women equally not only for “equal” work, but also for “comparable” or “substantially similar” work. Some of these laws also have narrowed the exceptions on which employers may rely, including by effectively removing geographic distinctions. In 2017, Oregon and Puerto Rico joined Massachusetts, California, Delaware, and Maryland in making these sorts of changes. In an effort to avoid perpetuating prior gender-based

wage discrimination, several states and municipalities—including California, Delaware, Maine, Oregon, Puerto Rico, New York City, Philadelphia, San Francisco, and Albany County in New York state—have introduced salary history bans, which prohibit employers from inquiring about applicants' pay history. Several states, including California, Colorado, Maryland, Massachusetts, Nevada, and New York, also have expanded their pay transparency laws, which, among other things, protect the open discussion of wages among employees. At the federal level, the EEOC has included "Ensuring equal pay protections for all workers" as one of its top priorities for 2017-2021. While the Office of Management and Budget stayed the effective date of the EEOC's new requirement that employers report wages and hours worked by race, ethnicity, and sex in EEO-1 forms, the EEOC has stated that it "remains committed to strong enforcement" of federal equal pay laws and the OMB's stay "does not alter the EEOC's enforcement efforts." Going forward, employers should continue to evaluate their pay practices and seek to identify and, where appropriate, address any disparities, as the legislative and enforcement momentum in the equal pay area is likely to continue.

### **Paid Leave Laws**

New York has joined California, New Jersey, Rhode Island, and Washington in recently passing legislation granting eligible employees paid family medical leave. New York's law became effective on January 1, 2018. In addition, various localities have passed legislation requiring employers to provide paid family medical leave. Relatedly, numerous jurisdictions have enacted legislation requiring employers to provide paid short-term sick leave. State and local paid leave laws fill a void left by the federal Family Medical Leave Act ("FMLA"), which requires employers, under certain circumstances, to provide employees with up to 12 weeks of leave, but does not require that employees be paid during the leave period. Indeed, the U.S. remains the only developed country in the world with no federal laws guaranteeing paid parental leave. Significantly, the recently enacted state leave laws have created funding mechanisms requiring

employees, not employers, to pay for the paid leave benefits under taxing schemes related to state workers' compensation and disability laws. Such laws have garnered support across the political spectrum under a growing recognition that more family friendly measures are needed not only to ensure equal opportunity in the workplace, but also to avoid creating economic pressure on employees to work while ill, and the associated adverse public health effects. There are efforts currently underway in more than 18 additional states to pass paid family medical leave legislation, so employers can expect to see additional jurisdictions adopting such paid family medical and sick leave laws in 2018. Finally, employers should be mindful that their existing leave policies are gender-neutral in light of a lawsuit recently commenced by the federal EEOC in which an employer has been accused of violating Title VII of the Civil Rights Act and the Equal Pay Act by providing unequal parental leave benefits based upon sex.

### **Confidentiality Requirements**

Employers should update the provisions requiring confidentiality contained in their codes of conduct and other employment agreements and policies. In response to the greater attention the public has given to claims of sexual harassment, Congress included in the tax legislation enacted in December 2017 a provision denying a tax deduction for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or . . . attorney's fees related to such a settlement or payment." It remains to be seen what Congress intended by "a payment related to sexual harassment or sexual abuse," and how settlements involving only allegations rather than actual findings or evidence of sexual harassment or abuse would be addressed under this law. For example, the law also does not specify whether employers may include confidentiality provisions in agreements where sexual harassment or abuse is only one of several claims being settled. Employers also should update confidentiality policies and agreements to address regulatory requirements first raised during the Obama administration by the SEC,

EEOC and NLRB. These agencies brought multiple enforcement actions challenging confidentiality provisions in employment policies and agreements claiming that such provisions violated public policy by deterring whistleblower activities. While the federal government enforcement actions appear to have subsided with the change in administrations, the securities litigation plaintiffs' bar has continued to leverage the SEC's precedents under SEC Rule 21F-17, 17 C.F.R. § 240.21F-17, by sending letters to a number of publicly traded companies demanding, upon threat of shareholder litigation, that the company amend its employment agreements and policies. In 2018, we expect the securities litigation plaintiffs' bar to continue to assert such claims.

### Trade Secrets and Restrictive Covenants

It has now been approximately 18 months since the enactment of the Defend Trade Secrets Act ("DTSA"), and the number of trade secrets and other restrictive covenant cases has spiked sharply during that time. A robust economy has created greater movement by groups and individuals to industry competitors, and employers are taking advantage of the easier access to federal court and the broader panoply of remedies provided under the DTSA to bring such actions. Moreover, employers seeking to enforce restrictive covenants and protect trade secrets have been including the Computer Fraud and Abuse Act ("CFAA") in their arsenal of claims in those circuits that continue to apply the CFAA to misappropriation of trade secrets cases, rather than limiting its use to computer hacking cases. Furthermore, as more jurisdictions have started enacting legislation limiting the applicability of non-competes, employers have sought to protect their core business interests and human capital through enforcement of employee and customer non-solicitation provisions. In that regard, courts in certain jurisdictions are beginning to sharpen the distinction between non-competes and non-solicits, particularly in the absence of meaningful "bad leaver evidence" and, as a result, many employers are devoting more resources to protecting the latter interest through litigation and other methods.

### Class Action Waivers in Arbitration Agreements

On October 2, 2017, the U.S. Supreme Court heard oral argument in *National Labor Relations Board v. Murphy Oil USA, Inc.*, (U.S. Supreme Court Case No. 16-307). The question presented in *Murphy Oil* is "[w]hether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in 'concerted activities' in pursuit of their 'mutual aid or protection,' 29 U.S.C. § 157, and are therefore unenforceable under the savings clause of the Federal Arbitration Act, 9 U.S.C. § 2." If the NLRB prevails in *Murphy Oil*, employers who wish to maintain broad arbitration programs may wish to consider allowing employees to opt out of a mandatory arbitration program after a dispute has arisen. This alternative may comply with the requirements of the National Labor Relations Act, but would potentially allow individuals to elect resolution of their own cases via arbitration rather than class action litigation. On the other hand, if the employer prevails in *Murphy Oil*, employers who do not include class action waivers in their arbitration programs should certainly include them.

# Supreme Court Punts on Whether Title VII Prohibits Sexual Orientation Discrimination

By Justin DiGennaro

On December 11, 2017, the U.S. Supreme Court declined to hear an appeal by a Georgia security guard who alleged that she was discriminated against and harassed at work because of her sexual orientation.<sup>1</sup> The plaintiff argued that Title VII of the Civil Rights Act, which has long been interpreted to prohibit gender stereotyping as a form of unlawful sex discrimination, prohibits discrimination on the basis of sexual orientation as well. The decision by the Supreme Court to forgo settling this issue ensures that the lower courts will continue to grapple with this challenging question of statutory interpretation in the wake of the Supreme Court's landmark gay marriage rulings in *United States v. Windsor*<sup>2</sup> and *Obergefell v. Hodges*.<sup>3</sup>

This article will summarize the approach that most federal courts have taken towards whether Title VII prohibits discrimination on the basis of sexual orientation. Next, it will summarize the Supreme Court's ruling in *Price Waterhouse v. Hopkins*<sup>4</sup>, which established that adverse employment action predicated on an individual's inability or unwillingness to conform to traditional gender stereotypes is a form of unlawful sex discrimination. Finally, this article will discuss the growing acceptance among some circuit and district courts that the logic of *Price Waterhouse* means that Title VII similarly prohibits discrimination on the basis of sexual orientation.

## Historical Exclusion of Sexual Orientation Protection

For roughly 50 years, every single district and circuit court to confront the question held that Title VII does not prohibit discrimination on the basis of sexual orientation.<sup>5</sup> Most courts adopted a straightforward interpretation of the language of Title VII, reasoning that the phrase "sex" refers to "gender," and does not encompass "sexual orientation."<sup>6</sup> This reading seemed consistent with the context of Title VII's

enactment, which occurred well before the gay rights movement began in earnest, making it unlikely that Congress ever intended to include sexual orientation protection with the scope of Title VII. Nevertheless, plaintiffs continued to press claims of sexual orientation discrimination under Title VII, using new Supreme Court precedents to advance creative legal arguments. One of the most important Supreme Court decisions for this strategy was rendered in 1989, in which the court held that it was unlawful to discriminate against an individual for his or her failure or unwillingness to conform to traditional gender stereotypes.

## Price Waterhouse v. Hopkins

In 1982, a female senior manager working for a professional accounting firm was proposed for partnership, but her candidacy was never approved. 490 U.S. at 231-32. As part of the evaluative process, the firm received written comments from the existing partners regarding their experiences with, and opinions of, all prospective partners. *Id.* at 232. The written evaluations for this particular prospective female partner suggested that she was "overly aggressive," "unduly harsh," "macho," "overcompensat[ing] for being a woman," and that she should take "a course at charm school" and refrain from swearing because it's "a lady using foul language." *Id.* at 235. All of these comments played a role in the firm's decision to place her candidacy on hold. *Id.* at 235. The man who bore responsibility for explaining the firm's decision told the female prospective candidate that if she wanted to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

The female senior manager brought suit under Title VII alleging discrimination on the basis of her sex. *Id.* at 232. The firm disputed whether making decisions based on an individual's departure from traditional gender stereotypes was a form of unlawful sex discrimination. *Id.* at 250. But the Supreme Court succinctly rejected this proposition, and held that "we are beyond the day when an employer could evaluate

employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Id.* at 251 (internal quotes omitted).

## Growing Disagreement Regarding Sexual Orientation Discrimination

Despite the Supreme Court’s holding in *Price Waterhouse*, most courts continued to hold that sexual orientation discrimination was permitted under Title VII.<sup>7</sup> However, beginning in 2014 and accelerating in the following years (likely prompted by the Supreme Court’s gay marriage rulings), more courts began to hold that discrimination based upon sexual orientation is a form of prohibited sex discrimination under Title VII.<sup>8</sup> A potentially paradigm-shifting decision occurred on April 4th, 2017, when the Seventh Circuit, in an 8-3 en banc decision, held that Title VII’s prohibition on sex discrimination incorporates a prohibition on sexual orientation discrimination as well.<sup>9</sup> Among several bases, the Court relied upon the gender-stereotyping theory set forth in *Price Waterhouse*, and held that the plaintiff “represents 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.” The court also reasoned that she would not have suffered the same treatment had she been a man married to a woman (as opposed to a woman married to a woman), and likened same-sex relationship discrimination to interracial relationship discrimination. All of these rationales, along with the Supreme Court’s recent gay marriage rulings, prompted the Court to overrule its prior precedent and become the first circuit court to hold that Title VII prohibits discrimination on the basis of sexual orientation.

## Moving Forward

It is unclear whether any other circuit courts will follow the Seventh Circuit’s lead and overrule their own precedents in light of the Supreme Court’s evolving

jurisprudence on sex discrimination and gay rights. The Supreme Court’s decision to deny certiorari suggests that the lower courts will have to continue to sort this issue out for themselves, at least for a while longer. Although many states and local municipalities have passed laws prohibiting discrimination on the basis of sexual orientation, employers in jurisdictions that have not should continue to monitor this area closely to ensure that they remain in compliance with their legal obligations and address any complaints of sexual orientation discrimination appropriately.

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<sup>1</sup> *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, No. 17-370, 2017 WL 4012214 (U.S. Dec. 11, 2017).

<sup>2</sup> 133 S. Ct. 2675 (2013) (mandating that the federal government recognize same-sex marriages).

<sup>3</sup> 135 S. Ct. 2584 (2015) (mandating that state governments recognize same-sex marriages).

<sup>4</sup> 490 U.S. 228 (1989).

<sup>5</sup> *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (holding that “Title VII does not proscribe harassment simply because of sexual orientation”); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret “sex” to include 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), *abrogated on other grounds by Oncale v. Sunowner Offshore Serv.*, 523 U.S. 75 (1998) (“[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

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Cir. 2005) (“Title VII’s protections [] do not extend to harassment due to a person’s sexuality.”); *Evans v. Georgia Regl. Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (“[Plaintiff] argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent forecloses such an action.”); *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).

<sup>6</sup> 42 U.S.C. § 2000e-2(a)(1) & (2) (stating that an employer may not “discriminate with respect to [] compensation, terms, conditions, or privileges of employment,” or “limit, segregate, or classify [] employees [] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [the individual’s] status as an employee, because of such individual’s [] sex.”).

<sup>7</sup> *But see Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women.”); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (“A jury could find that Cagle would not have acted as she (allegedly) did if Plaintiff were a man dating a woman,

instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender.”); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012) (holding that a supervisor’s discrimination against an employee based on sex stereotypes because the employee was married to a man and took his husband’s name “is a claim of discrimination because of sex.” (emphasis in original).

<sup>8</sup> *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *Strong v. Grambling State Univ.*, 159 F. Supp. 3d 697 (W.D. La. 2015); *Isaacs v. Felder*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016); *Boutillier v. Hartford Pub. Schs.*, No. 3:13-cv-01303, 2016 WL 6818348 (D. Conn. Nov. 17, 2016). *But see Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017) (three-judge panel holding that they are bound by circuit precedent, but extensively critiquing that circuit precedent which does not recognize Title VII sexual orientation discrimination claims).

<sup>9</sup> *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017) (holding that “a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.”).

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If you have questions concerning the contents of this issue, or would like more information about Weil's Employment Litigation and Executive Compensation & Benefits practices, please speak to your regular contact at Weil, or to the practice group members listed below.

**Practice Group Members:**

Jeffrey S. Klein  
Practice Group Leader  
New York  
+1 212 310 8790  
[jeffrey.klein@weil.com](mailto:jeffrey.klein@weil.com)

**Frankfurt**  
Stephan Grauke  
+49 69 21659 651  
[stephan.grauke@weil.com](mailto:stephan.grauke@weil.com)

**London**  
Ivor Gwilliams  
+44 20 7903 1423  
[ivor.gwilliams@weil.com](mailto:ivor.gwilliams@weil.com)

**Miami**  
Edward Soto  
+1 305 577 3177  
[edward.soto@weil.com](mailto:edward.soto@weil.com)

**New York**  
Sarah Downie  
+1 212 310 8030  
[sarah.downie@weil.com](mailto:sarah.downie@weil.com)

Gary D. Friedman  
+1 212 310 8963  
[gary.friedman@weil.com](mailto:gary.friedman@weil.com)

Steven M. Margolis  
+1 212 310 8124  
[steven.margolis@weil.com](mailto:steven.margolis@weil.com)

Michael Nissan  
+1 212 310 8169  
[michael.nissan@weil.com](mailto:michael.nissan@weil.com)

Nicholas J. Pappas  
+1 212 310 8669  
[nicholas.pappas@weil.com](mailto:nicholas.pappas@weil.com)

Amy M. Rubin  
+1 212 310 8691  
[amy.rubin@weil.com](mailto:amy.rubin@weil.com)

Paul J. Wessel  
+1 212 310 8720  
[paul.wessel@weil.com](mailto:paul.wessel@weil.com)

**Silicon Valley**  
David Singh  
+1 650 802 3010  
[david.singh@weil.com](mailto:david.singh@weil.com)

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