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What A Difference A Year Makes: 2017 Employment Law Update

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Agenda

- Can You Give Me An Overview?
- What Happened In The Courts?
- What Happened in DC….Nothing
- What Happened In Hartford?
- What Else Should I Know?
- What Do I Have To Look Forward To?

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Can You Give Me An Overview?

EEOC FY 2016 By The Numbers

- 91,503 charges filed; Up 2nd year in a row
- 97,443 charges resolved
- Over 76% of cases referred to mediation resolved successfully; downward trend in litigation
- LGBT (first time included): Resolved 1,650 charges and recovered $4.4 million for LGBT individuals who filed sex discrimination charges; Steady increase in claims filed
- Most common charge (3rd year): Retaliation (45.9% of all claims)
  - Race (35.3%)
  - Disability (30.7%)
  - Sex (29.4%)
- Most claims filed in Texas, CT is 37th
- New online charge and document filing system

CHRO FY 2016 By The Numbers

- Total claims continue increase: 2,160 complaints filed, up from 1,559 in FY2012; 39% increase
- Complaints by current employees of harassment or unequal "terms and conditions of employment" continue to increase
  - Includes promotions, pay, leave approvals,
  - FY2014 had 782, FY2016 had 1056
- Sexual harassment claims continue decline, lowest in 15 years
- Retaliation claims continue increase

50th Anniversary of ADEA

- Age Discrimination in Employment Act of 1967 (ADEA)
- Goal: Protect individuals over age 40 from discrimination in employment; applies to employers of 20 or more employees
  - Arbitrary age limits for hiring and firing were common
  - Older workers represented less than 5% of new hires
    - Estimates suggest that percentage of workers 65 and older will increase from 19% to 29% over the next 40 years
- Despite ADEA enactment:
  - Nearly 2/3 of workers age 55-64 report age as barrier to getting job
  - Study showed that woman between 29-31 twice as likely to get callback for interview than woman age 64-66 despite qualifications being identical

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What Happened In The Courts?

Medical Marijuana

- Facts: Registered qualifying patient for medical marijuana under CT law applied for Director of Recreational Therapy; received conditional offer, when taking pre-employment drug screen, disclosed that she had prescription for medical marijuana; offer rescinded because she tested positive for marijuana in drug screen
- Employer may violate Connecticut law by refusing to hire applicant who tests positive for marijuana where applicant is lawful user of medical marijuana under Connecticut law
- Federal law does not preempt Connecticut medical marijuana statute's prohibition on employers firing or refusing to hire qualified medical marijuana patients, even if they test positive on employment-related drug test
- Employer can prohibit use of intoxicating substances during work hours
  - Open question: How does employer prove employee with medical marijuana card under influence at work?

No Tip Credit for Delivery Drivers

- Facts: Plaintiff operated pizza restaurants and argued that it should be allowed to pay reduced minimum wage to delivery drivers because they regularly receive gratuities
- Tip credit allows employer to pay employee reduced minimum wage when employee regularly and customarily receives tips from customers
  - Current CT tip credit rates (minimum wage for service employees)
    - Waitstaff: $6.38 an hour
    - Bartenders: $8.23 an hour
- Connecticut Supreme Court: Employer's pizza delivery drivers are not subject to tip credit
- Although federal law more flexible, CT DOL regulations only permit tip credit for bartenders and traditional waitstaff

No FWW For CT Retail Employees

- Federal fluctuating workweek ("FWW") method for calculating overtime cannot be used for Connecticut retail employees
- Benefit: Overtime rate paid for hours worked in excess of 40 in a week declines the more hours that employee works
- Connecticut mercantile wage order mandates conventional overtime calculations, so FWW can not be used for retail employees in Connecticut
  - Note that Connecticut DOL has not indicated whether it would permit federal FWW in other industries

FWW - Example

- Marcus earns $800 a week. He works 40 hours the first week, 37.5 the second week, 60 the third week, and 48 hours the fourth week.
  - Weeks 1 and 2: He earns $800 because his hours do not exceed 40 in those weeks.
  - Week 3: He worked 20 hours of overtime. His regular rate of pay is $800/60 hours = $13.33 an hour. He earns additional half time on 20 hours or $13.33/2*20 = $133.34 more. So, for Week 3 Marcus earns $800 + $133.34 = $933.34
  - Week 4: He worked 8 hours of overtime. His regular rate of pay is $800/48 = $16.66. He earns additional half time on 8 hours or $16.66/2*8 = $66.64 more. So, for Week 4 Marcus earns $800 + $66.64 = $866.64
  - Compare FWW to Traditional = Company saves $589.88 for the month
    - With FWW = $3,400.12
    - Traditional overtime model compared at $20 an hour = $3,990

Indefinite Leave Reasonable Accommodation?

- Facts: Long time employee suffered from chronic medical condition and exhausted FMLA, left note for HR that she needed 30 or more days; HR mailed letter stating request for additional leave unauthorized and to contact HR to provide further medical documentation; employee failed to respond and she was terminated
- Employee's request for leave was not reasonable accommodation where employee requested indefinite leave and did not respond to employer's request to contact her regarding her leave
- Court said that where employee does not know how much leave needed, not a reasonable accommodation under CT law
  - EEOC guidance confirms that indefinite leave request is undue hardship

Additional Leave Reasonable Accommodation?

- Facts: Employee with back issues that needed to be able to lift as part of essential functions took exhausted FMLA leave; requested 2-3 months more of unpaid leave to recover from back surgery
- 7th Circuit held that request for 2-3 month leave of absence, after FMLA exhausted, not an ADA reasonable accommodation
  - ADA is anti-discrimination statute and not a leave entitlement statute
- Contradicts EEOC guidance and enforcement attempts
- Some leave still required: Court noted that multi-month leave of absence different from leave of absence that is "intermittent," "a couple of days," or "even a couple of weeks"

New Overtime Rules…Not Now

- Texas court that issued preliminary injunction last November, invalidated the changes to overtime rules proposed by Obama Administration.
  - Salary level imposed was too high and excluded too many individuals who otherwise would have satisfied duties test
  - Under FLSA primary test of whether position meets exemption is its duties, not its salary
- Not surprising – Forget everything we said last year about compliance…. back to tests from 2004 for now….

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What Happened In Hartford?

An Act Concerning Pregnant Women In The Workplace

- Took effect October 1, 2017
- Covered Employers: Any employer with more than 3 employees
- Notice requirement: Must post and provide written notice (in English and Spanish) to all existing employees by January 28, 2018; to an existing employee within 10 days after she notifies employer of pregnancy or related conditions; and to new employees upon commencing employment
  - Free online notice can be found at www.ctdol.state.ct.us/gendocs/SS46a%20Pregnancy%20Disability%20Poster.pdf
- Prohibition: No employer may discriminate against employee or job applicant because of her pregnancy, childbirth or other related conditions (e.g., breastfeeding or expressing milk at work)
  - No requirement that employee be employed for certain length of time prior to being granted job protected leave of absence
- Reasonable Accommodation: Absent undue hardship, employers must provide reasonable accommodation to employee or job applicant due to her pregnancy, childbirth or needing to breastfeed or express milk at work
  - Undue hardship: Employer must show that accommodation would require significant difficulty or expense in light of its circumstances

An Act Concerning Fair Chance Employment

- Effective January 1, 2017
- Prohibits employers from making inquiries into applicant's criminal history at onset of employment process, except under certain circumstances
- Employer may ask about criminal background, but not until after initial employment application, such as during interview process or contingent upon an offer
- $300 penalty for each violation

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What Else Should I Know?

CT Minimum Wage

- As of January 1, 2017: $10.10 an hour
- Minimum Wages Across USA
  - D.C. highest minimum wage at $11.50/hour.
  - GA and WY lowest minimum wage at $5.15/hour
  - 29 states and D.C. have minimum wages higher than federal minimum wage of $7.25
  - D.C., WA ($11), OR ($10.25), MA ($11) and CA ($10.50) have higher minimum wage than CT

New Form I-9

- As of September 18, 2017 all employers must use revised Form I-9
- Bears a revision date of "07/17/17" and an expiration date of "08/31/2019"
  - https://www.uscis.gov/i-9
- USCIS initially published new version on July 17, 2017, but permitted transition period through September 17, 2017

Revised EEO-1 Report Suspended

- Office of Management and Budget's Office of Information Regulatory Affairs (OIRA) directed Equal Employment Opportunity Commission to suspend implementation of revised EEO-1 report indefinitely
  - Would have included detailed pay reporting obligations for employers with 100 or more employees and all federal contractors
  - First pay disclosures which were due by March 31, 2018, no longer required
- Employers will use previous version of EEO-1 form for Fiscal Year 2017 reporting which will be due by March 31, 2018

Transgender Worker Protections….

- AG issued memorandum reversing DOJ's position that Title VII protections extend to discrimination based on gender identity
  - Contradicts current EEOC guidance on this issue; EEOC has stated it is reviewing AG's memorandum
  - OSHA and EEOC currently mandate that employers allow transgender employees to use bathroom that corresponds to employee's gender identity
  - Several federal courts have held that Title VII's protections extend to gender identity
- Impact in CT: Does not effect state laws, so limited impact due to CFEPA

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What Do I Have To Look Forward To?

Wellness Programs...voluntary?

- Court puts on hold EEOC final rules, effective January 1, 2017, clarifying position as to "voluntary" participation
  - New rules permit incentive/penalty of up to 30% of cost of self-only coverage to participate in wellness program (HIPAA allowed this)
  - D.C. court held EEOC 30% "voluntary" threshold not supported by any data, arbitrary
- ADA and GINA prohibit employers from asking for or collecting medical or genetic information from employees unless part of "voluntary" employee health program; HIPAA permits incentives of up to 30%
  - EEOC had long-held no incentive/penalty permissible
- Rules not vacated, but EEOC must reconsider in a "timely manner"

Non-Compete And Non-Solicitation

- Continued to be disfavored by courts and legislatures
  - Not enforced in CA, OK and ND
- Ensure that agreements narrowly crafted
  - Limited to specific area
  - Not more than one year

Paid Sick Leave

- More states enacting paid sick leave laws
- Currently AZ, CA, CT, D.C., MA, OR, VT and WA
  - Federal contractors
- Multi-state employers need to stay aware