



**The Local Government
Managers Association Meeting
April 26, 2019**



**FIVE FLASHPOINTS FOR
EMPLOYERS**

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Five Flashpoints

- **#METOO Movement**
- **LGBT Rights**
- **Workplace Leave**
- **Payroll**
- **Overtime**



#METOO MOVEMENT



Harassment Harms . . .

- Victim
- Employee Relations
- Productivity
- Business Reputation
- Liability/\$



Employment Discrimination Law

- Title VII of the Civil Rights Act of 1964
 - The Americans with Disabilities Act (“ADA”), as amended (“ADAAA”)
 - The Age Discrimination in Employment Act
 - The Pregnancy Discrimination Act (1978)
 - EEOC Guidance Defines “Sexual Harassment”
 - The Virginia Human Rights Act
- ... and more!





Title VII: Civil Rights Act of 1964

*It is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, **or otherwise discriminate** against any individual with respect to his compensation, **terms, conditions** or privileges of **employment** because of such individual's race, color, religion, **sex**, or national origin.*

–42 U.S.C. § 2000e



Protected Traits

- Race or color
 - National origin
 - Sex
 - Pregnancy (including lactating mothers)
 - Religion
 - Disability
 - A person who uses FMLA or military leave
 - Citizenship
- Marital status
 - A person who
 - Associates with a protected class
 - Opposes an unlawful practice or brings a complaint



Two Types

Quid Pro Quo

- “This for that”
- A person in a position of authority (typically a supervisor) who demands a sexual favor as a condition to getting or keeping a job benefit.

Hostile Work Environment

Offensive conduct is:

- Unwelcome
- Based on sex
- “sufficiently severe or pervasive” to alter the conditions of employment and to create an abusive work environment, and
- Imputable to the employer

#METOO



- Tarana Burke: 2006, Girls for Gender Equity
- Oct. 5, 2017: Ashley Judd accuses Harvey Weinstein of SH
- Oct. 15, 2017: Alyssa Milano tweets #metoo
- Allegations against Nassar, Spacey, Moore, Louis C.K., Lauer, Franken
- Jan. 2018: Women's March



Impact on the EEOC FY2018

- 66 harassment lawsuits filed in FY 2018, including 41 alleging sexual harassment: 50% increase from FY 2017
- Increase in sexual harassment charges by 12% from FY 2017
- \$70 million recovered for sexual harassment victims, up from \$47.5 million in FY 2017
- June 2018: Reconvened the Task Force on the Study of Harassment in the Workplace



“Severe and Pervasive”

PRE - #METOO

NOT severe and pervasive:

- Male supervisor gave female employee unsolicited back rubs, stood close in proximity, escorted to and from bathroom and car, attempted to give hugs, rubbed her hands
- Male supervisor locked male employee in restroom stating “Ah, alone at last” and attempted to kiss employee, held magnifying glass over crotch and asked “where is it,” commented on appearance, entered revolving door and touched employee on the back



“Severe and Pervasive”

POST - #METOO

Severe and Pervasive:

- Male captain blocked female firefighter in hall
- After she told him she did not like people close by, he put his body right up against her
- Told her he wanted to see her in a bathing suit
- Told her she was “not going to be able to handle that big hose now, are you?”
- Spread false rumor about her having an inappropriate relationship with a coworker



“Imputable to Employer”

Pre - #MeToo

INSUFFICIENT notice to employer:

Supervisor harassed employee after overhearing lewd name-calling on a male-dominated shop floor where male horseplay was frequent

Post - #MeToo

SUFFICIENT notice to employer:

Male employee harassed by coworker lodged multiple complaints to a supervisor (not his own) who took no action



“Severe and Pervasive”

POST - #METOO

Severe and Pervasive:

- Male employee started a rumor that a female supervisor got promoted because she slept with a male boss
- Male supervisor perpetuated the rumor, excluded her from a meeting where the rumor was discussed, and blamed her for bringing the rumor into the workplace



Best Practices Tips

- Review Policies and Offer Training
- Strengthen Investigations
- Assess Culture
- Supervisor Support
- Understand New Tax Consequences of Settling Sexual Harassment Claims



LGBT RIGHTS



LGBT ISSUES

NEWSFLASH: SCOTUS HAS ACCEPTED APPEALS IN THREE CASES WHERE THE COURT WILL LIKELY DECIDE WHETHER LGBT WORKERS ARE PROTECTED BY TITLE 7

The three cases are:

- *Altitude Express, Inc. v. Varda*, - 2nd Circuit – Title 7 prohibits discrimination for discharging a gay employee.
- *Bostock v. Clayton County, Georgia* – 11th Circuit – Title 7 does not protect the discharge of a gay employee.
- *EEOC v. R.G. and G. R. Harris Funeral Homes, Inc.* – 6th Circuit – Title 7 prohibits the discharge of a transgender employee.



“” LGBT ISSUES” cont’d...

(ORDER LIST: 587 U.S.)

MONDAY, APRIL 22, 2019

CERTIORARI GRANTED

17-1618) BOSTOCK, GERALD L. V. CLAYTON COUNTY, GA
)
17-1623) ALTITUDE EXPRESS, INC., ET AL. V. ZARDA, MELISSA, ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.

18-107 R.G. & G.R. HARRIS FUNERAL HOMES V. EEOC, ET AL.

The petition for a writ of certiorari is granted limited to the following question: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989).

18-565 CITGO ASPHALT REFINING, ET AL. V. FRESCATI SHIPPING CO., ET AL.

18-725 BARTON, ANDRE M. V. BARR, ATT'Y GEN.

The petitions for writs of certiorari are granted.



Gavin Grimm v. Gloucester County School Board

- The right of a transgender student to use the bathroom of his gender identity.
- Case started when Gavin Grimm was a student and has continued after his graduation.
- Most recent decision in the case is a May 22, 2018 decision from U.S.D.C. Judge Arenda Allen concluding that Grimm’s claim of transgender discrimination raises a claim of sex discrimination under Title IX and also an equal protection claim that warrants intermediate scrutiny.
- Judge Allen also found the School Board’s policy of protecting the privacy rights of its students was not substantially related to achieving an important governmental objective.



Where Does Virginia Stand?

- **The Virginia Human Rights Act which applies to employers of more than 5 but less than 15 persons prohibits employment discharge on the basis of sex and other protected classifications.**
- **Attorney General Opinion 15-070 issued by Attorney General Herring in May of 2016 concludes that courts would determine that discrimination against gay and lesbian individuals and transgender individuals would be prohibited because of sex stereotyping or less favorable treatment on account of sex.**



WORKPLACE LEAVE



Americans with Disabilities Act

- Purpose:
 - Eliminate discrimination against individuals with disabilities
 - Combat their isolation and segregation
 - Assure “equality of opportunity, full participation, independent living, and economic self-sufficiency”



ADA “Interactive Process”

- Request for Reasonable Accommodation
- Essential Job Functions
- Medical Documentation
- Undue Hardship



Family Medical Leave Act

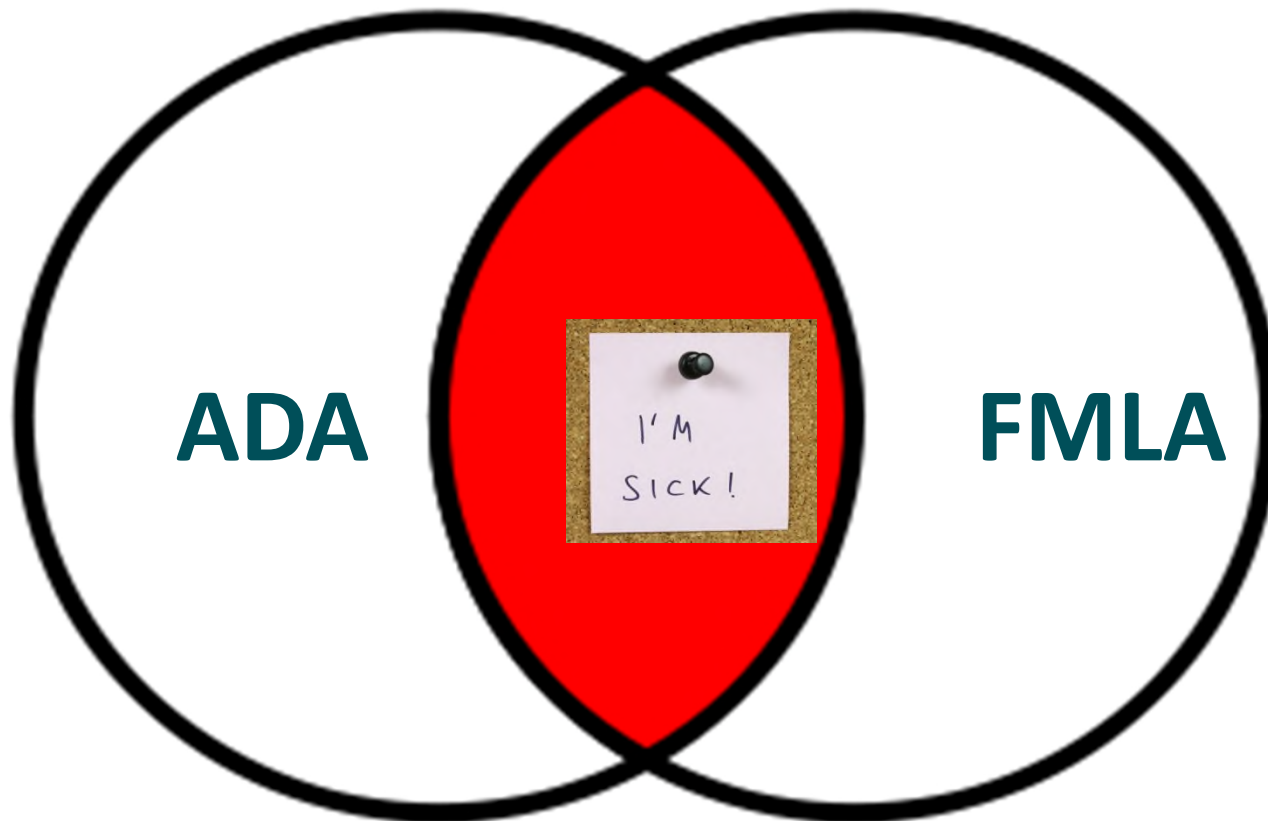
- Purpose:
 - ▶ “Promote the goal of equal employment opportunity for women and men”
 - ▶ “balance the demands of the workplace with the needs of families”
 - ▶ “promote the stability and economic security of families”
 - ▶ “promote national interests in preserving family integrity”



FMLA Rights & Responsibilities

- 12 workweeks of unpaid leave
 - Serious health condition of employee or child, spouse, or parent
 - Birth/adoption
 - Military service members/qualifying exigency
- Detailed certification process
 - Eligibility
 - Medical certification
 - Designation
- Policy and Notice requirements

Leave = Accommodation





FMLA v. ADA

FMLA

- Applies with 50 or more
- Medical certification
- Highly procedural
- “Serious health condition”
- 12-weeks unpaid leave

ADA

- Agencies with 15 or more
- Medical certification
- Individualized, fact-specific
- “Disability”
- Accommodation may not be time-limited, except for leave (and light duty)



Principles in Practice

- No “magic words” required for requests
- Intermittent leave is permissible
- Understand the limits of medical inquiries
- Observe time requirements (FMLA)
- Undue hardship is hard to prove (ADA)
- Consider all prior leave taken when assessing “undue hardship” – *with legal advice* (ADA)
- Require concurrent leave (FMLA)



Principles in Practice

- Second medical opinions can be required
- Keep up to date job descriptions
- Review maximum leave policies, no fault attendance policies, or 100% cure policies
- Misconduct, even when caused by a disability, should be disciplined
- *Document, document, document!*
- Consult with legal counsel



Sources of Helpful Information



www.dol.gov

www.eeoc.gov

www.SHRM.org

www.AskJan.org



PAYROLL



PAYROLL ISSUES

- The Federal Fair Labor Standards Act is primarily concerned with seeing that all employees are paid the minimum wage for all hours worked and non-exempt employees are paid overtime for hours worked beyond the overtime threshold (usually 40 hours in a work week) at 1.5 times the employee's average hourly wage.



2019 Virginia Senate Bill 1696

- Requires each employer to provide on each regular pay date a written statement by a pay stub or online accounting showing the name and address of the employer, the number of hours worked during the pay period and the rate of pay.
- The law does not apply to agricultural employment and does not take effect until January 1, 2020.
- Current law requires an employer to provide, when requested, a written statement of the employee's gross wages and any deductions.



Overtime Pay Requirements

- Overtime pay is triggered from the average hourly rate.
- The computation of the average hourly rate can be complex - see DOL Wage & Hour Division Fact Sheet No. 23.



Compensatory Time

- Under the FLSA, state and local government employers can provide compensatory time off (with certain limitations) in lieu of monetary overtime compensation. Compensatory time must be not less than 1.5 hours of compensatory time for each hour of overtime work.
- An agreement or understanding prior to performance of work is required as a condition for paying employees with compensatory time. An employer does not need to have this same agreement or understanding with every employee and does not need to provide compensatory time to all employees.



OVERTIME



ALERT!

New Overtime Rule: Fair Labor Standards Act

- March 7, 2019: U.S. Department of Labor announced a proposed rule change to the FLSA's regulations
- Current salary threshold: \$23,660/yr (\$455/wk)
- **Proposed salary threshold: \$35,308/yr (\$679/wk)**
- Highly compensated employees: Currently \$100,000/yr;
Proposed \$147,414/yr
- NO changes to duties test
- 60-day public comment period

Questions?

Thanks for your time!



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