Federal Bar Association
Labor and Employment Law Section
Summer 2017

The Labouring Oar

Message from the Chair

By Corie Tarara

As my term as chair of the L&E Section comes to an end before the next publication, I cannot adequately express how grateful I am for the opportunity to lead this amazing Section.

We have an incredibly strong Section, in both its leaders and membership: something that is built over not any one chair's term, but many. For example, five years ago we had 1,247 members; today we have more than 1,540! Thank you to all who have gotten the word out, invited your colleagues to events, and supported our Section. It is through numerous CLEs, publications, and other events that we have been able to grow as fast as we have—something we could not do without a hard-working board.

As for the leadership, we have five officers, five chapter representatives, three division representatives, eight committees and more than 20 members involved in the committees! I have no doubt this Section would not be growing as well as it is without the efforts of these individuals who have all supported me this past year. I cannot thank you all enough, and I know you, like me, will continue to support our incoming chair, Kathryn Knight.

As for what is coming up, be sure to check out the July 2017 dedicated L&E issue of The Federal Lawyer. Thank you to our member authors who contributed articles–it is going to be a great publication! We will have our monthly board meeting Thursday, Aug. 17 from 2 to 3 p.m. We also look forward to seeing everyone at the 2017 Annual Meeting and Convention in Atlanta, Ga., at the Westin Peachtree Plaza, Sept. 14-16. Also, I am happy to announce that our 2019 L&E Biennial Conference will be held once again in sunny San Juan, Puerto Rico! Thank you to Jose R. Gonzalez-Nogueras of Pizarro & Gonzalez for hosting us and to Danielle Brewer Jones (a past chair many times over), who has agreed to co-chair that event with Jose.

As always, we welcome anyone wanting to be more involved to contact me or any of the board members; as you can see from the above, there are plenty of opportunities to get involved! ■

A Look at What's Inside

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A Brave New World: Developments in the Circuits (and Soon the Supreme Court?) on Title VII Coverage of Sexual Orientation Discrimination

By Jack Blum

One of the most controversial debates in employment law in recent years is whether Title VII of the Civil Rights Act of 1964, the key federal employment discrimination statute, protects employees against discrimination based upon their sexual orientation. The Supreme Court in *United States v. Windsor*[1] and *Obergefell v. Hodges*[2] issued groundbreaking decisions securing the rights of homosexuals to public benefits, including marriage, but it has been a matter of debate whether the constitutional principles of those decisions are applicable in the Title VII statutory context. The Equal Employment Opportunity Commission has expressed its position that Title VII does provide such protections. A trio of decisions this spring from the Second, Seventh, and Eleventh Circuits, has now teed up the issue of Title VII sexual orientation coverage for Supreme Court review, and this important issue appears to have entered its endgame.

Title VII explicitly prohibits discrimination based on an employee's or applicant's race, color, national origin, religion, and, most critically to this analysis, sex. Sexual orientation is not expressly included as a Title VII protected class, and the case law thus far has focused on whether sexual orientation discrimination is encompassed by Title VII's prohibition of sex discrimination. Congress has on multiple occasions considered legislation, such as the Employment Non-Discrimination Act, which would explicitly add sexual orientation as a Title VII protected class, but those measures have never succeeded.

The closest Supreme Court decisions to the issue of Title VII sexual orientation coverage are *Price Waterhouse v. Hopkins*[3] and *Oncale v. Sundowner Offshore Services Inc.*[4] In *Hopkins*, the Supreme Court ruled that Title VII's protection against discrimination based on sex protected an employee from adverse employment actions based on her failure to comply with gender stereotypes, *i.e.*, the employee was perceived as being too masculine because she did not wear makeup or dresses or display other traditionally feminine traits.[5] However, *Hopkins* did not discuss the employee's sexual orientation or rely on it as a basis for the Court's decision. In *Oncale*, the Supreme Court addressed a male employee's claim that he had been sexually harassed by male co-workers and supervisors.[6] The Court rejected the existence of any categorical rule that same-sex harassment claims are excluded from Title VII coverage and held that such claims are actionable if the employee can prove that he or she was discriminated against because of his or her sex.[7] While the *Oncale* decision in its recitation of the case's facts notes that the employee was accused of being a homosexual by a co-worker, the decision was not based on the employee's sexual orientation and, in fact, held that same-sex harassment claims are not dependent on the harasser being motivated by sexual desire for the employee being harassed.[8]

Prior to 2017, every circuit to address the question had held that sexual orientation discrimination was not actionable under Title VII. Within the span of four weeks in March and April, however, three cases on the issue were decided by the Second, Seventh, and Eleventh Circuits, respectively, that could ready the issue for Supreme Court review.

The most significant decision came last when the *en banc* Seventh Circuit issued its opinion in *Hively v. Ivy Tech Community College of Indiana*[9] on April 4. Reviewing a panel decision that had found its hands tied by previous Seventh Circuit precedent holding that Title VII does not protect against sexual orientation discrimination, the *en banc* court overturned its Circuit precedent and held that such discrimination is a subset of the sex discrimination that Title VII expressly prohibits. In doing so, Chief Judge Diane Wood emphasized that the majority opinion was not considering whether to "amend" Title VII to add sexual orientation as a protected class, but whether the existing protection against discrimination based on sex also encompassed sexual orientation.[10] Echoing many of the arguments from the EEOC's 2015 *Baldwin v. Foxx*[11] decision (though disclaiming any deference to the EEOC's position), the majority concluded that it did.

First, Chief Judge Wood's majority opinion held that discrimination based on sexual orientation is sex discrimination under a comparative approach because it treats a woman married to a woman differently than a man married to a woman.[12] The majority also concluded that under the gender stereotyping line of cases, discrimination against the lesbian employee based upon her sexuality "represents the ultimate case of failure to conform to the female stereotype," holding that there is no distinction between a *Hopkins* gender stereotyping claim and a claim based on sexual orientation.[13]

Second, the *Hively* majority found that sexual orientation discrimination is prohibited under Title VII as associational sex discrimination because it discriminates against an employee based upon the protected characteristic of the employee's partner with whom she is associated. While associational discrimination cases have traditionally arisen in the race discrimination context, often based upon an employee's interracial marriage, the majority noted that Title VII's standards are identical regardless of which of its protected classes is implicated in a given case.[14] The majority also found that its decision was bolstered by the "backdrop"[15] of the Supreme Court's sexual orientation decisions in *Romer v. Evans*,[16] *Lawrence v. Texas*,[17] *Windsor*, and *Obergefell*.

Two judges authored concurrences agreeing with the majority's conclusion. Judge Richard Posner opined that while Title VII's sex discrimination would not reasonably have been understood to encompass sexual orientation upon its passage in 1964, the majority's decision was a permissible exercise in "judicial interpretive updating" to ensure that the statute reflected intervening developments in societal attitudes.[18] Judge Joel Flaum, joined by Judge Kenneth Ripple, authored a concurrence partially joining the majority's opinion on the ground that an employer engaging in sexual orientation discrimination at least partly bases its actions on the employee's sex, together with the sex of the employee's partner, and thus violates Title VII.[19]

Writing in dissent, Judge Diane Sykes, joined by two other judges, previewed some of the arguments that will likely be offered against Title VII sexual orientation coverage in

the event that the issue receives further review. The basic thesis of Judge Sykes's dissent was that the question of what protections employees should receive against sexual orientation discrimination is best addressed by Congress, and not by what Judge Sykes described as an attempt "to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents."[20] The dissent argued that no reasonable, plain-meaning understanding of the word "sex" in 1964 or today would understand that term to also include "sexual orientation," which the dissent regarded as a distinct concept. Judge Sykes pointed to numerous federal and state anti-discrimination statutes, including the Violence Against Women Act and Hate Crimes Act, that referred to both sex and sexual orientation as evidence that the two types of discrimination are not regarded as interchangeable. [21] Judge Sykes also rejected the majority's reliance on a comparative approach, explaining that the majority's comparison between a homosexual female and a heterosexual male improperly changed two variables—the employee's sex and sexual orientation—rather than holding all else constant beyond the protected class of sex. The proper comparison, according to Judge Sykes, would be to compare a lesbian female to a gay male to determine if sex, as opposed to sexual orientation, was the motivating factor.[22] The dissent also criticized the majority's reliance on the *Hopkins* gender stereotyping theory, noting that gender stereotyping is not an independent Title VII cause of action but merely a source of evidence that the employer discriminated against the employee because of her sex.[23] Judge Sykes argued that heterosexuality is not a gender stereotype at all because it is equally applicable to males and females. Finally, the dissent also disagreed with the majority's conclusion regarding associational discrimination, arguing that while interracial marriage policies are inherently racist, sexual orientation discrimination does not aim to promote or perpetuate the supremacy of one sex over the other.[24]

As noted above, in March, the Second and Eleventh Circuits also considered the Title VII sexual orientation question. A crucial difference between those cases and the Seventh Circuit cases, however, was that the Second and Eleventh Circuit cases were decided by three-judge panels—and thus were bound by prior circuit precedent—while the Seventh Circuit sat *en banc* with the discretion to reexamine its prior holdings. Accordingly, the Second Circuit's majority opinion in *Christiansen v. Omnicom Group, Inc.*[25] and the Eleventh Circuit's majority opinion in *Evans v. Georgia Regional Hospital*[26] both read as direct applications of on-point Circuit precedent. Notably, however, in each case the appellate court rejected the respective district court's conclusion that the homosexual plaintiffs could not assert *Hopkins* gender stereotyping claims. The Second and Eleventh Circuits held that homosexual employees do not receive *less* protection against gender stereotyping under Title VII than heterosexual employees, but any gender stereotyping claims must be based on evidence other than the employee's sexual orientation (such as, clothing choices, hair styles, masculine/feminine mannerisms, etc.). The Second and Eleventh Circuits also featured several separate opinions advancing arguments for and against Title VII's application to sexual orientation discrimination, which presaged the arguments advanced by Chief Judge Wood and Judge Sykes in *Hively*.

While the employer in *Hively* has announced that it does not plan to petition the Supreme Court for *certiorari*, post-decision developments in *Christiansen* and *Evans* suggest that further action at the Circuit and Supreme Court level may be impending. The *Christiansen* employee has petitioned the Second Circuit for rehearing *en banc*, where the full court would have discretion to overturn its prior precedents if it believed them to have been wrongly decided. Notably, the Second Circuit has already granted *en banc* rehearing in a different case, *Zarda v. Altitude Express*,[27] presenting the Title VII sexual orientation issue. In *Evans*, the Eleventh Circuit denied the employee's bid for *en banc* rehearing, and the employee's representatives have announced that they intend to seek Supreme Court review. Given the circuit split created by *Hively*, there appears to be at least a fair chance that the Supreme Court would accept the case.

While the employment law world awaits further *en banc* and Supreme Court developments, practitioners should not forget about state and local law as a source of protection against employment discrimination based on sexual orientation. Nearly half of the states (as well as the District of Columbia and Puerto Rico) have codified sexual orientation as a protected class under state law, and several more by executive order protect public employees against discrimination based on sexual orientation.[28] In addition, many local jurisdictions such as counties or cities have enacted their own employment discrimination laws prohibiting discrimination based on sexual orientation. Finally, there always exists the possibility that evidence of sexual orientation discrimination could also serve as evidence supporting a *Hopkins* gender stereotyping claim.

The last few months have seen the first shifts at the circuit level towards an expansion of Title VII to cover sexual orientation discrimination claims. If the Supreme Court accepts *certiorari* in *Evans* or another case, then it appears a final decision on the question could be forthcoming in the near future. Even if the Supreme Court declines review, however, it is likely that additional circuits will address the question on *en banc* rehearing and potentially overturn existing precedents. ■

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Endnotes

[1]*United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).
[2]*Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).
[3]*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[4]*Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75 (1998).

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The Emerging Trend Toward Employer Educational Assistance

By Matt Frame

A growing number of employers are becoming involved in the higher education process to promote its affordability and availability to students across the United States. So how can you assist your company and clients in creating educational assistance benefits that are impactful for employees and employers? Innovative options, like college-industry partnerships and credit-by-exam, have grown in popularity over the last two decades. Another more recent development that is gaining traction in Congress are tax breaks for employers who offer student-loan repayment programs for employees who have already incurred debt to finance their education. These three options provide employers opportunities to recruit new employees, retain existing ones, and increase employee satisfaction. Evaluating the successes (and struggles) some companies have attained provides some guidance on building the framework for these programs.

In the aftermath of World War II, thousands of soldiers returned home with skill sets that were no longer needed, while dozens of industries supported by the war were no longer necessary. Congress recognized the impending economic slump that would occur if these returning soldiers could not find work and created the GI Bill to help veterans gain an education that would presumably provide them with the tools to reenter the job market. Since then, the relationship between government and higher education has become more entwined as the federal and state governments work to boost the economy and support millions of students each year. Unfortunately, while the need for higher education is more crucial than ever, it also has become more costly and time-consuming than ever before.

Employers and employees alike have reason to be worried about the student loan crisis. By 2020, more than 65 percent of jobs will require some college. According to The Institute for College Access & Success (TICAS), to earn the education necessary to achieve those jobs, 68 percent of graduates from public and nonprofit colleges will have student loan debt averaging more than $30,000 per borrower. This does not include students who don't graduate or those who attend for-profit colleges and, on average, hold much higher levels of debt. To make matters worse, the U.S. Department of Education announced that more than 11 percent of recent graduates are defaulting on their loans. The rising levels of debt have ill-positioned employees for the needs of today's employers.

The fact remains that employers have been struggling for some time to find qualified and motivated employees. United Parcel Service had one such struggle in 1996, when the company was unable to find workers for the Next Day Air night shift at its central processing hub in Louisville, Ky. It was so bad that UPS informed the state that it may have to move its processing facilities to another state that could provide the needed workforce. Kentucky knew it couldn't lose such a large provider of jobs, so the state negotiated a deal between its local colleges and UPS to create Metropolitan College, an entity which provides educational benefits for UPS employees. The state and local governments pay half of the tuition and provide students with access to Jefferson Community and Technical College and the University of Louisville.

UPS provides part-time employment for students in the program, pays half the cost of tuition and provides reimbursement for textbooks. Metropolitan College students work part-time on the Next Day Air night shift and receive full-time benefits while attending college during the day. These student-employees receive deferred tuition for any major they choose as well as reimbursements for textbooks. Students also participate in workforce preparation activities, including financial literacy, career exploration, resume preparation, and a mock interview.

The program has had remarkable success. Only 8 percent of UPS workers had a postsecondary degree at the start of the program, but a decade later, approximately 45 percent of the UPS workforce had earned some kind of postsecondary credential. And the program is still growing, providing $16 million in tuition support to approximately 14,000 students in 2014. UPS has also benefitted greatly, with the Next Day Air operations turnover rate dropping from 100 percent to 20 percent. In fact, 89 percent of part-time employees enrolled in the program stayed with UPS, compared to 39 percent among non-enrolled employees.

Despite the successes that UPS had, it was Starbucks who made a splash in 2014 when it announced its partnership with Arizona State University to provide a four-year education to its employees. Starbucks employees who worked more than 20 hours per week with at least three months of service are eligible to apply for one of ASU's nearly 50 online degree programs. Eligible students receive a significant scholarship from Arizona State, and Starbucks reimburses students for the majority of their portion of tuition once they successfully complete the semester.

Starbucks took an additional step in February of this year by creating the Pathway to Admission program. Students who don't have qualifying test scores for the primary program have the opportunity to attend ASU and earn their bachelor's degree under ASU's Global Freshman Academy, which offers special preparation for the rigors of college. Students are also partnered with an academic coach to help them along their college journey and set them up for success.

The impact of this partnership on Starbucks' employees has been noticeable. More than 8,600 employees have enrolled since its inception, and more than 1,000 have already graduated. Starbucks has benefitted, too. Since the launch of the partnership with ASU, its applicant pool has increased by more than half a million, and nearly two-thirds of new hires expressed an interest in the partnership. Starbucks employees are not alone: half of today's millennials expect their employers to provide financial support for their education. A large majority of college students work and must balance employment and education; but students who drop out are twice as likely to cite difficulties managing the balance as the reason.

Today, more than half of companies help fund undergraduate coursework. But some employee assistance programs create barriers for students. Tuition assistance programs often require students to cover costs up front, a difficult task for those who

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A Cluster of Policies: States, Cities, and Counties Continue to Enact Paid Sick Leave Requirements That a Federal Policy May Not Fix

By Hadley Simonett

As more families are becoming dual income earners, the concept of work–life balance has been at the forefront of attracting and retaining talented employees.[1] In response to employees' desire for work–life balance, Congress has introduced and enacted legislation that intervenes in areas that traditionally were handled between the employer and employee.[2] While Congress had success in passing some of this legislation, one bill, the Healthy Families Act, has remained relatively stagnant, until recently.

Since the Act's introduction in 2004, members of Congress have reintroduced the Act roughly every two years. However, the Act has never made it out of committee. The lack of success on passing the Act has spurred local and state government action in creating paid sick leave policies. As a result, a cluster of policies continue to arise around the country, creating a web of varying requirements employers are struggling to follow. Specifically, employers are concerned about increased administrative costs associated with administering sick leave policies across multiple jurisdictions.[3] Under the current framework, even enacting the Act—introduced again in 2017—may not resolve compliance issues and concerns resulting from the patchwork of sick leave laws.

Historical Developments in Work–Life Balance Legislation

In 1984, Congress first considered the bill, now known as the Family Medical Leave Act (FMLA).[4] After nine years of opponents successfully blocking the bill, in 1993 Congress enacted the FMLA, in an effort to allow employees to take a leave of absence from work without fearing for job security.[5] Prior to the enactment of the FMLA, employers and states controlled family and medical leave.[6] Before 1993, 34 states enacted family leave legislation.[7] The scope varied from state to state on coverage (*i.e.* private/public sector employees) and type of protected leave (*i.e.* maternity/paternity leave).[8] Additionally, some employers, mostly large firms and unionized firms, offered family leave even without state mandates.[9]

Some states, such as Connecticut, that had family leave laws prior to the enactment of the federal FMLA faced difficulties determining how the state law would interact with the federal law.[10] In response, Connecticut enacted a bill created to reconcile the two laws, and established a commissioner to issue regulations and "make reasonable efforts to ensure compatibility."[11] Connecticut's state law is still in effect today, and offers greater worker protections than the federal FMLA.[12]

The FMLA requires employers with 50 or more employees to provide 12 weeks of unpaid leave to eligible employees for their own serious health condition or to care for a qualified family member with a serious health condition. However, in one survey, almost 80 percent of individuals who were eligible and needed to take FMLA leave did not because they could not afford it.[13]

Congress introduced the Act in 2004, partly in response to critiques that the FMLA does not adequately create work–life balance because it does not offer paid leave and only applies to a subset of employees.[14] The Healthy Families Act would require employers with 15 or more employees to allow employees to earn seven days of paid sick leave per year.[15] The Act adopts the Fair Labor Standards Act's definition of "employee": "any individual employed by an employer," with a narrow exception for certain volunteers.

The Act addresses concerns raised under the FMLA because it applies to a greater number of employees and allows them to take paid leave to address issues concerning prevention, recovery, and care due to an illness or domestic violence.[16]

Recent Developments

In 2015, the Act gained attention when President Obama, in his initiative to strengthen working families, called on Congress, states, and cities to pass legislation mandating paid sick leave.[17] While the Act has never moved out of committee, many states and cities have enacted legislation similar to the Act.

In 2012, Connecticut became the first State to enact a statewide paid sick leave law.[18] Since then, California, Massachusetts, Oregon, and Vermont have followed suit and enacted legislation requiring certain employers to provide paid sick leave to employees.[19] Most recently, voters in Arizona and Washington passed a ballot issue mandating paid sick leave. The Arizona paid sick leave law went into effect July 1.[20] The Washington paid sick leave law goes into effect on Jan. 1, 2018.[21]

Many cities or counties, where legislation has failed at the state level or in an effort to encourage the state to pass legislation, have enacted city or county ordinances mandating paid sick time. Most recently, the cities and counties of Minneapolis, St. Paul (Minnesota); Chicago, Cook County (Illinois); Santa Monica, Los Angeles, Berkley (California); Morristown and Plainfield (New Jersey) have joined the more than 20 cities to pass paid sick time ordinances.[22]

Responses to City Ordinance

Preemption challenges to legislation mandating paid sick leave have continued to rise as businesses are increasingly subjected to a patchwork of regulation resulting from a lack of a cohesive law. Opponents of paid sick leave have primarily utilized preemption in two capacities: (1) to create a legislative fix, and (2) to raise a legal challenge. Whether preemption has arisen through the courts or through the legislature, the purpose is the same—an attempt to invalidate and prevent the patchwork of ordinances mandating paid sick leave.

Preemption as a Legislative Fix

Many states have responded to city ordinances mandating paid sick leave by passing statewide preemption bills. Currently 17 states have enacted laws that preempt city ordinances mandating paid sick leave.[23] The majority of the preemption laws not only preempt cities and counties from mandating paid/unpaid sick days, but also preempt them from establishing and requiring minimum wages and other conditions of employment not mandated by other state or federal laws.

Some statutes are limited to preempting just minimum wage rates and the number of vacation or sick leave days; however,

others are more expansive.[24] For example, North Carolina's preemption statute covers "wage levels of employees, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce."[25] Additionally, Iowa's statue prohibits cities from establishing "[a] minimum or living wage rate, any form of employment leave, hiring practices, employment benefits, scheduling practices, or other terms or conditions of employment" beyond what federal and state law provide for.[26]

Currently, Oregon is one of the only states that prohibits cities from mandating paid sick time, by passing a statewide mandate providing for paid sick time that expressly preempts cities from setting any additional sick leave requirements.[27]

While many state legislatures have had success in passing these bills, others, such as Minnesota, have not. In 2017, Minnesota's House and Senate passed a bill preempting city ordinances mandating paid or unpaid leave and minimum wage. However, the governor vetoed the law. A similar situation arose in Missouri where the governor vetoed the preemption bill, but the General Assembly overrode his veto and enacted in the bill in 2015.[28]

Preemption as a Legal Challenge

Parties are bringing forth legal challenges arguing a federal law preempts a state law's mandate of paid sick leave. Recently, the U.S. District Court for the District of Massachusetts held the Railroad Unemployment Insurance Act (RUIA) preempts portions of Massachusetts's Earned Sick Time Law (ESTL) when applied to interstate rail carriers.[29] The Court found the plain textual meaning of the RUIA indicates Congress intended to "preempt all state sickness–related laws which include the ESTL" because it would be unduly burdensome and interfere with the regulation of interstate commerce and federal regulation.[30]

On appeal, the U.S. Court of Appeals for the First Circuit agreed with the district court that parts of the state law mandating sick leave were preempted by the RUIA. However, the court remanded the case in order for the district court to determine "whether other parts of the Massachusetts law that are not within the preemptive reach of the RUIA, and are not otherwise preempted by another federal law, might still be applied to interstate rail carriers."[31]

While the scope of preemption has not yet been resolved, this case illustrates the potential increased difficulties of compliance if more preemption cases arise in the future. Arguably, if the lower court finds sections of the statute can be severed from the preempted sections businesses will be subjected to an even greater patchwork of compliance demands than they currently are.

Preemption challenges also have arisen when interested parties bring forth lawsuits claiming state law preempts a city ordinance. For example, the Minnesota Chamber of Commerce filed suit against the City of Minneapolis alleging the paid sick time ordinance was invalid because the state has already extensively regulated the relevant field, the ordinance conflicts with state law, and because the city exceeded their authority.[32] Specifically, the Minnesota Chamber of Commerce argues the ordinance's broad definition of employee exceeds the city's authority as currently written, because the ordinance extends the city's control over employers based outside of the city (or state) who have workers who happen to have to go to the city for work (*i.e.* for meetings).[33]

The Minnesota District Court issued a partial temporary injunction holding it is not likely the Minnesota Chamber of Commerce will be successful on its claims of preemption, but may prevail on their claim that the city exceeded its authority by attempting to regulate outside of the boundaries of Minneapolis.[34]

Similarly, the Commonwealth Court of Pennsylvania recently upheld a ruling invalidating the City of Pittsburgh's sick time ordinance because the city, a Home Rule Charter city, lacked the statutory grant of authority to enact that type of ordinance required under Pennsylvania's Home Rule Charter and Optional Plans Law.[35] However, a New Jersey Court rejected a similar argument, finding the City of Trenton had a rational basis for the ordinance and the city's representation the ordinance would only apply to employers in the city was enough to limit concern of its breadth.[36]

The Act May Not Fix the Problem

As the different challenges to paid sick leave statutes and ordinances and their outcomes demonstrate, cities and states are all over the map when it comes to implementing and interpreting paid sick leave legislation. The lack of a uniform standard is subjecting businesses to different compliance requirements depending on the state or city in which they conduct business. Even when states enact statewide mandatory paid leave legislation, employers may still be subjected to different requirements if the state law does not preempt city ordinances.

Employers in California and Washington are still subjected to city ordinances mandating paid sick leave if the city ordinance is more generous than the state law mandating paid sick leave.[37] For example, covered hotel employers under the Los Angeles Municipal Code must provide "at least 96 compensated hours off per year for sick leave, vacation, or personal necessity to full time hotel workers" even though California's state statute mandates only 24 hours of paid sick leave.[38] Because of this patchwork of regulation and the potential difficulties of compliance, many employers and associations believe it is time Congress considered enacting the Healthy Families Act.

Even if passed, the Act does not address the problems employers are facing arising from the current patchwork of paid sick time legislation. Currently, the Act states, "nothing in this Act shall be construed to supersede (including preempting) any provision of any state or local law that provides greater paid sick time or leave rights (including greater amounts of paid sick time or leave, or greater coverage of those eligible for paid sick time or leave) than the rights established under this Act."

The issue of whether a national policy would remedy the compliance problems resulting from the patchwork of regulation has not been heavily discussed or mentioned in past congressional hearings regarding the Act. While this topic seems relevant to consider while conferring over a national policy, it likely has not been brought up much before because only recently have cities and states enacted paid sick leave

legislation that has created the patchwork of regulations and compliance issues.

While much of the debates surrounding paid sick time are unresolved, one thing is for certain: Paid sick leave mandates are not going away anytime soon and likely will keep appearing across the country as the demand for work–life balance continues to rise.

With the inevitable expansion of paid sick leave policies around the country, it is likely that preemption challenges will continue to rise either through the courts or through the legislature in an effort to combat compliance concerns resulting from the patchwork of regulations. While a federal policy may seem the likely solution, the currently proposed Healthy Families Act would do nothing more than increase the amount of regulation businesses have to comply with. Therefore, it is crucial, even in states that currently do not have sick leave legislation, to monitor federal and state legislation and proposed sick leave policies that might affect business in the region. ■

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Endnotes

[1]*The Family Income to Respond to Significant Transitions Act and The Healthy Families Act: Hearing on H.R. 2339 and H.R. 2460 Before the H. Comm. on Educ. & Lab.* 50–53, 111th Cong. (2015) [hereinafter *Hearings]* (prepared statement of Deborah L. Frett, CEO, Bus. and Prof. Women's Found.).

[2]*Id*.

[3]*See generally* Mercer, *State and Local Leave Laws Multiply Part 3*, Healthcare (June 1, 2017) www.mercer.us/our-thinking/healthcare/state-and-local-leave-laws-multiply-part-3.html; Complaint for Petitioner at 1–2, *Minnesota Chamber of Commerce v. City of Minneapolis*, No. 27-CV-16-15051 (D. Minn. Jan 19, 2017) (order granting partial temporary injunction).

[4]*See* Nat'l P'ship for Women and Families, *History of the FMLA*, Issues and Campaigns, www.nationalpartnership.org/issues/work-family/history-of-the-fmla.html (last visited July 5, 2017).

[5]*Id.*

[6]Jane Waldfogel, *Family Leave Coverage in the 1990s*, Monthly Lab. Rev. 13, 13–14 (Oct. 1999).

[7]*Id.*

[8]*Id*. at 13.

9*Id*. at 14.

[10]Conn. Dep't of Lab., Guidance on the Interaction Between the New Federal FMLA Regulations and the Connecticut FMLA Regulations (2008).

[11]*Id.* at 1.

[12]*Id.*

[13]*Hearings, supra* note 1, at 18–22 (prepared statement of Debra Ness, President, Nat'l P'ship for Women).

[14]*See* H.R. 4575, 108th Cong. (2004); H.R. 1902, 109th Cong. (2005); H.R. 1542, 110th Cong. (2007); H.R. 2460, 111th Cong. (2009); H.R. 1876, 112th Cong. (2011); H.R. 1286, 112th Cong. (2013); H.R. 932, 114th Cong. (2015); H.R. 1516, 115th Cong. (2017).

[15]*See* S. 636, 115th Cong. (2017); H.R. 1516, 115th Cong. (2017).

[16]*Id.*

[17]Press Release, The White House, FACT SHEET: White House Unveils New Steps to Strengthen Working Families Across America (Jan. 14, 2015) obamawhitehouse.archives.gov/the-press-office/2015/01/14/fact-sheet-white-house-unveils-new-steps-strengthen-working-families-acr.

[18]Michele Gehrke & Anne Barnett, *Patchwork of Rapidly Expanding Paid Sick Leave Laws Presents Challenges for Employers,* Empl. Relations Today Winter 2016 65, 66.

[19]*See* Ariz. Rev. Stat. § 23-371 to -381; Rev. Code Wash. (ARCW) § 49.46.020. *See generally,* Nat'l P'ship for Women and Families, *Current Sick Days* Laws, Support Paid Sick Days, www.paidsickdays.org/research-resources/current-sick-days-laws.html#.WVKq_U1K2Uk (last visited June 28, 2017).

[20]*See* Ariz. Rev. Stat. § 23-371-81; Rev. Code Wash. (ARCW) § 49.46.020.

[21]*Id*.

[22]*Supra* note 19.

[23]Nicole Dupuis, Trevor Langan, Christiana McFarland, Angelina Panettieri, & Brooks Rainwater, *City Rights in an Era of Preemptions: A State-by*-State, Analysis, Nat'l League of Cities (2017), www.nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf.

[24]*See* La. Rev. Stat. Ann. § 23:642; Miss. Code Ann. § 17-1-51.

[25]*See* N.C. Gen. Stat. § 95-25.1(c).

[26]Iowa Code § 364.3(12)(a).

[27]Or. Rev. Stat. Ann. § 653.661.

[28]Mo. Rev. Stat. § 285.055.

[29]*CSX Transp. Inc. v. Healey*, Civil Action No. 15-12865-NMG, 2016 U.S. Dist. LEXIS 90985 (D. Mass. July 13, 2016).

[30]*Id.* at 8.

[31]*CSX Transp. Inc. v. Healey*, Nos. 16-2171, 16-2172, 2017 U.S. App. LEXIS 11251 (1st Cir. June 23, 2017).

[32]Complaint for Petition, *Supra* note 3, at 4.

[33]*Id.* at 10.

[34]*Minnesota Chamber of Commerce v. City of Minneapolis*, No. 27-CV-16-15051 (D. Minn. Jan 19, 2017) (order granting partial temporary injunction).

[35]*Pa. Rest. & Lodging Ass'n v. City of Pittsburgh*, 2017 Pa. Commw. Unpub. LEXIS 356 (Commw. Ct. May 17, 2017).

[36]*New Jersey Bus. & Indus. Ass'n v. City of Trenton*, Case No. L-467-15, (Mercer Co. Sup. Ct., 2015). *See also* Noel P. Tripp, *Trenton, New Jersey Sick Leave Law Withstands Judicial Challenge; Philadelphia Sick Leave Law May Become Preempted*, Nat'l L. Rev. (2015) www.natlawreview.com/article/trenton-new-jersey-sick-leave-law-withstands-judicial-challenge-philadelphia-sick-le.

[37]*Supra* Note 18 at 67; Wash. Rev. Code Ann. § 49.46.120.

[38]*Compare* Los Angeles, Calif. Mun. Code, ch. XVIII, art. 6 (Ordinance 183,241), *with* Cal. Lab. Code § 246 (West).

McLane v. EEOC: What does it mean for the EEOC's systemic initiative and employers?

By Rebecca Magee

The EEOC's broad investigative powers may now reach farther than ever before. This past term, the Supreme Court issued a nearly unanimous[1] opinion in *McLane Co. Inc. v. Equal Employment Opportunity Commission*, holding that a district court's decision whether to enforce an EEOC subpoena should be reviewed for abuse of discretion, not *de novo*. 137 S. Ct. 1159, 1170 (2017). Although long-awaited, the decision surprised few legal practitioners. As the Supreme Court observed, prior to *McLane*, nearly every appellate court, except the Ninth Circuit, applied an abuse of discretion standard when reviewing subpoena enforcement actions.[2] *See id.* at 1167. Moreover, both litigants agreed that abuse of discretion was the proper legal standard of review; the only dispute was the relevance of the subpoenaed information. Despite the Supreme Court's fairly predictable holding, *McLane* may have a greater impact on the EEOC's ability to investigate systemic discrimination than employment practitioners might realize.

Factual and Procedural Background

McLane arose out of a single charge of sex discrimination filed by a woman named Damiana Ochoa who worked as a cigarette selector at McLane's Arizona facility. According to McLane, the job of a cigarette selector is physically demanding, requiring employees to lift, pack, and move large bins containing products. Due to the position's physical demands, McLane required all new employees and those returning from medical leave to pass a physical capability strength test. In 2007, Ochoa took three months of maternity leave but was not permitted to resume her position until passing McLane's strength test. Despite taking the test on three separate occasions, Ochoa failed to receive a passing score. Consequently, McLane terminated Ochoa's employment.

Ochoa subsequently filed a charge of discrimination with the EEOC alleging that she believed McLane terminated her because of her sex. She also made the following claim: "[t]he Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended." *McLane*, No. CV-12-02469, 2012 WL 5868959, at *1 (D. Ariz. Nov. 19, 2012), *rev'd in part, vacated in part sub nom*., 804 F.3d 1051 (9th Cir. 2015), *vacated and remanded sub nom*., 137 S. Ct. 1159 (2017). But Ochoa was not disabled herself nor did she purport to file a disability claim on behalf of another aggrieved individual. The EEOC thereafter commenced an investigation into Ochoa's charge, requesting a variety of information from McLane regarding its administration of the strength test, including so-called "pedigree information"—the names, social security numbers, last known addresses, and telephone numbers for all McLane employees who underwent the strength test. While McLane provided the EEOC with some information about the strength test and an anonymous list of employees by gender who had taken the test, it refused to provide the pedigree information.[3] Exercising its investigative authority, the EEOC thereafter issued a subpoena, demanding McLane produce detailed strength test data including pedigree information and medical and disability information for each test taker.[4] McLane refused to comply, and the EEOC filed suit in the District of Arizona seeking judicial enforcement of its subpoena.

The district court granted, in part, and denied, in part, the EEOC's request for enforcement. The court required McLane to disclose specific information regarding each test taker, including their gender, test date, test score, position, and any adverse action imposed within 90 days of the test result. But the court refused to enforce the subpoena to the extent it required McLane to disclose medical or disability information or pedigree information.

First, the district court found the EEOC did not have jurisdiction to subpoena medical or disability information. Title VII expressly requires that a charge be "tied to a specific aggrieved party." *Id.* at *4 (citing 42 U.S .C. § 2000e-5(b) (charges to be filed "by or on behalf of a person claiming to be aggrieved")). Ochoa's "blanket" allegations of disability discrimination, which were untied to a specific aggrieved party, could not provide the EEOC with jurisdiction to investigate disability discrimination. To hold otherwise, the district court reasoned, would provide the EEOC with nearly unlimited investigative authority:

> To ignore the plain language of the statute and to allow the EEOC to investigate a generalized charge of discrimination that is untethered to any aggrieved person would invite the oft-cited 'fishing expedition' to become a full-blown harvest operation. If anyone could file a charge—devoid of a specific aggrieved party—that asserts that such- and-such policy discriminates on any number of bases, the EEOC would have close to unlimited jurisdiction, and it would make virtually limitless any investigation the EEOC wished to undertake.

Id. (internal citation omitted).[5]

The district court also refused to enforce the portion of the EEOC's subpoena relating to the pedigree information, concluding that "an individual's name, or even an interview he or she could provide if contacted, simply could not 'shed light on' whether the ICPS PCE [strength test] represents a tool of [gender] discrimination in the aggregate." *Id.* at *5. But before finding the pedigree information irrelevant, the district court noted the true motivation for the EEOC's request—to investigate Ochoa's allegations of disability discrimination *not* her claims of sex discrimination. *Id.* ("Judging by the EEOC's filings and the discussion at the hearing, the primary motivation for obtaining the pedigree information related to the ADA charge.").[6]

The EEOC timely appealed the district court's decision not to enforce the portion of the subpoena that requested the pedigree information but did not appeal the remainder of the decision. On appeal, the EEOC abandoned its argument that the pedigree information was relevant to its ADA investigation, arguing only that the pedigree information was relevant to its investigation of sex discrimination. The Ninth Circuit agreed. *See McLane*, 804 F.3d at 1056.

McLane subsequently filed a petition for writ of certiorari, which the Supreme Court granted in part, limiting its review

to whether a district court's decision to quash or enforce an EEOC subpoena should be reviewed *de novo* or with deference. *McLane*, 137 S. Ct. 30 (2016).

The Supreme Court's Opinion

On April 3, the Supreme Court issued its opinion, holding that a district court's decision to enforce an EEOC subpoena should be reviewed for abuse of discretion. The Supreme Court reasoned that the "long history of appellate practice" in applying the more deferential standard to administrative subpoena enforcement actions carried significant persuasive weight. *McLane,* 137 S. Ct. at 1167. The Court also noted that because relevance and burdensomeness determinations are "fact-intensive, close calls better suited to resolution by the district court than the court of appeals," "basic principles of institutional capacity" counseled in favor of deferential review. *Id.* at 1167-68 (internal quotations omitted).

As promised when it granted certiorari, the Supreme Court limited its decision to the appropriate standard of review, declining to address the Ninth Circuit's relevance determination. But before vacating the Ninth Circuit's judgment and remanding the case for further proceedings, the Supreme Court provided both district courts and employment practitioners some limited guidance on the appropriate relevancy inquiry. First, the Court reaffirmed the EEOC's broad subpoena powers, explaining that the term "relevant" should be interpreted "generously," allowing the EEOC "access to virtually any material that might cast light on the allegations against the employer." *Id.* at 1169 (quoting *EEOC Shell Oil*, 466 U.S. 54, 68-69 (1984)). But a district court need not defer to the EEOC's relevance determination; "it must simply answer the question cognizant of the agency's broad authority to seek and obtain evidence." *Id.*

The Ninth Circuit's Decision on Remand

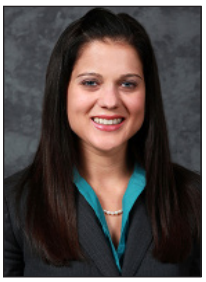
Management attorneys touted *McLane* as a victory, claiming the decision expressly limited the EEOC's subpoena authority. But the victory, if any, was short-lived. On remand, the Ninth Circuit found the pedigree information might cast light on Ochoa's claim of sex discrimination. *McLane*, 857 F.3d 813, 815–17 (9th Cir. 2017). As the Ninth Circuit reasoned: "[T]he EEOC might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not. Or it might learn the opposite. Either way, the EEOC will be better able to assess whether use of the test has resulted in a pattern or practice of disparate treatment. To pursue that path, however, the EEOC must first learn the test takers' identities and contact information, which is enough to render the pedigree information relevant to the EEOC's investigation." *Id.* at 815–16.

McLane's Practical Implications

The Ninth Circuit's opinion in *McLane* is a substantial victory for the EEOC, especially for its systemic initiative, which "makes the identification, investigation, and litigation of systemic discrimination cases—pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area—a top priority." *See* U.S. Equal Employment Opportunity Commission, Strategic Plan for Fiscal Years 2012-2016, www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf at 14. Contacting a company's past and current workforce on a national level will enable the EEOC to more easily investigate whether an individual charge has potentially broad-based, systemic implications.

But this strategy exposes employers to a wider range of potential liability. The pedigree information provides the EEOC with the tools to gather information not only concerning the charge under investigation but also whether a company engages in any *other conceivable type* of discrimination. Armed with the pedigree information, the EEOC may now investigate whether McLane's strength test has a disparate impact on persons with disabilities—an investigation the EEOC attempted but lacked jurisdiction to conduct. *McLane* provides the EEOC with the means to circumvent this jurisdictional bar and engage in a "virtually limitless" investigative fishing expedition untethered to any aggrieved individual.

Whether other jurisdictions follow the Ninth Circuit's precedent remains to be seen. However, both the EEOC and management attorneys should follow the ensuing case law closely as it may have far-reaching implications regarding the scope of an EEOC's investigation.



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Endnotes

[1]All justices agreed on the appropriate standard of review but one disputed the next step in the case. A seven-justice majority agreed remand was the appropriate next step because it would allow the Ninth Circuit to review the district court's decision using the correct standard of review. Justice Ginsburg dissented in part, arguing the Court should have affirmed the Ninth Circuit's judgment on the alternative ground that the district court erred by demanding the EEOC show more than relevance to enforce its subpoena.

[2]Even the Ninth Circuit questioned its use of the *de novo* standard in this context. *See McLane*, 804 F.3d 1051, 1055 n.3 (9th Cir. 2015), *vacated and remanded sub nom*., 137 S. Ct. 1159 (2017) ("Why we review questions of relevance and undue burden de novo is unclear. In a similar but related context—issuance of a protective order restricting the scope of an administrative subpoena—we have said that review is for abuse of discretion. Other circuits also appear to review issues related to enforcement of administrative subpoenas for abuse of discretion. Nonetheless, the de novo standard of review is now firmly entrenched in our case law.") (internal citations omitted) (italics omitted in original).

[3]According to McLane, the requested pedigree information included contact information for 14,000 past and present

employees nationwide.

[4]The EEOC also issued a separate subpoena to investigate potential age discrimination pursuant to the Age Discrimination in Employment Act of 1967 (ADEA). Unlike Title VII and ADA investigations, which are triggered by the filing of a charge of discrimination, the EEOC has "independent authority to investigate age discrimination." *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991). The EEOC sought to enforce its ADEA subpoena against McLane in a separate but parallel action. *See EEOC v. McLane Co. Inc*., No. CV–12–615–PHX–GMS, 2012 WL 1132758 (D. Ariz. Apr. 4, 2012).

[5]At least two other district courts have found this rationale persuasive. *See EEOC v. Homenurse Inc*., No. 1:13–CV–02927–TWT–WEJ, 2013 WL 5779046, at *10 (N.D. Ga. Sept. 30, 2013) ("Like *McLean II* [sic], this Court cannot allow the EEOC to investigate a generalized charge of discrimination that is untethered to any aggrieved person."); *EEOC v. A'GACI, LLC*, No. SA:14–MC–445–DAE, 84 F.Supp.3d 542, 549 (W.D. Tex. Feb. 5, 2015) ("As the *McLane II* and *Homenurse* courts noted, allowing the EEOC to subpoena information based on general allegations of discriminatory practices untethered to an aggrieved party would give the EEOC nearly unlimited jurisdiction.").

[6]In fact, the EEOC argued in its district court briefing that it needed the pedigree information "to identify individuals with disabilities and conduct data analysis regarding the test performance of those individuals." *See* EEOC Memorandum in Support of Application for an Order to Show Cause why an Administrative Subpoena Should not be Enforced, *EEOC v. McLane*, No. 2:12-cv-02468-GMS, Dkt. No. 2 at 8 (Aug. 14, 2012).

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cannot afford to float several thousand dollars until they are reimbursed at the end of a term. Starbucks has been under fire for limiting its tuition assistance to just one university, especially because the partnership financially benefits ASU. Furthermore, many students struggle academically with an online format, and low-income students are even less likely to be successful with online schooling than more traditional options.

Some employers are recognizing these struggles and instead are offering higher education scholarships, including Amazon, Costco, Intel, Southwest Airlines, and Uline. While tuition reimbursement repays employees after they have spent the money, these companies are rewarding employees with funds to help them afford the cost of higher education before tuition is due.

Congress has taken notice of the growing trend of employer involvement in higher education and is seeking to encourage employers to offer tuition-assistance programs. In February, Congress introduced H.R. 795, the Employer Participation in Student Loan Assistance Act, which provides tax incentives to employers who provide educational assistance to their employees. Specifically, it expands a current tax credit for employers who will pay a portion of an employee's student loans. More than 82 co-sponsors have already signed onto the bipartisan bill.

The Lumina Foundation, an independent, private foundation which focuses on increasing Americans' success in higher education, reported that investing in education assistance provided employers a positive ROI of 129-144 percent, due in part to increased retention. The Lumina Foundation also evaluated the impact of Cigna's educational assistance program on its workforce. Participants in the program were 10 percent more likely to be promoted and made an average of 43 percent more over three years than colleagues who did not take advantage of the program. Lumina found that, in pursuing educational assistance for employees, companies not only provide a valuable benefit for their employees but also enjoy a stronger, dedicated, trained, and reliable workforce.

One of the best ways to start providing educational assistance and benefits to employees is through CLEP and DSST exams. Developed by the College Board, creators of the SAT exam, CLEP helps nontraditional students earn credit for what they already know. DSST was developed by the military to help its members achieve a college education, and the tests are available to the general public as well. Test-takers who receive a passing score—usually determined by the American Council on Education—can be awarded anywhere from three to nine credits depending on the subject. The tests are available for a fee and cover a variety of topics in business, leadership, social sciences, science, and math. These college credits are among the least expensive available and are accepted by thousands of higher education institutions across the nation.

So how can you assist a company in creating educational-assistance benefits that are beneficial for employees and the employer? First, implement a strategy and set specific goals to accomplish. UPS' success is driven by the fact that its program is tailored to the individuals served. Determine why a company wants to create a program and what benefits it wants employees to gain.

Second, build management engagement and support. These programs often succeed or fail depending on the culture created by management. The company should take steps to promote the program to all key stakeholders, providing adequate funding and resources to keep the program open and available, and to celebrate employee achievements. Only by supporting the program long-term and building engagement can companies reap the benefits like the ones identified by the Lumina Foundation.

Lastly, a company should plan the program with employees in mind. Structuring tuition to make it accessible and affordable and allowing employees the necessary flexibility to participate and succeed will strengthen employee engagement and produce better results for the company. Ultimately, with the implementation of employer educational-assistance programs on the rise and the increasing expectations of the millennial workforce, now is the time to work with companies to examine their benefits and remain competitive employers.

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[5]*Hopkins*, 490 U.S. at 258.
[6]*Oncale*, 523 U.S. at 75.
[7]*Id.* at 79.
[8]*Id.* at 80.
[9]*Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017).
[10]*Id.* at 343.
[11]*Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641 (E.E.O.C. 2015).
[12]*Hively*, 853 F.3d at 346.
[13]*Id.*
[14]*Id.* at 349.
[15]*Id.*
[16]*Romer v. Evans*, 517 U.S. 620 (1996).
[17]*Lawrence v. Texas*, 539 U.S. 558 (2003).
[18]*Hively*, 853 F.3d at 353 (Posner, J., concurring).
[19]*Id.* at 358 (Flaum, J., concurring).
[20]*Id.* at 360 (Sykes, J., dissenting).
[21]*Id.* at 363.
[22]*Id.* at 366.
[23]*Id.* at 369.
[24]*Id.* at 368.
[25]*Christiansen v. Omnicom Grp. Inc.*, 852 F.3d 195 (2d Cir. 2017).
[26]*Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017).
[27]*Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017).
[28]A useful survey of state protections authored by the National Conference of State Legislatures can be found at http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx, but practitioners should verify that the survey's information is current through independent research.

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