

LATSHA DAVIS & MARSHALL



ATTORNEYS AT LAW

Employment and Labor Law Update

Andrew P. Dollman, Esquire
Latsha, Davis & Marshall, P.C.

What's New?

Updated EEOC Charge Filings

TYPE	YEAR 2019	YEAR 2020	YEAR 2021
Total	72,675	67,448	61,331
Race	23,976	22,064	20,908
Color	3,415	3,562	3,516
Sex	23,532	21,398	18,762
National Origin	7,009	6,377	6,213
Religion	2,725	2,404	2,111
Retaliation-All	39,110	37,632	34,322
Retaliation Title VII	30,117	27,997	25,121
Age	15,573	14,183	12,965
Disability	24,238	24,324	22,843
Equal Pay Act	1,117	980	885
GINA	209	440	242

Judicial Case Filings

Twelve-Month Period	# of Employment Discrimination Cases Filed
2016	14,109 (including ADA employment cases)
2017	14,406 (including ADA employment cases)
2018	15,203 (including ADA employment cases)
2019	15,119 (including ADA employment cases)
2020	13,712 (including ADA employment cases)

PA UC Update

- ▶ Reminder that employers are now required to provide departing employees with an Employee Information Sheet, Form UC 1609.
- ▶ UC Claims System up and running for over a year.
- ▶ Job Search requirements resumed in July 2021.
- ▶ In-person hearings have resumed.
 - Considerations for self-representation, UC service, or attorney.

Wage and Hour Update

- ▶ In 2022, DOL hired at least 100 investigators to monitor employers for Wage and Hour violations.
- ▶ In FY 2021, DOL collected \$230 million for workers who were improperly compensated.
- ▶ DOL announced in summer of 2021 that it was in the process of reviewing the Final Overtime Rule implemented in 2019 under the Trump administration, which raised the salary-basis threshold to \$684/week and announced a proposed rule may be coming in October; this is the current rule.
- ▶ DOL held “listening sessions” for employers in mid-May to discuss some of DOL’s proposed changes.
- ▶ It is speculated that salary levels may reach \$900/week or more.

Wage and Hour Update

- ▶ DOL's regulatory agenda indicates the new proposed Overtime Rule will be released in May of 2023.
- ▶ It is a near certainty that the salary basis test will be increased significantly.
- ▶ There is a possibility that the duties test(s) may be revised, which may affect the various exemptions.
- ▶ A Final Rule on Employee/Independent Contractor classification also slated for May of 2023.

Wage and Hour Update

- ▶ As part of the 2021-2022 PA budgetary process, Act 70 became law on July 9, 2021, which abrogated regulations for the PA Minimum Wage Act.
- ▶ No legislative action since to rectify the situation.
- ▶ Effectively, this means that the executive, administrative, and professional exemptions of PA's Minimum Wage Act are no longer enforceable by DLI. However, the federal DOL still enforces its rules.
- ▶ Employers need to know and review employee classifications, especially in nursing.
- ▶ Can nurses be paid a salary versus hourly? Hybrid situations?
- ▶ Considerations for 8/80 Rule.
- ▶ See EEOC v. Medical Staffing of America, LLC

OSHA Update

- ▶ General Duties Clause reminder.
- ▶ Injury Log (Form 300) – recording COVID cases.
- ▶ No need to record reaction to COVID vaccine through May 2023.
- ▶ June 2021 Healthcare ETS.
 - Expired in December of 2021.
 - Recordkeeping duties remain.
 - A comment period on a proposed final standard closed on April 22, 2022 and a hearing was held on April 27th. OSHA targeted December of 2022 for release, but no release came.
 - Final Standard continues to be delayed, but OSHA continues to work on this. Necessary in light of lifting of COVID emergency?
- ▶ Uptick in OSHA inspections in long-term care, generally. Could be additional focused inspection windows, such as last year's window.

OSHA Update

- ▶ What will OSHA review at inspection?
- ▶ See Hi Tech Motorcars, LLC case.

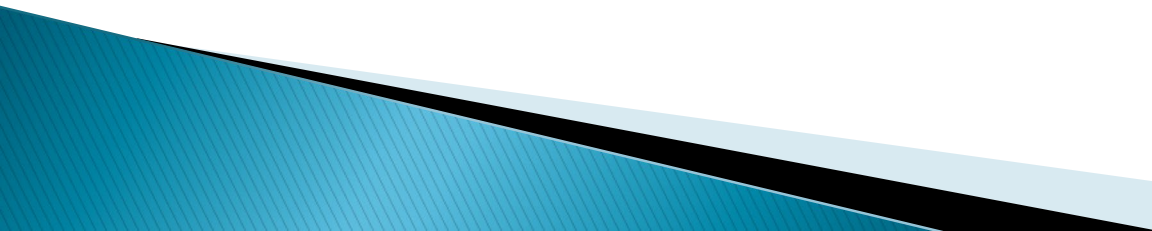
FMLA Update

- ▶ DOL forms updated in Summer 2020.
 - We strongly recommend using the DOL forms versus an in-house form.
 - Be aware of the various notices and designations an employer must make.
 - When in doubt, give employees a Certification of Health Care Provider to be completed by their physician.
- ▶ Law continues to evolve to become less rigid and punish the mechanical application of standards; it's not black and white.
- ▶ See EEOC v. Groendyke Transport, Inc. case

NLRB Update

- ▶ April 7th , 2022 General Counsel memo requesting NLRB to restrict employers from requiring employees to attend meetings discussing union issues on work time, so-called “Captive Audience Meetings.”
- ▶ New lawsuit challenging the memo and guidance, suggesting General Counsel overstepped her authority.
- ▶ Social Media policies continue to be a hotly-litigated issue.
- ▶ In *Medic Ambulance Service*, 370 NLRB No. 65 (Jan. 4, 2021), NLRB found the following provisions in an employer’s Social Media Policy to be acceptable:
 - “Do not disclose confidential or proprietary information regarding the company or your coworkers.”
 - A prohibition of employees using the company name to endorse a product or pass on opinions regarding people, products, or causes.
 - Prohibiting employees from using social media to disparage the company or others.
 - Employers should periodically review social media policies (and Employee Handbooks, generally) to ensure compliance.

NLRB Update

- ▶ Renewed focus on union activity.
 - ▶ In July of 2022, NLRB announced union petitions up 58% during 1st 9 months of FY 2022.
 - ▶ 2022 finished out with 2072 Petitions filed vs. 1269 filed in 2021; over 500 more elections in 2022.
 - ▶ Proposed Joint Employer Rule of 9/6/22.
 - ▶ DOL issued online Employer Toolkit to help employers deal with union issues.
- 

NLRB Update

- ▶ NLRB Decision re: Provisions in Severance Agreements
 - *McLaren Macomb* case
 - *February 21, 2023*
 - Employers may not offer severance agreements with broad Confidentiality and Nondisparagement provisions because such provisions violate separated employees' Section 7 rights under the NLRA.

Medical Marijuana in PA

- ▶ Medical Marijuana Act (“MMA”) passed in 2016.
- ▶ An employer cannot discriminate against applicants or employees “solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.”
- ▶ Federal MORE bill, which would end federal prohibition on cannabis use, passed in the House, but not expected to pass Senate.
- ▶ Recreational use still illegal in PA, as is smoking medical marijuana.
- ▶ Philadelphia ordinance regarding job applicant testing.

Marijuana

- ▶ The following states have or soon will authorize recreational marijuana:
 - Alaska, Arizona, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Nevada, Oregon, Rhode Island, Vermont, Virginia, Washington, Washington, D.C.
- ▶ What does this mean for PA employers?
- ▶ At the federal level, marijuana is still listed as a Schedule I drug under the Controlled Substances Act.

PA Department of Health Updates to the Long Term Care Regulations

- **Chapter 201**

- **201.19 Personnel records**

- Changes include a more detailed and comprehensive list of items that must be in the staff personnel files

- All personnel files must be kept current and available for each facility must contain the following information:

1. The employee's job description, educational background and employment history

2. Employee performance evaluations, including, documentation of any monitoring, performance, or disciplinary action related to the employee

3. Documentation of credentials, which shall include, at a minimum, current certification, registration or licensure for the position assigned

PA Department of Health Updates to the Long Term Care Regulations

- **Chapter 201**

- **201.19 Personnel records**

4. A determination by a health care practitioner that the employee as of their start date is free from communicable diseases or conditions
5. Records relating to a medical exam, if required by the facility or attestation that the employee is able to perform the employee's job duties
6. Documentation of the employee's orientation to the facility and the employee's assigned position prior to or within 1 week of the employee's start date
7. Documentation of the employee's completion of required trainings under this chapter, including documentation of orientation and other trainings

PA Department of Health Updates to the Long Term Care Regulations

- Chapter 201

- 201.19 Personnel records

8. A copy of the final report received by PSP and FBI as applicable in accordance with Older Adults Protective Services Act and the Adult Protective Services Act
9. In the event of a conviction prior to or following employment, documentation that the facility determined the employee's suitability for initial or continued employment in the position to which the employee is assigned "Suitability for employment" shall include a review of the offense; the length of time since the individual's conviction; the length of time since incarceration, if any; evidence of rehabilitation; work history; and the employee's job duties
10. The employees completed employment application

PA Department of Health Updates to the Long Term Care Regulations

- **Chapter 201**

- **201.20 Staff development**

- Changes include a new requirement for staff training
- Topics required to be covered:
 - Topics outlined in 483.95
 - Accident prevention
 - Restorative nursing techniques
 - Emergency preparedness in accordance with 483.73
 - Fire and safety in accordance with 483.90
 - Resident rights, including nondiscrimination and cultural competency
 - Training needs identified through the facility assessment
 - Facility orientation shall include training on the prevention, detection and reporting resident abuse and dementia management and communication skills

Non-Compete

- ▶ On January 5, 2023 the Federal Trade Commission (“FTC”) proposed a new rule that would ban non-competes between employers and employees.
- ▶ Rule would rescind all existing non-competes on the Rule’s compliance date (no date yet).
- ▶ Compels employers to provide notice that the non-competes are no longer valid.
- ▶ Rule would also apply to independent contractors.
- ▶ Comment period extended through April 19th.
- ▶ FTC already issuing complaints against employers.

Non-Compete

- ▶ PA Health Care Facilities Act Chapter 8-A: Temporary Health Care Services Agencies.
- ▶ “ A temporary health care services agency . . . May not restrict in any manner the employment opportunities of Health Care Personnel. This requirement shall also apply to a health care facility.”
- ▶ Grandfather provision?
- ▶ What does this mean for “placement fees?”

MISCELLANEOUS

- ▶ I-9 Guidance allowing Remote Verification of I-9 Documents expires July 31, 2023.
 - Gives employers flexibility to examine I-9 documents via video or other remote means instead of an in-person examination.
 - Requires employers to retain evidence of the documents examined.
- ▶ H-1B VISA cap already met for FY 2023.

PA Workers' Compensation Update

- ▶ **No reported COVID-19 cases to date.**
 - Oral report from WCJ at conference suggests COVID cases to number in the hundreds so far, most of which have resolved.
 - However, DLI's "Pennsylvania Workers' Compensation Workplace Safety Annual Report" suggests there were far more.
 - We are aware of a few unreported cases which did not settle, but details are sparse.
- ▶ **Two avenues to pursue COVID WC claim:**
 - Infectious Disease.
 - Disease as Injury.
- ▶ **Tough standard to prove COVID-19 contracted at work and to the exclusion of other sources, which requires a medical expert.**
 - What can employers do prior to and after the claim is made?
- ▶ **What is the pragmatic approach for employers: to settle or not to settle?**

Statutes, Case Law, and Guidance



Statutes

- ▶ **Marijuana Opportunity Reinvestment and Expungement (“MORE”) Act**
 - Passed in the U.S. House of Representatives 4/1/22; Currently before the Senate.
 - Removes marijuana from the list of scheduled substances under the Controlled Substances Act, also eliminating criminal penalties for individuals who manufacture, distribute, or possess marijuana.
- ▶ **Creating a Respectful and Open World for Natural Hair (“CROWN”) Act of 2022**
 - Passed in the House on 3/18/22; Currently before the Senate.
 - Prohibits discrimination based on an individual's hair texture or hairstyle if that texture or style is commonly associated with a particular race or national origin.
 - Philadelphia and Pittsburgh have city ordinances.
- ▶ **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 signed into law on March 3, 2022.**
 - Amends the Federal Arbitration Act makes arbitrations unenforceable as to claims of sexual assault and sexual harassment.
 - Applies to claims filed after March 3, 2020.

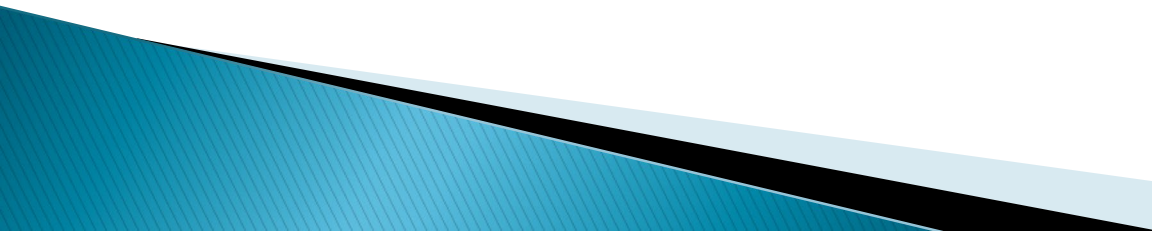
Recent Title VII Cases

- ▶ **Kengerski v. Harper**
 - Violation of Title VII by discriminating against employee for associating with an employee of a different protected class.
- ▶ **Whetstine v. Woods Services**
 - Termination of employment for office romance/love triangle NOT discrimination based on sex.
- ▶ **Norfolk v. GEO Group, Inc.**
 - Employer may be liable for discrimination based on spouse's protected activity.
- ▶ **Friel v. Mnuchin**
 - No sex discrimination claim where claim is based on end of consensual relationship.

Recent Title VII Cases

- ▶ EEOC v. Houchens Food Group, Inc. d/b/a Hometown IGA
- ▶ Job applicant is a Spiritualist Rastafarian who wears his hair long and in dreadlocks.
- ▶ Applicant's stated religious belief is that his hair connects him to God.
- ▶ IGA allegedly said applicant would need to cut his hair; interview ended with no job offer.
- ▶ EEOC filed suit.

Recent EEOC Guidance

- ▶ EEOC created a new webpage with guidance regarding discrimination based on sexual orientation and gender identity.
 - ▶ The guidance states, among other things, that consistent, intentional use of names or pronouns inconsistent with a transgender individual's preferred gender (misgendering) could result in liability for a hostile work environment.
 - ▶ However, unintentional use of the same does not arise to such a level.
- 

Recent EEOC Guidance

- ▶ New EEOC Guidance released on 1/24/23.
- ▶ “Hearing Disabilities in the Workplace and the Americans with Disabilities Act”
- ▶ The guidance explains:
 - When an employer may ask an applicant or employee questions about a hearing condition;
 - How to treat voluntary disclosures;
 - What types of accommodations applicants may need; and,
 - How an employer can ensure that no employee is harassed because of a hearing disability.

Questions?

????

Thank you and enjoy the conference!

Andy Dollman
Latsha Davis & Marshall, P.C.
717-686-4778
adollman@ldylaw.com
www.ldylaw.com