



LGBT ISSUES ARE IN TRANSITION



Ann E. Sartwell....

"[E]xpect more conflict and uncertainty, but don't unwittingly run afoul of existing obligations."

Mixed signals on the regulatory, court, and legislative fronts are the present reality. Do not expect clarity any time soon.

On January 31, 2017, President Trump indicated he intended to maintain an Obama-era Executive Order prohibiting discrimination in federal employment based on sexual orientation or gender identity. It also applies to federal contractors and subcontractors, as well as construction contractors and subcontractors on federally-assisted construction contracts. The OFCCP rules implementing the order do not include affirmative action requirements for LGBT (lesbian, gay, bi-sexual,

transgender) applicants and workers, but prohibit sexual orientation and gender identity discrimination and include a specific requirement that transgender employees be permitted bathroom access consistent with their gender identities.

A few weeks later, the Justice and Education Departments withdrew guidance that said public schools must allow transgender students to use bath and locker rooms consistent with their gender identities. That guidance had been issued by the Obama Administration at the same time multiple states and localities were confronting LGBT employment and education issues, and the resulting "bathroom wars" mobilized advocates at both ends of the spectrum. The U.S. Supreme Court, which had been poised to hear a case brought by a transgender teen that relied heavily on that guidance, redirected the case to the Fourth Circuit Court of Appeals in March to consider whether and how the 1972 federal law prohibiting sex discrimination in education applies to transgender individuals.

The U.S. Equal Employment Opportunity Commission (EEOC) is meanwhile vigorously pursuing an appeal in the Sixth Circuit on behalf of a transgender former funeral home employee, but it supported the efforts of the employee to intervene in the case in February because its own position in

the case may change after the EEOC General Counsel vacancy is filled and because Attorney General Jeff Sessions would make the final decision regarding any Supreme Court review.

Courts are likewise struggling with the issue of the LGBT employment protections. A divided panel of the Eleventh Circuit Court of Appeals in Atlanta ruled in March that sexual orientation discrimination is not sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). *Evans v. Georgia Regional Hospital*, (850 F.3d 1248 (11th Cir. 2017)). A month later, the Seventh Circuit Court of Appeals became the first federal appeals court to rule that Title VII prohibits sexual orientation discrimination. *Hively v. Ivy Tech. Community College of Indiana*, 2017 U.S. App. LEXIS 5839 (April 4, 2017). That decision was lauded by Acting EEOC Chair Victoria Lipnic, a Trump appointee, in an April 5 email to Bloomberg BNA. The employer is not appealing that decision, but will continue to defend against the claim on the merits. The plaintiff in *Evans* is seeking review by the entire Eleventh Circuit. Now that there is a clear conflict among the circuits, Supreme Court review appears ultimately inevitable. It is just a question of how and when the issue reaches the nation's highest court.

In the meantime, expect more conflict and uncertainty, but don't unwittingly run afoul of existing obligations. Recall the federal contracting or subcontracting obligations discussed above. Outside of Tennessee, which preempts local regulation of private employers along these lines, be alert to potential local laws. The Sixth Circuit (which covers TN, OH, KY and MI employers), does not interpret Title VII to ban discrimination based on an individual's sexual orientation, and no Tennessee law prohibits employment discrimination for that reason. Things are not that simple, however. Since a 1989 landmark decision, it has been a violation of Title VII to discriminate because of a person's failure to conform with stereotypical notions about gender. Later, the Sixth Circuit applied that analysis to claims by individuals (including transgender individuals) who asserted that it was what they looked like and how they acted, rather than perceived or actual same-sex attraction or identity of their sexual partners, that was the basis for harassment or other discrimination. Training supervisors, managers and a workforce is hard work. Consider that a simple, inclusive policy may be the most prudent course of action.

Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.





Jerome D. Pinn....

"This is only the second time that Congress has ever passed legislation under the Congressional Review Act invalidating federal regulations and/or executive orders."

FEDERAL CONTRACTOR "BLACKLISTING" EXECUTIVE ORDER OVERTURNED BY CONGRESS

On March 6, 2017, Congress gave final approval to legislation invalidating President Obama's Fair Pay and Safe Workplaces Executive Order, and various implementing rules. This order has been commonly called the "blacklisting" order, as it would require federal contractors to report recent violations of labor and employment laws when bidding on new or renewed federal contracts. It also would have required certain federal contractors to provide reports to employees on hours, paycheck deductions, and

independent contractor status. In October, a federal judge in Texas had issued a temporary injunction preventing most of the Executive Order from ever being implemented. Many employers have objected to the Executive Order on the grounds that it called for companies to report mere allegations that had not been fully adjudicated. Companies would feel a need to prove their innocence rather than enjoy the presumption of innocence.

This is only the second time that Congress has ever passed legislation under the Congressional Review Act invalidating federal regulations and/or executive orders. There is great significance to such Congressional action, since the Congressional Review Act provides that passage of such a law prevents any "substantially similar" rule from being issued in the future, unless Congress grants specific approval.



KNOW YOUR ATTORNEY GARY WRIGHT RETURNS TO THE FIRM!

We are delighted to announce that GARY W. WRIGHT is returning to active practice with Wimberly Lawson Wright Daves & Jones, PLLC, after serving for the past several years as *Branch Chief for Employment Litigation* with the U.S. Forest Service, where he managed and supervised the Agency's defenses in labor and employment lawsuits. Gary is now Of Counsel with the Firm and will continue to focus his practice on labor law, with an emphasis on NLRB work, collective bargaining, contract administration, and arbitration law. Gary received his BS degree *cum laude*

in 1974 and his J.D. degree in 1977, both from the University of Tennessee. Gary received his Certification in *Alternative Dispute Resolution* from Cornell University, School of Industrial and Labor Relations. Before starting private practice, Gary was a federal prosecutor for the National Labor Relations Board, working in its Peoria and Atlanta Regions. He served as an instructor of business law at Virginia Tech and Carson Newman College. He has also served on the Executive Council of the Tennessee Bar Association's Labor Law Section, and is a member of the American Bar Association.

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COURTS STRIKE DOWN BROAD FEDERAL AGENCY SUBPOENAS FOR EMPLOYMENT INFORMATION



Rebecca Brake Murray.....

“[T]he Supreme Court mentioned that ... the court should enforce the subpoena unless the employer establishes that the subpoena is ‘too indefinite,’ has been issued for an ‘illegitimate purpose’ or is unduly burdensome.”

Act, and the Americans’ with Disabilities Act (ADA), for failing to accommodate the claimant’s work schedule and responsibilities. The charging party claimed both disability and pregnancy discrimination in denying her request for accommodation. The EEOC informed the employer in a letter that it was expanding the scope of its investigation to include the “failure to accommodate persons with disabilities and/or failure to accommodate women with disabilities due to pregnancy.” It sought from the employer a complete list of employees who requested an accommodation for disability and a complete list of employees who had been pregnant and whether they sought or were granted any accommodations, for a four-year time frame. The employer petitioned the EEOC to revoke the subpoena arguing it was unduly burdensome and a “fishing expedition.”

The lower court judge denied the EEOC’s subpoena application, finding that the EEOC’s real intent in requesting the information was difficult to pin down. On appeal, the EEOC argued two purposes: (1) to determine whether the employer had a pattern or practice of violating the ADA; and (2) to determine whether the employer treated the claimant less favorably than other comparable employees. The EEOC said these purposes correlated to the

A couple of recent federal rulings have given encouragement to employers facing overbroad and often unreasonable federal agency subpoena demands for a broad array of employment information. In a recent federal appeals court ruling, the court affirmed a district court judge’s ruling that the U. S. Equal Employment Opportunity Commission (EEOC) was not entitled to enforce its subpoena requesting information. *EEOC v. TriCore Reference Labs*, 849 F.3d 929 (10th Cir. Feb. 27, 2017).

The law provides that when investigating charges of discrimination, the EEOC may obtain evidence that “relates to unlawful employment practices covered by Title VII and is relevant to the charge under investigation.” In the course of the *TriCore* case, the employee claimed alleged violations of the Pregnancy Discrimination

two subpoena requests - with the disability request relating to the pattern-or-practice rationale and the pregnancy request relating to the comparator-evidence rationale.

The appeals court found that the lower court did not abuse its discretion in denying the broad subpoena request. Among other things, the court cited an earlier precedent that the EEOC was entitled only to evidence “relevant to the charges under investigation,” rejecting the notion that an individual charge of discrimination could be part of a pattern-or-practice discrimination charge and stating that such a rationale would stretch the relevance requirement so broadly as to render it a nullity. As to the argument pertaining to seeking information for comparative analysis, the court found the EEOC’s paltry explanation of how the pregnancy request was relevant before the district court lacking.

In another related development, an administrative law judge at the Department of Labor (DOL) ruled in March that Google does not have to give the OFCCP pay information dating back to the company’s formation and the names and contact information for some 20,000 workers at its California headquarters, as requested as part of a random government audit. Of particular interest is the fact that Google apparently had only a \$600,000 federal contract, and the company estimated that compiling the requested information would cost several million dollars. The judge denied the request for summary judgment in the DOL lawsuit seeking to force Google to turn over the information, saying the DOL request - which included job and salary histories among 38 categories of data - was not reasonable. Later, the judge granted Google’s request for a protective order on the salary data. *OFCCP v. Google, Inc.*, Dep’t of Labor A.L.J., No. 2017-OFC-00004.

Also in April, the U.S. Supreme Court made a ruling in a subpoena enforcement case as to what standard an appeals court should use in reviewing lower court decisions to enforce or quash an EEOC subpoena. In addressing the issue, the Supreme Court mentioned that if the charge is proper and the material requested is relevant, the court should enforce the subpoena unless the employer establishes that the subpoena is “too indefinite,” has been issued for an “illegitimate purpose” or is unduly burdensome. *McLane Co. v. EEOC*, 197 L. Ed. 2d 500 (April 3, 2017).

Editor’s Note - It is common for employers to receive broad information request demands from plaintiffs in lawsuits as well as governmental agency investigations. These current rulings provide encouragement for employers to resist overbroad and unreasonable information demands.

NLRB RULES THAT MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS VIOLATES LABOR ACT



Howard B. Jackson

"[The] decision is fraught with legal traps and should be carefully considered."

Misclassification cases - in which it is alleged that independent contractors are actually employees - have been one of the most important and heavily-litigated areas of employment law in recent years. Many of the lawsuits are filed under the Fair Labor Standards Act or comparable state laws and seek wage and hour and other protections for workers. A recent case highlights the position of the National Labor Relations Board (NLRB) on this issue.

Why does the independent contractor versus employee question matter in this context?

The National Labor Relations Act grants organizing and other rights to "employees." Therefore, a group of employees may organize a union. But a group of independent contractors may not. Independent contractors do not have such rights under the Act.

In 2016, the NLRB Regional Director in Los Angeles issued an unfair labor practice complaint against Intermodal Bridge Transport contending that the company treated its drivers at the port as contractors in order to stop the Teamsters' union from organizing them. *Pacific 9 Transportation, Inc.*, 21-CA-150875. NLRB General Counsel Richard Griffin a month earlier had issued a memo noting that the NLRB is cracking down on worker misclassification and urging NLRB regional directors to refer cases involving misclassification claims to Washington for review. Previously the NLRB had not taken as strong an interest regarding whether the intentional misclassification of workers as independent contractors interfered with worker's rights to organize under the Act. More recently, in August of 2016, the General Counsel issued an advice memorandum directing the NLRB regional directors to treat employee misclassifications as a violation of the Labor Act.

Editor's Note: The NLRB's position on this subject is another cautionary sign when considering whether an employer may lawfully treat a group of persons as independent contractors instead of employees. That decision is fraught with legal traps and should be carefully considered.



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