Employment Law Update

JONES WALDO
ATTORNEYS · EST.1875

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SEXUAL ORIENTATION AND TRANSGENDER STATUS NOW ARE PROTECTED CLASSES NATIONALLY: Federal civil rights law protects gay, lesbian, and transgender employees, the United States Supreme Court announced today (Monday) in a landmark ruling. The historic decision will extend workplace anti-discrimination and anti-harassment protections to about 8 million LGBTQ workers nationwide. The ruling also vindicates a position long taken by the federal Equal Employment Opportunity Commission (EEOC). It is a defeat, however, for the Trump administration, which opposed the EEOC. President Trump instructed the Department of Justice to argue that the provision of Title VII of the Civil Rights Act that bars discrimination based on sex did not extend to claims of gender identity and sexual orientation bias. This led to the odd circumstance where two parts of the same government argued for opposite positions. The 6-3 court opinion adopting the EEOC's view was written by Trump appointee Justice Neil Gorsuch and joined by conservative Chief Justice John Roberts as well as the court's four liberal justices. Justice Gorsuch wrote, "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." About half the states, including Utah, already prohibit this type of workplace discrimination, but the Supreme Court ruling means the anti-bias rule now applies nationally.

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TITLE VII DRAFTERS SURPRISED AT SUPREME COURT RULING? The Supreme Court took on this case now because there were three recent underlying lower court cases that had resulted in different and conflicting outcomes around the country. A Georgia county fired a man for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. A New York skydiving company fired an employee a few days after he mentioned being gay. A Michigan funeral home fired a person who, although presenting as a male when she was hired, later informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII's general prohibition on sex discrimination. All three of those cases probably would have failed if brought at the time the law was first enacted. The Supreme Court today addressed the notion that the legislators who enacted Title VII over five decades ago might be surprised at this ruling: "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extra-textual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

WHAT SHOULD EMPLOYERS DO IN LIGHT OF NEW COURT RULING? Employers should review their policies, practices, posters, handbooks, and training materials, and make necessary changes to ensure that employees understand that acts of discrimination and harassment based on sexual orientation, gender identity, and/or transgender status are against the law. Employers also should train HR personnel, supervisors, and claims investigators about the applicable law and this recent court ruling so that the law and company policy are accurately and effectively implemented regarding all terms and conditions of employment. Existing laws prohibiting retaliation remain in place, and so employers also must ensure that there is no retaliation against employees complaining about discrimination or harassment based on sexual orientation, gender identity, and/or transgender status.

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SENATE PASSES CHANGES TO PAYCHECK PROTECTION PROGRAM: Spencer Topham from the Jones Waldo business law group reports on an important COVID-19 workplace development: On June 3, 2020, the United States Senate approved changes to the Paycheck Protection Program ("PPP") based on a House bill called the Paycheck Protection Flexibility Act (the "PPP Flexibility Act"), that will allow small businesses more flexibility in using the loan funds. The bill was signed into law by President Trump on June 5, 2020, and makes a number of changes and clarifications to the PPP, including the following:

- Current PPP borrowers can choose to extend the eight-week period to 24 weeks, or they can keep the original eight-week period. New PPP borrowers will have a 24-week covered period, but the covered period can't extend beyond Dec. 31, 2020, which is designed to make it easier for more borrowers to reach full, or almost full, forgiveness.

- Borrowers can use the 24-week period to restore their workforce levels and wages to the pre-pandemic levels required for full forgiveness--this must be done by Dec. 31 (a change from the previous deadline of June 30).

- Under current PPP guidance, a borrower must use 75% of the loan proceeds for "payroll costs", which include wages, tips, bonuses and certain employee benefit costs. Currently, a borrower is required to reduce the amount eligible for forgiveness if less than 75% of eligible loan proceeds are used for payroll costs, but forgiveness isn't eliminated if the 75% threshold isn't met. Under the language in the House bill, however, the payroll expenditure requirement drops to 60% from 75% but borrowers must spend at least 60% of the loan proceeds on payroll costs or none of the loan will be forgiven. This significant issue was raised by several representatives and senators, so it seems likely that technical tweaks will be made by the SBA and Treasury after passage to clarify the issue and return loan forgiveness to a sliding scale rather than a cliff.

- The bill includes two new exceptions allowing borrowers to achieve full PPP loan forgiveness even if they don't fully restore their workforce. The SBA's interim final rule on loan forgiveness issued on May 22, 2020 already allowed borrowers to exclude from those calculations employees who turned down good faith offers to be rehired at the same hours and wages as before the pandemic. Under the new bill, borrowers will be allowed to adjust because they could not find qualified employees or were unable to restore business operations to Feb. 15, 2020 levels due to pandemic related operating restrictions.
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- New borrowers now have five years to repay a PPP loan instead of two, and existing PPP loans can be extended up to 5 years if the lender and borrower agree (the interest rate remains at 1%).
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- Although previously prohibited under the CARES Act, the bill would allow businesses that took a PPP loan to also delay payment of their payroll taxes.

For more information, please contact Spencer Topham at (801) 534-7262 or stopham@joneswaldo.com.

IRS PROVIDES TAX RELIEF FOR EXECUTIVE VOLUNTEER WORK: Geoff Gunnerson from the Jones Waldo tax law group reports a new development: The 2017 Tax Cuts and Jobs Act imposed a 21% excise tax on executive pay greater than $1 million and excess parachute pay to a nonprofit's five most highly compensated employees. (Internal Revenue Code § 4960) In 2019, an IRS notice explained how to calculate that tax, but the IRS's guidance subjected for-profit businesses to the tax if a highly paid officer volunteered at a related tax-exempt organization. (IRS Notice 2019-09) After many commenters expressed concerns, on Friday, June 5, 2020, the IRS issued proposed regulations under Internal Revenue Code § 4960. The proposed rules offer several clarifications and certain exceptions. One such exception generally provides that an employee will be disregarded for the purpose of determining the tax if neither the applicable tax-exempt organization, nor any related tax-exempt organization, nor any organization controlled by the applicable tax-exempt organization pays the employee for the services performed.

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For additional information, or to discuss applicability of Internal Revenue Code § 4960 and the proposed regulations to your organization, please contact Geoffrey Gunnerson at (801) 407-6541 or ggunnerson@joneswaldo.com.

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Legal-mail is a legal and legislative update service sent out about twice a month to interested HR professionals as well as various Utah SHRM members and chapters. As a courtesy, the Utah law firm of Jones Waldo Holbrook & McDonough P.C. underwrites the costs of the service. If you have any questions or comments, please contact Michael Patrick O'Brien, Mark D. Tolman or Marci B. Rechtenbach.