# BEFORE AND AFTER FIXER-UPPER REVEALS

## 2020 Federal Employment Law Update

With most of 2020 spent focused on the COVID-19 pandemic response and the election, most of the other employment-related legal developments ultimately equate to fairly minor "remodeling" of existing standards. There are, however, a few notable exceptions:

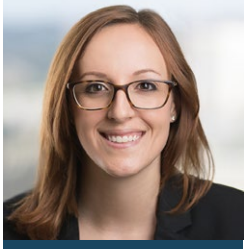
### THE UNITED STATES SUPREME COURT

**Title VII's prohibitions on employment discrimination "on the basis of sex" extends to homosexuals and transgender persons. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 207 L. Ed. 218 (2020)**

On June 15, 2020, the U.S. Supreme Court resolved three cases that were consolidated for review:

- *Bostock v. Clayton County* (Eleventh Circuit). Gerald Bostock, a child welfare advocate, was discharged for "conduct unbecoming a county employee" after he joined a gay softball team and community members made disparaging comments about his sexual orientation.
- *Zarda v. Altitude Express, Inc.* (Second Circuit). Donald Zarda, a skydiving instructor, was fired days after he mentioned that he was gay.
- *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (Sixth Circuit) (Stephens). Aimee Stephens presented as male when she began working for a funeral home. Six years into her employment, she notified her employer that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. Her employer discharged her, stating that "this is not going to work out."

All three cases involved the question whether the employers' conduct violated Title VII, which prohibits discrimination on the basis of sex where sexual orientation or gender identity were at issue, but the prior courts had reached different conclusions. Resolving that conflict, the Supreme Court determined that Title VII's protections extend to employment discrimination on the basis of sexual orientation or gender identity.



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### KEY TAKEAWAYS

Several states—including Oregon, Washington, and California—already have statutes that extend employment-discrimination protections to sexual orientation, gender identity, or gender expression, so the *Bostock* decision is not expected to drastically alter the legal landscape in those states. But the Court's decision highlights issues for employers to consider, including:

- **Review policies and practices to ensure compliance with the Court's ruling.** Although the Supreme Court expressly declined to extend the Bostock ruling to mandate "sex-segregated bathrooms, locker rooms, [or] dress codes," which were not at issue in any of the three cases on review, employers should review their policies and practices to identify those that potentially implicate Title VII's prohibition on discrimination on the basis of sex, sexual orientation, or gender identity.
- **Conduct regular trainings regarding sex-based discrimination, including discrimination based on sexual orientation and gender identity.** Regularly reminding managers, human-resources personnel, and other employees of unlawful employment practices is one of the best ways to reduce potential legal risk. Employers should take proactive steps to assure employees

that discrimination based on sex, sexual orientation, and gender identity will not be tolerated, educate employees on different forms of discrimination based on sex, sexual orientation, and gender identity, and ensure that employees know how and where to report potential discrimination.

Some areas for proactive training include use of appropriate names and pronouns and how implicit biases can manifest in the workplace. Employers who address these issues before employees raise a concern or announce a gender transition will be better positioned to prevent discrimination and address any legal claims that may arise.

- **Review compensation and employment practices to ensure compliance with Title VII.** The three cases considered by the Court involved discharge, but the Court's rationale extends to other types of disparate treatment, including compensating gay or transgender employees less than their heterosexual or cisgender counterparts. Employers should review their compensation and promotion practices to eliminate any implicit or explicit bias against employees on the basis of their sex, sexual orientation, or gender identity, and correct any discrepancies that do not appear to have a legitimate nondiscriminatory justification.

**A set of consolidated cases buttresses the strength of religious exemptions to employment-discrimination laws and in the Affordable Care Act**

On July 8, 2020, the U.S. Supreme Court resolved two consolidated cases concerning the application of the "ministerial exception" to federal antidiscrimination laws concerning employment:

- *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 207 L. Ed. 2d 870 (2020). Agnes Morrissey-Berru taught at a Roman Catholic school and sued for age discrimination when she was terminated and replaced with a younger teacher.
- *St. James Sch. v. Biel*, No. 19-349, 140 S. Ct. 680, 205 L. Ed. 2d 448 (2019). Kristen Biel taught at a Roman Catholic school and sued for disability discrimination when she was terminated after seeking a leave of absence to obtain treatment for breast cancer.

The Catholic schools defended against the claims by invoking the "ministerial exception" to employment-discrimination claims. The Supreme Court has held that religious institutions have wider latitude to make employment decisions because they have independence with respect to its faith and doctrines, and thus requires independent authority to select, supervise, and, if necessary, remove a minister without interference by secular authorities, like nonreligious institutions. Based on this, such organizations can be shielded from employment-discrimination claims brought by leaders of the organizations (e.g., ministers) because the leaders hold prominent positions and convey the institution's faith and doctrine.

The Supreme Court's decision in these two cases expanded the ministerial exception beyond ministers, holding that the teachers' claims were barred by the ministerial exception because the teachers "performed vital religious duties, such as educating their students in the Catholic faith and guiding their students to live their lives in accordance with that faith."

That same day, on July 8, 2020, the Supreme Court also resolved two consolidated cases concerning religious exemptions to the Affordable Care Act (ACA):

- *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-431, 140 S. Ct. 2367, 207 L. Ed. 2d 819 (2020)
- *Trump v. Pennsylvania*, No. 19-454, 140 S. Ct. 918, 205 L. Ed. 2d 519 (2020)

In general, the ACA requires employers to provide health care plans to employees that include coverage for no-cost contraceptives, although there are some narrow exceptions for religious employers. Certain agencies tasked with establishing rules to implement the ACA promulgated broad exemptions to the ACA's mandate, allowing employers with religious or moral objections to avoid providing such coverage. The Supreme Court found that the agencies had authority to promulgate the rules and upheld the religious and moral exemptions.

**KEY TAKEAWAYS**

These decisions reinforce the strength of religious exemptions where they are recognized. This means that employers who qualify for this exemption will continue to have significant latitude to avoid providing health care plans that offer the ACA's mandated no-cost contraceptive coverage. Employers seeking to utilize the ministerial exception should ensure that its mission-focused work is well documented and consistently professed, and that job descriptions of key employees demonstrate that their work is engaged in performing duties vital to the employer's religious mission.

## THE DEPARTMENT OF LABOR

**The new minimum salary level finally received "permit approval" to begin January 1, 2020**

The minimum salary under the federal Fair Labor Standards Act (FLSA) was raised from $455 per week, where it has been since 2004, to $684 per week. 29 C.F.R. § 541.600. That amount equates to an annual salary of $35,568. Salaried employees making this new minimum amount must still, of course, satisfy the duties test to be assured exemption from overtime requirements.

The new rule also now allows up to 10 percent of that amount to be satisfied by nondiscretionary bonuses and incentive payment (including commissions).

In addition, the minimum salary required to meet the abbreviated exemption test for highly compensated employees was raised from $100,000 a year to $107,432 per year, which must include payment of the minimum weekly salary of $684 on a salary or fee basis.

### KEY TAKEAWAYS

Make sure that all exempt employees are paid no less than the current minimum salary, or work with counsel for guidance on how to reclassify them

**A reframing of the joint-employer test under the FLSA that may or may not withstand the elements**

The U.S. Department of Labor (DOL) issued long-sought clarification on two common questions related to "joint employer" status under the FLSA—a test is used for determining when two entities may both be deemed to be "employer" for purposes of owing obligations to employees under the FLSA. The new rule was effective March 16, 2020. See 29 C.F.R. 791.1 to 791.3.

The rule reframed factors that would be used in what's referred to as "vertical" employment relationship, which is where one entity employs an individual, but another business benefits from that work. Common examples include staffing agency placements, employee leasing arrangements, and labor contractors. Now, under this new rule, the DOL will now use a four-factor test based on whether the benefiting entity will be considered a joint employer of the subject employee:

1. hires or fires the employee.
2. supervises and controls the employee's work schedule or conditions of employment to a substantial degree.
3. determines the employee's rate and method of payment.
4. maintains the employee's employment records (though this factor alone is not sufficient to constitute joint employment).

While they may be primary, these four factors are not necessarily conclusive factors, and the rule indicates that other factors may be considered where they provide additional evidence of the existence of "control" over the employee, or lack thereof. It also clarifies that to the extent control is relevant, it must be actually exercised, not just a possibility, and that such control must be a "substantial degree" in order to tip the scales.

In addition to added clarity on what is relevant to the determination, the new rules go further and outline factors that are, expressly, NOT relevant. That includes the "economic dependence" the employee has on the third party. For additional information about this standard, the DOL has published a Fact Sheet, as well as an FAQ, on the topic.

In September, this rule was successfully challenged (in part) in an action brought in New York federal court, by 18 states, who opposed what they considered to be impermissible narrowing of the criteria.[1] Just a month ago, a coalition of industry groups, including the International Franchise Association, Chamber of Commerce of the United States, HR Policy Federation, US Retail Federation, Associated Builders and Contractors, and the American Hotel and Lodging Association appealed that decision, so it currently remains to be seen whether the rule will ultimately be upheld.[2]

### KEY TAKEAWAYS

Even if the rule stands, joint-employment issues remain particularly challenging due to the different tests that can apply, depending on which jurisdictions(s) and which agency(ies) are involved, as well as the inherently fact-specific nature of the typical inquiries. We recommend that clients work closely with counsel to ensure that these issues are appropriately addressed before proceeding with employee leasing arrangements, temporary staffing, and other scenarios that can present joint-employment concerns.

[1] *New York, et al. v. Scalia, et al.*, No. 20-cv-1689, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020).

[2] *New York, et al. v. Scalia, et al.*, No. 20-cv-1689, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020), appeal docketed, No. 20-3806 (2d. Cir. Nov. 6, 2020).

**Measure twice, cut once: DOL offers guidance for time tracking related to remote workers**

On August 24, 2020, the DOL issued Field Assistance Bulletin (FAB) 2020-5, offering timely reminders and additional guidance related to an employer's recordkeeping obligation under the FLSA in the telework/remote-work context. Recall that under the FLSA, the employer bears the burden to ensure that records are kept reflecting all hours worked and is obligated to pay for all work performed, even if it was not approved or authorized. Given the constraints of remote work on employers' ability to observe and monitor employees' activities, the DOL suggests that employers can satisfy their obligations in this regard by adopting reasonable procedures for reporting work, including unscheduled work. It also suggests, at least as to its own enforcement efforts, it will not fault the employer for failing to pay for unauthorized work if it has reasonable procedures available for reporting, has properly trained employees on the procedure, and employees do not avail themselves of it.

While this should not be new information, FAB 2020 5 also included timely reminders to employers that these and other employer policies, or associated procedures, should not prevent or discourage employees from reporting time worked. And, again, this should not be new—employers cannot require an employee to waive their rights to payment for any and all time worked, even if it was not authorized.

**KEY TAKEAWAYS**

Although FAB 2020-5 directly responds to compensable-time issues associated with COVID-19-related remote-work arrangements, the guidance applies to other remote and telework scenarios. Employers with remote workers will want to update their payroll-reporting policies to ensure that it appropriately addresses requirements for reporting any unscheduled work, and that employees are properly trained on such requirements.

## U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS)

**The Form I-9 gets refinished**

On January 31, 2020, the USCIS announced a new version of Form I-9, Employment Eligibility Verification, with minor changes to the form and instructions. Employers were given a 60-day grace period to get into compliance, but must use the new form (labeled "Rev. 10/21/2019"), or can face penalties for use of outdated forms. The Handbook for Employers M-274 was also updated in April 2020.[3]

**KEY TAKEAWAYS**

Make sure that all exempt employees are paid no less than the current minimum salary, or work with counsel for guidance on how to reclassify them

## THE WHITE HOUSE

**Race- and sex-stereotyping training for federal government agencies and contractors is "red tagged," requiring significant redesigns to current practices**

By Executive Order 13950, issued on September 22, 2020, the White House mandated that federal agencies, uniformed services, and recipients of federal funds shall not "promote race or sex stereotyping or scapegoating" or use grant funds for these purposes. It also prohibits federal contractors from "inculcat[ing] such views in their employees."

The Order defines race or sex scapegoating as "assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others."

Examples of impermissible concepts, according to the FAQ issued by the Office of Federal Contract Compliance Program (OFCCP), include:

- That one race or sex is inherently superior to another race or sex;
- That an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- That an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- That an individual's moral character is necessarily determined by his or her race or sex;

[3] *Available at* Handbook for Employers M-274 | USCIS.

- That an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; or
- That an individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.[4]

In addition, specific language related to the Order, and supplementing prior EEO language mandated by Executive Order 11246, is to now be incorporated into federal government contracts addressing these requirements.

So what does this really mean? In short, it means that training that deals with concepts like unconscious or implicit bias is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously. According to the OFCCP, it does not prohibit training that "is designed to inform workers, or foster discussion, about pre-conceptions, opinions, or stereotypes that people—regardless of their race or sex—may have regarding people who are different, which could influence a worker's conduct or speech and be perceived by others as offensive."

The OFCCP, as mandated by Executive Order 13950, has established a hotline for any individual or group to file a complaint about potential violations of the Order. Once the Order becomes effective (which was to occur on November 21, 2020), then all available remedies for enforcement are available, including cancelation, termination, or suspension of exiting federal contracts, as well as debarment from future federal contract opportunities.

**KEY TAKEAWAYS**

While it remains to be seen if the new administration will roll these mandates back as has been predicted, federal government contractors and agencies need to make sure that training in the interim complies with the Order or risk enforcement action.

[4] Executive Order 13950 - Combating Race and Sex Stereotyping | U.S. Department of Labor (dol.gov).