

EEOC Poised to Focus Enforcement Efforts on Gender-Equality Issues

By Nate Bailey and Jillian Barron

The Equal Employment Opportunity Commission (“EEOC”) recently issued several new fact sheets addressing bathroom access for transgender employees, equal pay, and pregnancy discrimination. The EEOC often issues fact sheets when it decides to focus its enforcement efforts on a particular issue. So these fact sheets indicate that the EEOC is likely to focus enforcement activity on gender-equality issues going forward.

Transgender Bathroom Access. The issue of transgender bathroom access was thrust into the spotlight recently when North Carolina passed a state law prohibiting transgender people from using public restrooms that correspond to their gender identities. The debate intensified as other local governments sought to follow North Carolina’s lead, while a number of individuals and entities announced they would boycott business with that state. In response, the EEOC issued a fact sheet explaining that it believes Title VII of the Civil Rights Act requires employers to allow transgender employees access to common restrooms corresponding to their gender identity, not birth gender. The EEOC’s fact sheet is meant to discourage discriminatory local laws by making clear that following those laws (e.g., North Carolina’s) is not a defense under Title VII.

The fact sheet defines *transgender* as “people whose gender identity and/or expression is different from the sex assigned to them at birth” and emphasizes that a person need not undergo any medical procedure to receive protection under Title VII. This reflects the reality that many transgender people choose not to undergo medical procedures such as gender-reassignment surgery. The EEOC makes clear that – under its interpretation of Title VII - no such surgery is needed before employers must respect a transgender employee’s gender identity.

In what may surprise some employers, the fact sheet clarifies that providing transgender employees a single-occupant restroom will not suffice. Where employers provide common restrooms, transgender employees *must* be allowed to use them. Rather, single-occupant restrooms, where available, can be offered to employees who are uncomfortable sharing a common restroom with transgender coworkers. The EEOC was careful to point out that Title VII protections address workplace conduct, not employee beliefs. Thus, coworkers who are uncomfortable sharing a bathroom with transgender individuals need not change their beliefs. Employers implementing these changes, however, should be vigilant to ward off any potential harassment of transgender employees as a result of other employees’ perception that their own rights and beliefs are being violated.

Equal Pay and Compensation Discrimination. In our March note, we mentioned the EEOC’s proposed change to the annual EEO-1 form, which is required for private employers with 100 or more employees. That change, which is scheduled to take effect in September 2017, will require employers to begin disclosing pay data by job category, race, ethnicity, and sex. The EEOC plans to use this data to try to enforce the Equal Pay Act (“EPA”), requiring that men and women be given equal pay for work that is substantially equal.

To help employers assess their own pay practices, specifically whether job classifications perform work that is substantially equal, the EEOC issued a fact sheet explaining that it will evaluate similar jobs based on (1) the experience/skill necessary to perform the job; (2) the physical and mental effort needed to perform the job; (3) the degree of accountability required of the job; (4) the physical conditions and hazards associated with the job; and (5) whether similar jobs are with the same “establishment.” These factors all relate to the job, not the person holding the job. Thus, employees should generally be paid in line with those performing substantially equal job duties, not necessarily those who have the same qualifications. Further, the EPA requires only that substantially

equal jobs “in the same establishment” receive equal pay, and “establishment” refers to the physical location of the job, not an entire employer’s operations. Thus, similar jobs at different locations may be paid differently in certain circumstances.

Pregnancy Discrimination. The third recent fact sheet addresses another gender-equality issue – pregnancy discrimination. It provides an overview of the EEOC’s interpretation of the Pregnancy Discrimination Act (“PDA”). In short, employers may not discriminate in any way based on pregnancy. While employers in Washington State have long been prohibited from discriminating based on pregnancy, the EEOC’s fact sheet can assist employers in ensuring they comply with both state and federal laws.

Specifically, the fact sheet provides guidance on issues such as leave, disability, and benefits. For instance, employers may not single out pregnancy-related conditions for special leave procedures that are not required for employees with a similar ability or inability to work. Thus, employers may not require pregnant employees to get medical clearance where other similarly abled or disabled employees are not required to do so. Further, employers may not prevent pregnant employees from working as long as they are able to perform their jobs, and pregnant employees must have the same access to light-duty assignments and disability leave as other employees with non-pregnancy related temporary disabilities.

Employer Takeaways. These recent fact sheets show that the EEOC is preparing to ramp up its enforcement of issues related to transgender rights, equal pay, and pregnancy discrimination under Title VII of the Civil Rights Act. Smaller employers – who may not be bound by Title VII – should also take note because state and local laws are likely to follow the EEOC’s lead, especially if federal courts defer to the EEOC’s interpretations. Washington courts, for instance, look to federal judicial opinions interpreting Title VII for persuasive authority. Thus, all employers should use this opportunity to reevaluate their written policies and their unwritten practices. For instance, employers (especially those with 100 or more employees) should begin scrutinizing any pay differences between men and women in similar jobs to make sure they are justifiable. And employers concerned about transgender access to common restrooms might proactively provide diversity training to employees to ease the transition.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations. For more information on this subject, please call Sebris Busto James at (425) 454-4233. © 2016 SEBRIS BUSTO JAMES

SEBRIS BUSTO JAMES
14205 SE 36th Street, Suite 325
Bellevue, WA 98006
