

**EMPLOYMENT LAW AHEAD:  
FIVE AREAS OF FOCUS FOR 2017**

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**Overview**

1. The New Massachusetts Pay Equity Law
2. The Fair Labor Standards Act: 2017 Update
3. Marijuana Legalization and Employment Issues
4. Union and Labor Relations Update
5. Equal Employment Opportunity Commission's Strategic Enforcement Plan for 2017-2021 and Takeaways for Employment Practices on Your Campus

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**The New Massachusetts  
Pay Equity Law:  
Effective July 1, 2018**

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## The New Massachusetts Pay Equity Law

- **August 1, 2016:** Massachusetts New Pay Equity Law, "Discrimination on basis of gender in payment of wages prohibited; enforcement; unlawful practices; good faith self-evaluation of payment practices."  
<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section105A>
- **Amends:** Current Massachusetts Equal Pay Law, "Discrimination in payment of wages on basis of sex of employee prohibited; damages; actions in general; assignment of claim; limitations."
- **July 1, 2018:** Effective Date
- **Headlines Set the Stage:**
  - ❖ *Massachusetts Legislature Passes Sweeping Equal Pay Amendments*, The National Law Journal, July 29, 2016

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## The New Law: Effective July 1, 2018

It is unlawful for an employer to discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work.

- ❑ **Except:** Variations in wages are permissible "if based upon: (i) a system that rewards seniority with the employer; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the geographic location in which a job is performed; (v) education, training or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job."
- **Wages:** All forms of remuneration for employment.
- **Comparable work:** Work that is "substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions," but "job title or job description alone shall not determine comparability."
- **Working conditions:** Includes "environmental and other similar circumstances customarily taken into consideration in setting salary or wages," such as "reasonable shift differentials, and the physical surroundings and hazards encountered by employees performing a job."

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## Additional Prohibitions under the New Law

It is unlawful for an employer to:

- Seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer, or to require that a prospective employee's prior wage or salary history meet certain criteria.
  - **But:** (i) if a prospective employee voluntarily discloses that information, a prospective employer may confirm prior wages or salary or permit a prospective employee to confirm prior wages or salary; and (ii) a prospective employer may seek or confirm a prospective employee's wage or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee.
- Require, as a condition of employment, that an employee not ask about, discuss, or disclose information about his/her own wages, or another employee's wages.
- Discharge or retaliate against any employee because the employee:
  - Opposes any act made unlawful by this law;
  - Intends to, or does, make a complaint under this law; or intends to, or does, participate in any way in an investigation or proceeding under this law; or
  - Disclosed his/her wages or discussed or asked about the wages of another employee.

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## Actions and Penalties for Violation of New Law

- Employers are liable for the affected employee's:
  - unpaid wages and an additional equal amount of liquidated damages.
  - reasonable attorneys' fees and costs of action incurred by the affected employee.
  - "any damages incurred" (prohibitions against inquiry about salary).
- Actions can be brought within 3 years after the date of the alleged violation.
- A violation occurs when:
  - a discriminatory compensation decision or other practice is adopted,
  - an employee becomes subject to a discriminatory compensation decision/practice, or
  - an employee is affected by application of a discriminatory compensation decision/practice, including each time wages are paid, resulting in whole or in part from such decision/practice.

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## Actions and Penalties for Violation of New Law

- Actions can be brought by:
  - One or more employees for/on their own behalf, or on behalf of other employees similarly situated.
  - The Attorney General, on behalf of one or more employees.
  - One or more applicants for employment (prohibitions against inquires about salary).
- Some related notes:
  - There is no requirement that an employee file first with the Massachusetts Commission Against Discrimination (MCAD).
  - Employees can also bring sex discrimination claims for pay disparity under Massachusetts General Law, Chapter 151B, section 4.
  - A similar federal law address pay disparity based on sex. The Massachusetts law is more burdensome for employers.
  - The multiple laws do not mean multiple/duplicate recovery.

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## Availability of Affirmative Defense

An employer against whom an action is brought alleging a violation of pay disparity under this law, and who, within the 3 years before the action commences,

- has completed a **self-evaluation of its pay practices** in good faith, and
- can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work (if any), in accordance with that evaluation,

shall have an **Affirmative Defense** to liability under this law (and to a pay discrimination claim under Chapter 151B; section 4).

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## Availability of Affirmative Defense

### The Affirmative Defense Based on Self Evaluation of Pay Practices

- The self-evaluation may be of "the employer's own design" but must be reasonable in detail and scope, considering the size of the employer. Also, it may be "consistent with standard templates or forms issued by the Attorney General."
- An employer who (a) completes a self-evaluation in good faith within 3 years before the action begins, and can demonstrate that reasonable progress has been made towards eliminating gender based wage differentials for comparable work per that evaluation, *but* (b) cannot demonstrate that the evaluation was reasonable in detail and scope, *shall not be entitled to an affirmative defense, but shall not be liable for liquidated damages.*
- Evidence of a self-evaluation or remedial steps taken per this law shall not be admissible in a proceeding as evidence of a violation of this law (or Chapter 151B, section 4) that: (a) occurred before the date the self-evaluation was completed, or (b) occurred either within 6 months thereafter, or within 2 years thereafter if the employer can demonstrate that it has developed and begun implementing in good faith a plan to address any wage differentials based on gender for comparable work.
- An employer who has not completed a self-evaluation shall not be subject to any negative or adverse inference as a result of not having completed a self-evaluation.

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## A Few Other Points

- No employer shall contract with an employee to avoid complying with this law, or by any other means exempt itself from this law.
- An employee's previous wage or salary history shall not be a defense to an action.
- An employer who is paying a wage differential that violates this law may not reduce the wages of any employee solely to comply with this law.
- An employer "may prohibit a human resources employee, a supervisor, or any other employee whose job responsibilities require or allow access to other employees' compensation information, from disclosing such information without prior written consent from the employee whose information is sought or requested, unless the compensation information is a public record ...."
- Nothing in this law obligates an employer to disclose an employee's wages to another employee or a third party.

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## Previews of Coming Attractions

### The New Law Also States:

- DOL is to issue regulations.
- There shall be a special commission to investigate, analyze and study the factors, causes and impact of pay disparity based on **race, color, religious creed, national origin, gender identity, sexual orientation, genetic information, ancestry, disability, and military status.**
- The special commission shall consist of: the secretary of labor and workforce development (or designee); the attorney general (or a designee); 2 members appointed by the speaker of the house of representatives; 1 member appointed by the house minority leader; 2 members appointed by the senate president, and 1 member appointed by the senate minority leader.
- The special commission is to submit its initial findings to the clerks of the house of representatives and senate, the chairs of the house and senate committees on ways and means and the chairs of the joint committee on labor and workforce development not later than **January 1, 2019.**

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**Massachusetts Employers Should be Proactive Now and Prepare for the July 1, 2018 Effective Date of the New Law**

- Review hiring, compensation and confidentiality policies and procedures.
- Review application and other forms that call for wage or salary history.
- Train interviewers and search committees.
- Be clear about how specified education, training, or experiences are reasonably related to a specific job.
- Review job descriptions and update to update to reflect actual duties. (Job titles alone do not control.)
- Be able to articulate any pay merit systems with objectivity and clarity.
- Examine seniority systems. Does time spent on leave due to a pregnancy-related condition or protected parental, family and medical leave impact seniority?
- Do job performance objectives and evaluations address tangible goals around quantity or quality of production, sales, revenues, or other defined out-put or work product?
- Address and implement the self-evaluation review described in the New Law in an informed and comprehensive way.

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**The Fair Labor Standards Act: 2017 Update**

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**Then: New 2016 Regulations for December 1, 2016**

	EXECUTIVE	ADMINISTRATIVE	PROFESSIONAL
Salary Basis Test	• Employee must be paid on a salary basis	• Employee must be paid on a salary or fee basis	• Employee must be paid on a salary or fee basis
Standard Salary Level Test to Have Been Effective December 1, 2016 (Current \$455 weekly)	• <b>\$913 per week</b> (\$47,476 per year for a full year worker)	• <b>\$913 per week</b> (\$47,476 per year for a full year worker) • Special salary level for certain academic administrative personnel	• <b>\$913 per week</b> (\$47,476 per year for a full year worker) • Salary level test does not apply to teachers (doctors, lawyers)
Standard Duties Test	• The employee's "primary duty" must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full-time employees as well)  • Some Additional requirements provided in 29 CFR 541 Subpart B	• The employee's "primary duty" must include the exercise of discretion and independent judgment with respect to matters of significance  • Some Additional requirements provided in 29 CFR 541 Subpart C	• The employee's "primary duty" must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor  • Some additional requirements provided in 29 CFR 541 Subpart D

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## But What Happened on November 22, 2016?

- On November 22, 2016 in *State of Nevada v. U.S. Department of Labor*, a federal District Court in Texas preliminarily enjoined the DOL from enforcing the overtime New Regulations.
  - District Court looked to the plain meaning of "bona fide executive, administrative or professional capacity" as set forth in the FLSA when enacted in 1938 and concluded those terms referred to employees who performed actual executive, administrative, and professional duties – *without regard to their salary level*.
  - Congress intended the executive, administrative or professional exemptions to depend on employee's duties, not salary.
  - Congress gave DOL leeway to "define and delimit" the types of duties that would qualify as executive, administrative or professional. Nothing in the statutory language of the FLSA gives the DOL the authority to "define and delimit" a minimum salary level for the exemption classifications.
- District Court found that plaintiffs demonstrated a substantial likelihood of success on the merits and the prospect of irreparable harm, and enjoined the New Regulations from going into effect.

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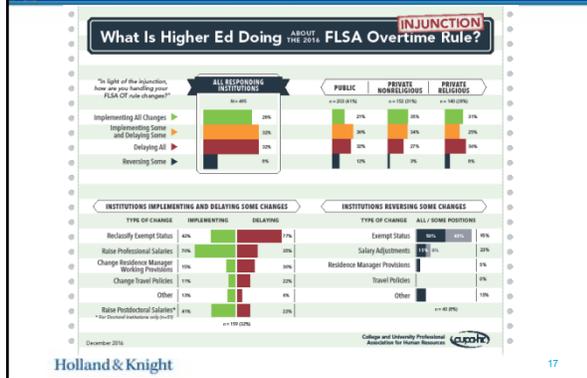
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## Response to the Injunction on Campus



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## Response to the Injunction on Campus

- Some common changes planned on campuses before November 22, 2016 to be ready for December 1, 2016:
  - Raising postdoctoral fellow salaries to the \$47,476 threshold.
  - Raising salaries of some professional positions to the \$47,476 threshold.
  - Reclassifying some positions from exempt to non-exempt in light of the \$47,476 threshold.
  - Changing working hours, travel policies, or other terms for certain positions.
- What happened after November 22, 2016?
  - Implementation of planned changes.
  - Putting changes on hold or delay.
  - Reversal of changes already implemented.
- All was not lost:
  - Anticipation of New Regulations led to internal reviews showing need for correcting misclassifications regardless of the New Regulations.
  - Employer's internal review of job descriptions, actual duties, and pay structures needs to be an on-going process.

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**Massachusetts Marijuana Laws: Employment Provisions**

- Chapter 94G, Section 2(e) [Recreational Use Law]:  
This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.
- Chapter 369, Section 7(D) [Medical Marijuana Law]:  
Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking medical marijuana in any public place.

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**Marijuana on Campus: Federal Laws**

- Under federal Controlled Substances Act, marijuana is still a controlled substance
- Under federal Drug-Free Schools and Communities Act, colleges that receive federal funding (student financial aid, grants) must comply with federal regulations that prohibit illegal use of drugs and alcohol on campus (e.g., notify employees that college prohibits unlawful possession, use, distribution of drugs; description of sanctions, health risks, and treatment programs; biennial review)
- Under federal Drug Free Workplace Act, colleges with federal contracts and grants must meet certain certification, notice, and policy requirements regarding drug free workplace (e.g., employees must notify college within five days of criminal drug statute conviction for violation occurring in the workplace)
- Under federal Omnibus Transportation Employee Testing Act, drivers with commercial driver license are subject to employer drug testing

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**Reasonable Accommodation and Marijuana**

- As with all reasonable accommodation requests, manage any request regarding marijuana use carefully
- As a general matter, courts analyzing marijuana use under the Americans with Disabilities Act ("ADA") have concluded that an employer is not required to accommodate marijuana use
  - ADA states: "[A] qualified individual with a disability shall not include any employee or applicant who is currently engaging in the *illegal use of drugs*, when the covered entity acts on the basis of such use."
  - ADA also provides that employer may require that employees conform with Drug Free Workplace Act and rules established by federal agencies concerning drugs in the workplace
- Be aware of related disability issues:
  - Engage in the interactive process
  - Does employee have a disability that must be accommodated in some other way?
  - Obligation not to discriminate against employee on basis of that disability
  - Law is evolving – check with human resources and counsel

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## Marijuana on Campus

- Colleges may continue to maintain drug free workplaces consistent with Massachusetts and Federal law, including lawful drug testing:
  - Safety sensitive positions (campus security)
  - Building and grounds (working with machinery, driving)
  - Commercial driver's license holders (as required by DOT regulations)
  - Various screenings (e.g., pre-employment, random, reasonable suspicion, post-accident)
- Practical considerations:
  - College's policies concerning drug and alcohol possession and use
  - Communicate with faculty and staff about drug issues and expectations
  - Monitor state law developments concerning marijuana, employee drug testing
  - Medical marijuana use raises *potential* ADA accommodation and disability discrimination issues

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## Union and Labor Relations Update

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## Union Issues on Campus

- Colleges and universities continue to face unionization efforts
  - Faculty
  - Adjuncts
  - Graduate and Undergraduate Teaching Assistants
    - National Labor Relations Board (NLRB) decision in *Columbia University*
  - Campus Safety
  - Maintenance Workers
  - Dining Services
- NLRB's "quickie election" rule – providing an employer less time to communicate with employees about why they should vote no to union – potentially makes unionization efforts easier
- Colleges should assess whether they are vulnerable to potential unionization efforts and be prepared to act quickly in response to union organizing

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### Are Faculty Employees or Management Under NLRA?

- > The NLRA confers the right of employees, not managers, to unionize
- > "Management" employees are those individuals who "formulate and effectuate management policies by expressing or making operative decisions of their employer"
- > Are faculty employees or management?
  - Supreme Court addressed issue in 1980 in *Yeshiva University*, where Court concluded that faculty were management
  - Court concluded that the faculty "substantially and pervasively" operated the university by exercising extensive control over decision making and playing a "crucial role . . . in determining . . . central policies of the institution"
  - For more than 30 years, Board decisions applying *Yeshiva* further developed the law on this issue

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### Are Faculty Employees or Management Under NLRA?

- > In *Pacific Lutheran University* (2014), Board refined the standard set forth in *Yeshiva*.
- > The Board identifies factors to answer whether faculty "actually or effectively exercise control over decision making pertaining to central policies of the university such that they are aligned with management."
- > Board concludes that contingent (non-tenure eligible) faculty members who teach a minimum of three credits per term at Pacific Lutheran are employees, not management -- they have a right to unionize under the Act.

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### Are Faculty Employees or Management Under NLRA?

- > The Board in *Pacific Lutheran University* identified "primary" and "secondary" areas of university decision making
- > Primary areas of university decision making [more important]
  - Academic programs (curricular offerings, requirements to complete)
  - Enrollment management (size, scope, and makeup of student body)
  - Finances (financial decisions – both income and expenditure)
- > Secondary areas of university decision making [less important]
  - Academic policy (teaching methods, grading policy, syllabus policy)
  - Personnel policy and decisions (hiring, tenure, dismissal)
- > College must show that faculty *actually* exercise control or make effective recommendations in these areas identified above
  - College must show "actual – rather than mere paper – authority"
  - Recommendation "must *almost always* be followed by the administration"
  - Structure of university decision-making and where faculty fit in that structure

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### Columbia Univ. Decision – Are Graduate Students Employees?

- *Columbia University* NLRB decision (August 23, 2016) – Board rules 3-1 that graduate and undergraduate teaching assistants are employees under NLRA.
- Board applies common law of agency test: whether employer has a right to control the individual's work and whether the work is performed in exchange for consideration.
- Board concludes that "there is no compelling reason – in theory or in practice – to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education."
- The Board explained that "affording student assistants the right to engage in collective bargaining will further policies of the Act, without engendering any cognizable, countervailing harm to private higher education."

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### Columbia Univ. Decision – Are Graduate Students Employees?

- *Columbia University* decision reverses *Brown University* (2004), where Board decided graduate students were not employees because they "are primarily students and have a primarily educational, not economic, relationship with their university."
  - *Brown University* had reversed *New York University* (2000), where Board concluded graduate students were employees.
- Board Member Miscimarra dissented, highlighting numerous practical problems with ruling, including potential for strikes.

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### Assessing Risk of Unionization on Campus

- Before union organizing begins, assess the workplace:
  - Provide channels for employees to voice concerns
    - Common concerns include pay, benefits, assignments, eligibility for awards/recognition, participation in governance
  - Listen to and address concerns
  - Assess compensation practices
  - Understand current practices across departments (particularly for adjuncts)
  - Review policies and procedures
  - Professional training opportunities
  - Eligibility for awards and other professional recognition
  - Non-economic issues such as "respect" and "recognition"
  - Train and educate administration and managers about rights and responsibilities under the NLRA
  - Avoid legal pitfalls and missteps
  - Develop effective messages in response to potential organizing efforts

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**NLRA and Workplace Policies**

- Section 7 of NLRA: "employees have a right to self-organization, to form, join or assist labor organizations of their own choosing, and to engaged in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection*"
- Maintaining a workplace policy may violate the NLRA if it has a "chilling effect" on Section 7 activity
- Analysis typically comes down to: Would employee "reasonably construe" the policy to prohibit Section 7 activity?"
- NLRB continues to take expansive view of "concerted activity" and strike down workplace policies
  - Workplace conduct policies
  - Confidential information policies
  - Communications with the media
  - At-will disclaimer
  - E-mail use policies
  - Social media policies

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**NLRA and Workplace Policies**

- Practical steps
  - Review handbooks and policies with critical eye concerning NLRA and recent Board decisions
  - Avoid broad language in policies that could be reasonably construed to restrict an employee's Section 7 rights
  - Avoid ambiguity
  - Ask the question: Would an employee *reasonably interpret* a particular policy to restrict right to engage in protected concerted activities, such as communicating about wages or working conditions?

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**Equal Employment Opportunity Commission's Strategic Enforcement Plan for 2017-2021**  
and  
**Takeaways for Employment Practices on Your Campus**

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**EEOC Strategic Enforcement Plan for 2017 – 2021**

1. Eliminating Barriers in Recruitment and Hiring
2. Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination
3. Addressing Selected Emerging and Developing Issues
4. Ensuring Equal Pay Protections for All Workers
5. Preserving Access to the Legal System
6. Preventing Systemic Harassment

<https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>

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**EEOC Strategic Enforcement Plan for 2017 – 2021**

Taking a closer look at the EEOC Strategic Enforcement Plan for 2017-2021 and Identifying Some Takeaways for Employment Practices on Your Campus

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**EEOC Strategic Enforcement Plan for 2017 – 2021**

**1. Eliminating Barriers in Recruitment and Hiring.**

- EEOC will focus on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities.
  - **Examples:** Exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, job segregation, restrictive application processes (including online systems that are inaccessible to individuals with disabilities), and screening tools that disproportionately impact workers based on their protected status (e.g., pre-employment tests, background checks impacting African Americans and Latinos, date-of-birth inquiries impacting older workers, and medical questionnaires impacting individuals with disabilities).

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**EEOC Strategic Enforcement Plan for 2017 – 2021**

**2. Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination**

- EEOC will focus on job segregation, harassment, trafficking, pay, retaliation and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities.
  - **Reason for this focus:** These workers are often unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. Their work status, language, financial circumstances, or lack of work experience make them particularly vulnerable to discriminatory practices or policies
  - **Example:** Discrimination against members of Native American tribes might be a focus for some offices as part of this priority.

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**EEOC Strategic Enforcement Plan for 2017 – 2021**

**3. Addressing Selected Emerging and Developing Issues**

EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. These currently fall within this category:

- Qualification standards and inflexible leave policies that discriminate against **individuals with disabilities**.
- Accommodating **pregnancy-related limitations** under the Americans with Disabilities Act Amendments Act and the Pregnancy Discrimination Act.
- Protecting **lesbians, gay men, bisexuals and transgender (LGBT) persons** from discrimination based on sex.
- Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including **temporary workers, staffing agencies, independent contractor relationships**, and the on-demand economy; and
- Addressing discriminatory practices against those who are **Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups**, arising from backlash against them from tragic events in the United States and abroad.

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**EEOC Strategic Enforcement Plan for 2017 – 2021**

**4. Ensuring Equal Pay Protections for All Workers**

- EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII.
- EEOC will also focus on compensation systems and practices that discriminate based on race, ethnicity, age, and for individuals with disabilities, and other protected groups.

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## EEOC Strategic Enforcement Plan for 2017 – 2021

### 5. Preserving Access to the Legal System

- EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts, typically on systematic basis
  - Examples: (1) overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims); (2) employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and (3) significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights.

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## EEOC Strategic Enforcement Plan for 2017 – 2021

### 6. Preventing Systemic Harassment

- EEOC: Harassment continues to be one of the most frequent complaints raised in the workplace.
  - Over 30 percent of the charges filed with EEOC allege harassment. Most frequent bases alleged are sex, race, disability, age, national origin and religion.
  - EEOC Proposed Enforcement Guidance on Harassment

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## Related EEOC Guidance

- EEOC Enforcement Guidance on Retaliation and Related Issues  
<https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>
- EEOC Enforcement Guidance on "National Origin Discrimination"  
<https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm>
- EEOC Guidance on Mental Health: Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights  
[https://www.eeoc.gov/eeoc/publications/mental\\_health.cfm](https://www.eeoc.gov/eeoc/publications/mental_health.cfm)
- EEOC Guidance on Employer-Provided Leave and the Americans with Disabilities Act  
<https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>
- What You Should Know About EEOC and the Enforcement Protections for LGBT Workers  
[https://www.eeoc.gov/eeoc/newsroom/ysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/ysk/enforcement_protections_lgbt_workers.cfm)
- EEOC Seeks Public Input (until February 9, 2017) on Proposed Enforcement Guidance on Harassment  
<https://www1.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm>

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## Some Takeaways for Employment Practices on Your Campus

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### Takeaways for Employers: Employees with Disabilities

**Careful Focus on Employer-Provided Leave and the Americans with Disabilities Act**

**EEOC Goal:** Address employer qualification standards and inflexible leave and return to work policies that discriminate against individuals with disabilities.

- Employees with disabilities must be provided with access to leave on the same basis as all other similarly-situated employees.
- Leave can be a reasonable accommodation.
- An employer's "maximum" leave policy cannot be imposed in lieu of engaging in the interactive process to determine what length of leave time is reasonable.
- The fact that an employee's FMLA time is exhausted does not preclude employer's need to assess (interactive process) if further leave is appropriate as a reasonable accommodation.
- Employer cannot require employee with a disability to have no medical restrictions or be "100%" recovered in order to return from leave. Employee may return to work with doctor recommended restrictions/conditions if they enable employee to perform the essential functions of the job and do not impose undue hardship, as part of reasonable accommodation process.
- **Interactive process remains critical.** Employer should engage in interactive process with the employee. Process is to enable the employer to obtain relevant information to determine the feasibility of providing the requested leave or requested restrictions/conditions upon return from leave as a reasonable accommodation so employee can perform the essential functions of the job, without causing an undue hardship. Undue hardship requires careful analysis and can present challenges to the employer.

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### Takeaways for Employers: Sexual Orientation and Transgender Issues in Employment

- Title VII of the Civil Rights Act of 1964: Prohibits discrimination "because of" an individual's sex; does not reference gender identity or sexual orientation.
- U.S. Supreme Court has interpreted Title VII protections based on sex to include sexual stereotyping and same-sex harassment.
- EEOC Enforcement Priority: Protecting lesbians, gay men, bisexuals, and transgender (LGBT) people from discrimination based on sex.
- States: 22 states have passed laws guaranteeing protections based on sexual orientation, and 19 states have passed laws guaranteeing protections based on gender identity.
- Recent Related News: The Trump administration withdrew Obama-era guidance for transgender students in public schools that let them use bathrooms and facilities corresponding with their gender identity. Looks to state-level decisions. A US Supreme Court case regarding a transgender student's access to bathrooms in place of public accommodation is now on hold.
- **Massachusetts employment laws are clear:** Massachusetts employers cannot discriminate based on applicant's or employee's sex, sexual orientation, or gender identity. This recent related news does not change that.

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## Takeaways for Employers: Sexual Orientation and Transgender Issues in Employment

- Stay compliant with prohibitions on discrimination.
- Learn from students and embrace cultural awareness into employment practices.
- Understand and use proper terminology.
- Address restroom access issues.
- Use preferred name (and reflect in personnel and administrative records, external personnel directories, e-mail address, and business cards)
- Use preferred pronoun usage.
- Examine current practices and policies to ensure they do not create unnecessary issues based on sexual orientation, gender identity and transgender status (e.g., dress codes, bathroom usage).
- Incorporate education about gender identity and workplace protocols for gender transitions to address responsibilities and expectations of transitioning employees, their supervisors, colleagues, and other staff.
- Provide employee training, awareness and outreach.

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## Takeaways for Employers: National Origin Discrimination

- Title VII (and Massachusetts law) prohibit employment discrimination and harassment against individuals because of their national origin group or ethnicity.
- A "national origin group," or an "ethnic group," is a group of people sharing a common language, culture, ancestry, race, and/or other social characteristics.
- National origin discrimination or harassment includes discrimination or harassment:
  - because of persons' or their ancestors' place of origin (e.g., discrimination against someone because he is Hispanic).
  - against persons because they do *not* belong to a particular ethnic group, such as less favorable treatment of employees who are *not* Hispanic.
  - against persons because they have physical, linguistic, and/or cultural characteristics closely associated with a national origin group.
  - based on perception of/association with place of origin *or* national origin.
- Recent Related News on travel bans and emerging immigration policies do not alter these employment discrimination laws (especially given EEOC focus on addressing "backlash" discrimination against persons of Arab, Middle Eastern or South Asian descent, or who are Muslim or Sikh, as well as those perceived to be members of these groups).

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## Takeaways for Employers: Harassment

### EEOC Proposed Enforcement Guidance on Harassment: Employer's Checklist

- Strong and comprehensive and effective harassment policies
- Effective, regular, and interactive harassment training tailored to audience
- Trusted, effective and accessible harassment complaint system
- Committed and engaged leadership

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## Takeaways for Employers: Retaliation

### EEOC Enforcement Guidance on Retaliation: Employer's Checklist

- Anti-retaliation policy: Plain language; provide examples; include reporting mechanism.
- Training: Tailor training to address specific issues; remind employees not to act on feelings of revenge or retribution; encourage respectful workplace.
- Anti-retaliation advice and individualized support for employers, managers, and supervisor: Guidance for managers alleged to have engaged in discrimination on how to carry out management duties or interact in the workplace.
- Proactive follow-up: Check in with employees, managers, witnesses during pendency; identify issues before they surface; provide ongoing support for managers and supervisors who are waiting for resolution.
- Review of employment actions to ensure EEO compliance: Require decision-makers to identify reasons and provide supporting documentation; review performance evaluations; engage HR/counsel.

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Questions?

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### IMPORTANT NOTICE

This PowerPoint presentation is not intended to provide, and should not be used as, legal advice. Specific circumstances and facts may lead to different application of different laws. Also, changes in federal and state laws, and related developments, occur frequently. Recipients of this PowerPoint presentation are to consult their own legal counsel for assistance.

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EMPLOYMENT LAW AHEAD:  
FIVE AREAS OF FOCUS FOR 2017

AICUM Spring Symposium March 23, 2017



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