AN UPDATE ON THE LGBT LEGAL FRONT AND ITS IMPACT ON IDAHO EMPLOYERS

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Clay Gill takes on each of his clients’ issues as if they were his own. His passion and creativity distinguish him from most lawyers. On the litigation front he excels at trial strategy. His business and financial background makes him a strong candidate for all commercial litigation matters. On the transactional front, his experience in corporate formation, corporate governance, commercial contracts, employment law, and insurance makes him an ideal candidate for small or medium sized companies looking for an outside general counsel.
Three Significant Developments

1. Discrimination Laws
2. Entitlement to Employee Benefits
3. Leave Rights under the FMLA
DISCRIMINATION
Title VII does not include “sexual orientation” or “gender identity” as protected classes.
Idaho State Law

• The IHRA does not include “sexual orientation” or “gender identity” as protected classes.
Local Municipal Laws

- Boise, Coeur d’Alene, Driggs, Idaho Falls, Ketchum, Lewiston, Moscow, Meridian, Pocatello, Sandpoint, and Victor have adopted ordinances that prohibit discrimination on the basis of “sexual orientation” and “gender identity.”

- Twin Falls adopted an ordinance that prohibits discrimination on “sexual orientation,” but not “gender identity.”
Other States

• 18 States and the District of Columbia prohibit discrimination on basis of “sexual orientation” and “gender identity” — WA, OR, CA, NV, UT, CO, NM, MN, IA, IL, ME, VT, MA, RI, CT, NJ, DE, MD, DC.

• 3 States prohibit discrimination on basis of “sexual orientation,” but not “gender identity” — WI, NY, and NH.
• 89% have adopted policies prohibiting discrimination on basis of “sexual orientation.”
  – Up from 61% in 2002.

• 66% have adopted policies prohibiting discrimination on basis of “gender identity.”
  – Up from 3% in 2002.
Agency Interpretations

- EEOC – “Sex discrimination also can involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex. Discrimination against an individual because that person is transgender is discrimination because of sex in violation of Title VII. This is also known as gender identity discrimination. In addition, lesbian, gay, and bisexual individuals may bring sex discrimination claims. These may include, for example, allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person’s non-conformance with sex-stereotypes.”

- IHRC – discrimination on the basis of sexual orientation or gender identity is discrimination on the basis of sex, and thus a violation of the IHRA.

- DOJ – Title VII’s prohibition on sex discrimination includes a prohibition on gender identity discrimination and transgender discrimination.

- Federal Executive Order No. 13672 – prohibits federal contractors from discriminating on the basis of “sexual orientation” or “gender identity.”
Case Law


- Male employee who quit his job because of fear of being raped by other male employees had viable claim under Title VII.

- “Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination’ . . . because of . . . sex.”
Case Law (cont’d)

*Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (2002)

- Title VII does not prevent discrimination on the basis of “sexual orientation.”

- But, the court held that conduct by male employees to another gay male employee, including whistling and blowing him kisses, calling him "sweetheart" and "muñeca" (Spanish for "doll"), telling crude jokes and giving sexually oriented "joke" gifts, forcing him to look at pictures of naked men having sex, and grabbing him in the crotch and poking their fingers in his anus through his clothing constitute unlawful discrimination based on sex in violation of Title VII.

- “First, Title VII forbids severe or pervasive same-sex offensive sexual touching. . . . Second, offensive sexual touching is actionable discrimination even in a same-sex workforce. . . .”
Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (2002) (cont’d)

• “Viewing the facts, as we must, in the light most favorable to the nonmoving party, we are presented with the tale of a man who was repeatedly grabbed in the crotch and poked in the anus, and who was singled out from his other male co-workers for this treatment. It is clear that the offensive conduct was sexual. It is also clear that the offensive conduct was discriminatory. That is, Rene has alleged that he was treated differently — and disadvantageously — based on sex. This is precisely what Title VII forbids: "discriminat[ion] . . . because of . . . sex." In sum, what we have in this case is a fairly straightforward sexual harassment claim. Title VII prohibits offensive "physical conduct of a sexual nature" when that conduct is sufficiently severe or pervasive. Meritor, 477 U.S. at 65, 106 S. Ct. 2399. It prohibits such conduct without regard to whether the perpetrator and the victim are of the same or different genders. See Oncale, 523 U.S. at 79, 118 S. Ct. 998. And it prohibits such conduct without regard to the sexual orientation — real or perceived — of the victim.”
Future Legislation

• Federal – proposed legislation passed the Senate in November of 2013, but the House refused to consider the bill.

• Idaho – proposed legislation died in Idaho House State Affairs Committee in January of 2015.
Future Legislation (cont’d)

- Utah – passed legislation that made “sexual orientation” and “gender identity” protected classes; provided definitions of “sexual orientation” and “gender identity”; allowed employers to adopt reasonable dress codes and grooming standards; allowed employers to adopt reasonable policies that designate sex-specific facilities, such as restrooms, shower rooms, and dressing facilities; provides exemptions for religious organizations, associations and corporations, religious societies, educational institutions and leaders, and the Boy Scouts of America; and provides that State law shall preempt any inconsistent local municipal law.
EMPLOYEE BENEFITS AND FMLA
Gay Marriage and Adoption Cases


- DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), cert. granted sub nom. Bourke v. Beshear, 135 S. Ct. 1041 (2015) – United States Supreme Court will decide same issues decided in Latta v. Otter, namely: (1) does the Fourteenth Amendment require a state to license marriage between two people of the same sex; and (2) does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

- In re Adoption of Doe, 326 P.3d 347 (Idaho 2014) – Upheld the right of a female adult to adopt the children of her same-sex partner.
Application to Employee Benefits

• If a gay employee is married in Idaho or another state that recognizes gay marriage, you must provide benefits to that employee’s spouse the same as you would for heterosexual couples.

• Likewise, if you provide benefits for your employee’s children, you must provide those benefits to a gay employee who has lawfully adopted their same-sex partner’s children.
Application to FMLA

- If a same-sex couple is married in Idaho or another state that recognizes gay marriage, you must provide FMLA leave benefits to care for their spouse.

- If a gay employee has legally adopted their partner’s children, you must provide FMLA leave benefits to care for such children.

- In February of 2015, the DOL issued a final regulatory rule that revised the definition of “spouse” under the FMLA in order to adopt a “place of celebration” rule that provides coverage to same-sex couples when they move to a state that does not recognize same-sex marriage (former regulation applied a “place of residence” rule).
  
  - Texas federal court has stayed implementation of this regulation in TX, AR, LA, and NE.
For more information or questions, please contact:

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