Warner Norcross&Judd® LLP
ATTORNEYS AT LAW

A Better Partnership®

HR Focus

HUMAN RESOURCES NEWSLETTER SUMMER 2015

Employers Should Proceed with Caution as Transgender Employment Laws Evolve

KEVIN M. MCCARTHY
269.552.8109
kmccarthy@wnj.com

Bruce Jenner's transition to Caitlyn has people buzzing. More employers are facing questions about transgender employees than at any time in the past, and answers to these questions have recently become more complicated.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex. Title VII does not specifically extend workplace protections to gay, lesbian, bisexual or transgender individuals. For a number of years, some members of Congress have attempted to amend Title VII to provide protections to these categories of individuals. This effort has been through the so-called Employment Non-Discrimination Act (ENDA). However,

...Transgender Employment Laws Evolve

ENDA has not been passed into law.

A majority of federal courts that have addressed the issue of whether discrimination against a transgender employee is illegal under Title VII have determined that it is not. However, some federal courts have held that a transgender individual does enjoy employment protections under Title VII.

Late in 2014, the U.S. Equal Employment Opportunity Commission instructed its investigators and attorneys "that discrimination against an individual because that person is transgender is a violation of Title VII's prohibition of sex discrimination in employment." Since that time, the EEOC has been filing complaints and reaching settlements with some private employers in gender identity cases.

Last year, President Obama issued Executive Order 13672, which added gender identity to the list of protected classifications for federal contractors and subcontractors. It is now clear that federal contractors and subcontractors are prohibited from discriminating against transgender employees and applicants.

> It is estimated that 700,000 Americans, 0.2% of the population, are transgender.

It is not so clear whether other private sector employers are barred from taking employment actions against individuals because of their transgender status. According to most federal courts, there is no such prohibition in Title VII. According to the EEOC, though, such a prohibition is contained in that law. Until and unless ENDA is enacted into law or there is a decision from the United States Supreme Court, we have conflicting guidance from the courts and the EEOC.

> Employers need to be aware of the communities in which their employees work and whether there is a local law or ordinance extending protection.

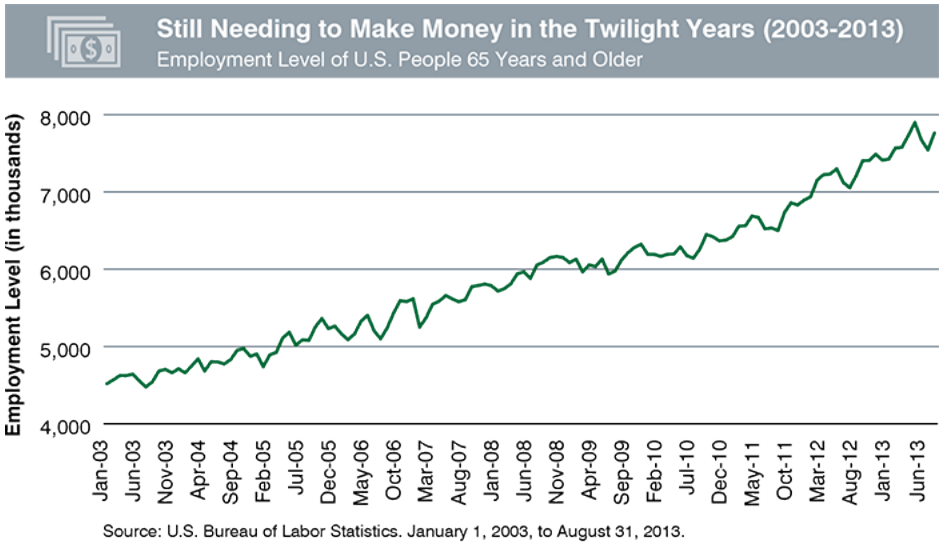
This leaves private sector employers who are not federal contractors or subcontractors in a quandary. There is currently a greater likelihood that the EEOC will accept and process transgender discrimination complaints and find violations of Title VII. However, in most courts, it will be determined that transgender plaintiffs are not protected by Title VII.

A number of states and cities have added gender identity or expression as a protected status under human rights laws and ordinances. Former Michigan governor Jennifer Granholm signed an executive order banning discrimination in state employment based on gender identity or expression. Accordingly, employers need to be aware of the communities in which their employees work and whether there is a local law or ordinance extending protection.

Some employers are acting on the assumption that the EEOC's position will ultimately prevail and that transgender employees and applicants will be protected by Title VII. Because of the uncertainty and the existence of local, state and federal law considerations, employers facing questions about the protected status of transgender individuals should proceed carefully.

Employing Retirees? Take Steps to Avoid Problems with Corporate Retirement Plans

MARY JO LARSON
248.784.5183
mlarson@wnj.com



Source: U.S. Bureau of Labor Statistics. January 1, 2003, to August 31, 2013.

As the workforce ages and retires, employers often seek to fill in gaps by hiring their own retirees as independent contractors or temporary or part-time employees. This practice threatens the tax qualification of employers' retirement plans, both 401(k) plans and traditional pension plans.

Distributions from 401(k) and 403(b) plans are permitted only under narrow circumstances: death, disability, hardship, attaining age 59-1/2 or severance from employment. Distributions from pension plans are even more constrained: all in-service distributions are banned until the participant reaches at least age 62. The plan document may restrict distributions even further, for example, by not allowing any in-service payouts. Distributions made before the law and the plan allow disqualify the plan.

For example, if a participant "retires" at 57, takes a 401(k) distribution and returns to work for the same employer part-time, the retiree may be seen as not separated. The plan has then made an impermissible in-service distribution – a plan-qualification violation.

The employee may have a true severance if re-hired as an independent contractor rather than as an employee; the question is whether the re-hire truly is an independent contractor. The ongoing skepticism the IRS and courts have of "independent contractor" status doubly applies to former employees. Since the standard for "independent contractor" is whether the employer has a right to direct or control the individual, if the retiree is doing the same type of work, in the same place, with the same tools, what is the difference that suddenly creates an independent contractor status?

We recommend the following steps before hiring a retiree:

1. Check your plan document. If your 401(k) plan permits in-service distributions at age 59-1/2, or your pension plan permits in-service payouts to begin at 62 or later (rare), and the employee took the retirement payout after the applicable age, then the plan is safe.

2. Prohibit any understandings with retirees before retirement that they will be re-hired in any capacity.

3. Require a minimum period of time before a retiree can be re-hired. Although no set time is safe-harbor, six months may be sufficient. Some employers use 90 days. This is not a substitute for step #2.

4. If you re-hire the retiree as an independent contractor, make the position sufficiently different to support independent contractor status. Contract with the retiree to set goals, but turn control over to the retiree as to how the goals are to be accomplished. Let the retiree hire others; have him provide his own equipment and supplies and set his own hours. Allow him to work for other employers doing the same work. The less the work looks like the retiree's prior employment, the better.

5. If the retiree is safely re-hired, review the future effect of re-employment under the retirement plans. The retiree may be eligible for additional contributions or accruals. A pension may have to suspend monthly payments during re-employment and give notice to the participant of the suspension.

The attorneys in the Warner Norcross & Judd Employee Benefits/Executive Compensation Practice Group can help you properly handle the hiring of retirees.

Telling Harasser to "Stop" is Protected Activity under Title VII

AMANDA M. FIELDER
616.752.2404
afielder@wnj.com

MARGARET STALKER JOZWIAK
616.752.2767
mjozwiak@wnj.com

"Stop." "Don't do that." "Leave me alone." In a recent decision, the U.S. Court of Appeals for the Sixth Circuit held that when an employee makes statements like these to a supervisor in response to the supervisor's sexually harassing conduct, the employee has engaged in protected activity under Title VII of the Civil Rights Act of 1964.

In *EEOC v. New Breed Logistics*, James Calhoun, a supervisor at New Breed Logistics, "repeatedly made sexually suggestive comments" to three females under his supervision – Jacquelyn Hines, Capricius Pearson and Tiffany Pete. Pearson told Calhoun to "stop touching" her, Pete told Calhoun to "leave her alone," and Hines told Calhoun to "get . . . out of [her] face." All three employees were later fired. Calhoun was involved in each employee's termination.

The U.S. Equal Employment Opportunity Commission (EEOC) brought a sexual harassment and retaliation action against New Breed. The EEOC claimed that Calhoun sexually harassed the three women under his supervision and retaliated against them when they objected. A jury agreed, finding New Breed liable for Calhoun's sexual harassment and retaliation. The jury awarded $1.5 million, including punitive damages.

New Breed appealed, arguing that the evidence did not support the jury's retaliation verdict because Hines, Pearson and Pete did not engage in protected activity under Title VII before they were terminated. New Breed argued that the act of telling Calhoun to stop the harassment did not constitute protected activity under Title VII. The Sixth Circuit disagreed, holding for the first time that "a demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII."

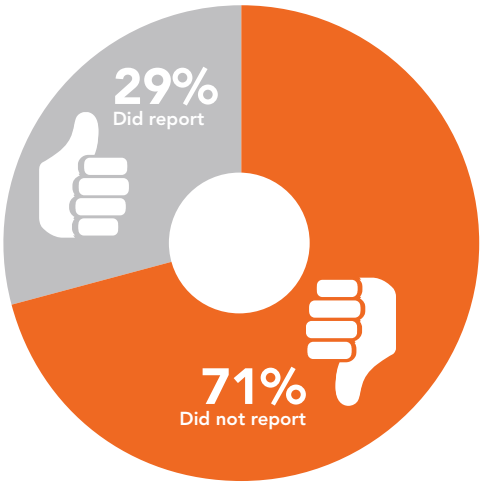
In reaching this conclusion, the Sixth Circuit examined the language of Title VII. Under Title VII's anti-retaliation provision, an employer may not retaliate against an employee who has "opposed any practice made an unlawful employment practice by this subchapter." This provision is commonly referred to as the "opposition" clause. The court, quoting the U.S. Supreme Court's decision in *Crawford v. Metropolitan Government of Nashville & Davidson County*, stated that the term "oppose," as used in the statute, "carries its ordinary meaning: 'to resist or antagonize ... ; to contend against; to confront; resist; withstand.'" So in addition to protecting the filing of formal discrimination charges with the EEOC, the provision also shields employees from retaliation for "less formal protests of discriminatory employment practices."

> The Sixth Circuit held for the first time that "a demand that a supervisor cease his/her harassing conduct constitutes protected activity."

The Sixth Circuit held that under these expansive definitions, "[i]f an employee demands that his/her supervisor stop engaging in this unlawful practice – i.e. resists or confronts the supervisor's unlawful harassment – the opposition clause's broad language confers protection to this conduct." The Sixth Circuit concluded that even where the employee's communication is directed only to the harassing supervisor, the conduct is protected, as "the language of the opposition clause does not specify to whom protected activity must be directed."

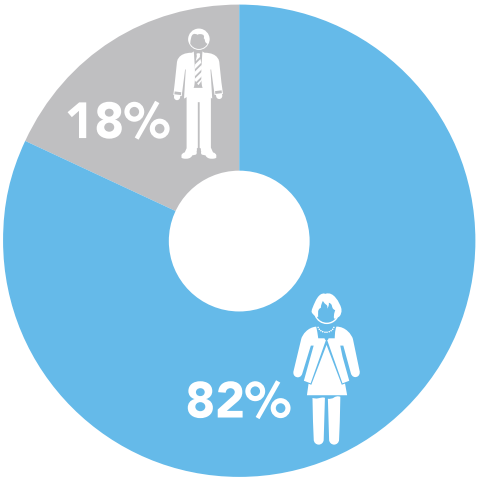
Employers must proceed with increased caution when taking an adverse employment action against an employee who has complained of harassment. Employers may be liable

Is Sexual Harassment Being Reported?



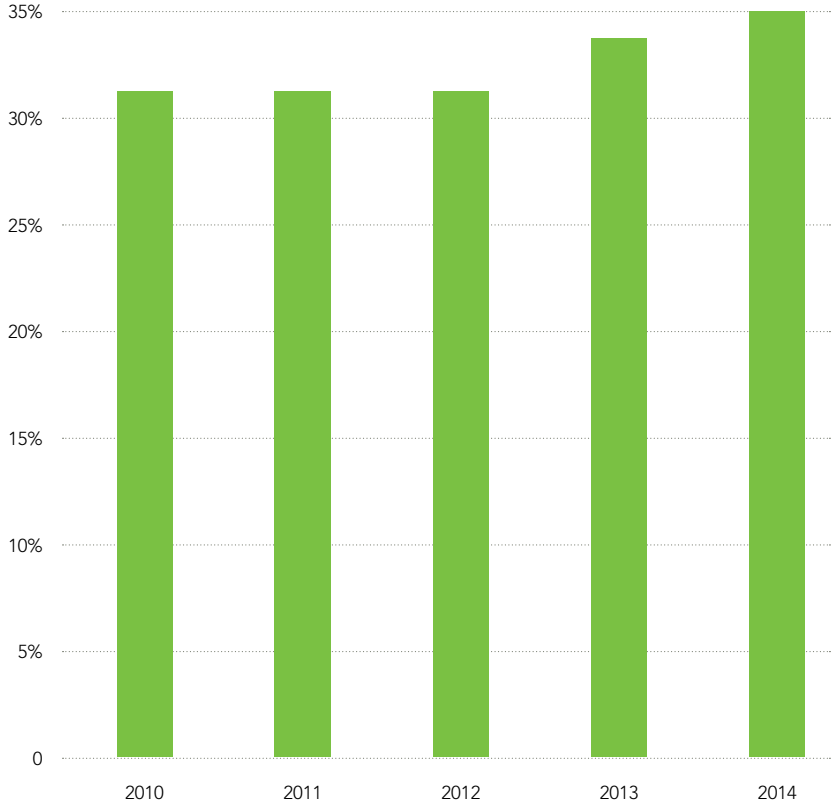
A survey published in March 2015 by Cosmopolitan.com

Who is Filing?



Courtesy of EEOC

Title VII Retailiation Charges as % of All Charges



	2010	2011	2012	2013	2014
Total	99,922	99,947	99,412	93,727	88,778
Retaliation Title VII	30,948	31,429	31,208	31,478	30,771
	31%	**31%**	**31%**	**34%**	**35%**

Courtesy of EEOC

even if the complaint was made only to the harassing supervisor and even if the "complaint" consisted only of telling the supervisor, "stop."

Employers should develop policies and procedures to encourage employees to report any complaints to the human resources department, and require supervisors to report to HR immediately any communications that could be viewed as "opposition" to the supervisor's behavior.

Warner Norcross & Judd is available to assist employers develop HR policies and provide training that may help an employer avoid a Title VII retaliation claim.

Not Your Father's Internal Controls: A Checklist

GEORGE WHITFIELD
616.752.2102
gwhitfield@wnj.com

In the past retirement plan operation and compliance was often handled by the owner or other management individual without necessary guidelines. Even with the many helpful checklists and fix-it guides now available on the IRS website and elsewhere, maintaining the qualified status of a plan is difficult and complex. Compliance practices and procedures are critical to proper administration and fiduciary responsibility.

If your plan is selected for examination by the IRS or investigation by the DOL, the initial process will include interviews of those involved in the operation and administration of the plan. The IRS agent will ask about "internal controls." A DOL investigator will ask similar questions. Your legal counsel should be present at these interviews. Also, self-correction of a plan failure under the IRS correction procedures is conditioned on having formal or informal compliance practices and procedures in place.

Although being ready for agency audits and self-correction is very important, there is a more general need for internal controls as well. Internal controls should be the basis for an annual compliance self-audit of your plan.

The IRS generally defines "internal controls" as business processes or policies and procedures designed to help detect and prevent errors and ensure proper administration and operation of a retirement plan. Drafting and applying internal controls for your plan should at least include the following important operational issues:

- ☐ Compliance with plan document.
- ☐ Determining eligibility, correct compensation, elective contributions and proper vesting credits.
- ☐ Verifying employer contributions and application of forfeitures.
- ☐ Properly classifying any contingent workers and applying applicable service crediting rules.
- ☐ Confirming and documenting rollovers, participant loans and hardship withdrawals and the accuracy of all other distributions.
- ☐ Determining special controls and advance decisions needed in the event of a plan or entity merger or other such transaction.
- ☐ Following a calendar or checklist to ensure notices and other participant communications are delivered in a timely manner.
- ☐ Having and following up-to-date policies and procedures for records retention.
- ☐ Compliance with fee and expense disclosure and monitoring requirements.
- ☐ Independent review of your Form 5500 Annual Report before filing.
- ☐ Identifying the parties, internal or external, responsible for compliance issues and confirming appropriate redundancy.
- ☐ Obtaining expert advice when needed.

A more detailed version of this article, including a link to other publications specifically addressing many of the foregoing operational issues, can be found on the Publications page at www.wnj.com.

The members of our Employee Benefits/Executive Compensation Practice Group can help you establish appropriate internal controls that work effectively.

News Digests:

EEOC Issues Proposed Rules for ADA Compliance in Wellness Programs

On April 16, the U.S. Equal Employment Opportunity Commission issued a Notice of Proposed Rulemaking dealing with how the Americans with Disabilities Act applied to employer wellness programs that are part of a group health plan. The proposed EEOC rule makes clear that wellness programs are permitted under the ADA, but that they may not be used to discriminate based on disability. The rule explains that, under the ADA, companies may offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with wellness programs. These programs can include medical examinations or questions about employee health, such as questions on a health risk assessment.

NLRB Election Rules Are in Place; Petition for Elections Surge

The new National Labor Relations Board representation election rules took effect April 14 and are now in full force for all election petitions filed with the Board. One of the lawsuits challenging these rules has been dismissed, and most observers expect the other suit seeking to overturn the rules to also be dismissed. The new rules significantly reduce the amount of time for employers to respond to union organizing campaigns, increasing the importance of proactive measures to maintain positive workplaces. According to the Board, the number of petitions for an election submitted to the agency increased 32 percent in the first month after the election.

NLRB Guidance on Deferral to Arbitration

The NLRB's general counsel issued new guidance on the circumstances in which the Board will defer unfair labor practice charge proceedings to arbitration, based on the Board's new standards issued in December 2014. In short, the Board will defer to an arbitration decision if the party arguing for deferral proves "(1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) NLRB law reasonably permits the award."

Vehicle Crashes the Leading Cause of Worker Deaths

The number one cause of worker deaths is motor vehicle crashes. The National Safety Council estimates that cell phone usage is involved in approximately one-fourth of all crashes. These facts have not gone unnoticed by the U.S. Occupational Safety and Health Administration. OSHA has published a Distracted Driving Brochure for employers, which notes that: "When OSHA receives a credible complaint that an employer requires texting while driving, or organizes work so that texting is a practical necessity, we will investigate and will issue citations and penalties where necessary to end this practice." To avoid potential OSHA citations, employers should consider having a cellular telephone policy as part of their safety programs. The OSHA brochure can be found at: https://www.osha.gov/Publications/3416distracted-driving-flyer.pdf.

Department of Labor Updates FMLA Forms

The U.S. Department of Labor recently updated the various forms needed by employers to administer the Family and Medical Leave Act. Except for adding language referencing the Genetic Information Nondisclosure Act (GINA) to the certification forms dealing with leave for a serious health condition or to care for a military service member, the forms were not substantively changed. The new forms can be found on the DOL website: http://www.dol.gov/whd/fmla/.

EEOC v. Abercrombie & Fitch Stores Inc.

The U.S. Supreme Court has clarified that employers may not make hiring decisions motivated in any way by an employee's perceived religious practices. In *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, a fashion clothing store refused to hire an applicant who wore a headscarf to an interview because the interviewer thought she wore the headscarf for religious reasons and might need an accommodation of the store's physical appearance policy. Abercrombie & Fitch argued that, because the applicant had not actually informed it that she wore the headscarf for religious reasons and would need an accommodation, it had not violated Title VII's ban on religious discrimination. The Court rejected this view, holding that an employer cannot make employment decisions motivated by an employee's religious practices even if the employee has not requested an accommodation.

Warner Norcross&Judd LLP
ATTORNEYS AT LAW

A Better Partnership®

900 FIFTH THIRD CENTER, 111 LYON STREET NW, GRAND RAPIDS, MI 49503-2487

ADDRESS SERVICE REQUESTED

Human Resources Attorneys

LABOR AND EMPLOYMENT

Edward Bardelli *	(616) 752.2165
Andrea Bernard *	(616) 752.2199
Gerardyne Drozdowski	(616) 752.2110
Robert Dubault	(231) 727.2638
Pamela Enslen *	(269) 276.8112
Amanda Fielder *	(616) 752.2404
C. Ryan Grondzik *	(616) 752.2722
Angela Jenkins	(616) 752.2480
Margaret Stalker Jozwiak *	(616) 752.2767
Ian Kennedy	(269) 276.8111
Jane Kogan *	(248) 784.5193
Jonathan Kok	(616) 752.2487
Kevin McCarthy *	(269) 552.8109
Matthew Nelson *	(616) 752.2539
Dean Pacific *	(616) 752.2424
Steven Palazzolo	(616) 752.2191
Louis Rabaut	(616) 752.2147
Allyson Terpsma	(616) 752.2785
Karen VanderWerff	(616) 752.2183
Donald Veldman	(231) 727.2603
Elisabeth Von Eitzen *	(616) 752.2418
B. Jay Yelton	(269) 276.8130

* Litigators

EMPLOYEE BENEFITS

Sue Conway	(616) 752.2153
Amy Fredrickson	(248) 784.5059
April Goff	(616) 752.2154
Anthony Kolenic, Jr.	(616) 752.2412
Norbert Kugele	(616) 752.2186
Mary Jo Larson	(248) 784.5183
Heidi Lyon	(616) 752.2496
John McKendry, Jr.	(231) 727.2637
Vernon Saper	(616) 752.2116
Justin Stemple	(616) 752.2375
Jennifer Watkins	(248) 784.5192
George Whitfield	(616) 752.2102
Lisa Zimmer	(248) 784.5191