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Five New Challenges Facing Retail Employers

This issue of *Take 5* is devoted to recent laws and court rulings that have particular significance for retailers. These five short articles address fundamental changes to policies and practices in the retail workplace, spanning from handbook policies to a focus by the Equal Employment Opportunity Commission (“EEOC”) on certain types of discrimination. Each of these articles discusses challenges to how retailers must navigate legal situations and offers some practical solutions. We address whether an employer can maintain a policy banning recording in the workplace and a U.S. Department of Labor (“DOL”) rule that places burdens on how employers can communicate with their counsel during a union election and related reporting requirements. We also examine how retailers can navigate conflicting laws regarding transgender protections and provide practical legal solutions on how to treat transgender employees. Lastly, we look at new equal pay laws and the EEOC’s focus on religious and national origin discrimination against Muslims. The five articles are as follows:

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1. “Smile . . . You’re on Your Employee’s (Not So) Candid Camera!”

By Jeremy M. Brown and Adam S. Forman

Imagine that an employee asks to come to your office to address concerns about workplace harassment. Pursuant to the company’s open door and non-harassment policies, you promptly schedule a meeting. When the employee arrives, she sits down, sets her smartphone on the desk facing you, and turns on the video camera before beginning to speak. Can you instruct her to turn off the recording device? Can you stop the meeting if she refuses? Would the answer change if the recording was surreptitious?

The answer to questions like these have become more blurry since the decision last year by the National Labor Relations Board (“Board”) in *Whole Foods Market, Inc.*¹ Conventional wisdom before *Whole Foods* supported the view that, as a general rule, employers were on safe ground prohibiting audio or video recording in the workplace. In *Whole Foods*, however, the Board held that an employer may not lawfully adopt a work rule prohibiting employees from workplace recording, if the employees are acting in concert for mutual aid and protection and the employer cannot demonstrate an overriding business interest.

According to the Board, it is unlawful for an employer to prohibit employees from recording images of protected picketing and documenting unsafe equipment or workplace conditions. Similarly, an employer may not prohibit an employee from recording discussions with others about terms and conditions of employment or documenting inconsistent application of employer rules. Perhaps most troubling, even if the conversation or event that the employee wishes to record is not legally protected, the Board has ruled that an employee may record evidence to preserve for later use in administrative or judicial forums in employment-related actions. Get the picture?

Presently, the *Whole Foods* decision is on appeal before the U.S. Court of Appeals for the Second Circuit. Until then, employers have a few options to address recording devices in the workplace:

- **End the meeting.** Employers that do not want conversations with their employees recorded could simply decline to participate in any conversation in which an employee is knowingly recording. This option, however, has several risks, particularly in a harassment scenario where the employer’s liability hinges on whether it took prompt remedial measures that were reasonably calculated to stop the allegedly unlawful conduct.
- **Narrowly tailor the rule.** An employer can ensure that its ban on workplace recording is not so overly broad that employees would reasonably construe it to prohibit protected concerted activity. For example, the recording prohibition could be limited to legitimate business interests, such as recording trade secrets,

¹ *Whole Foods Market Inc.*, 363 NLRB No. 87 (Dec. 24, 2015).

proprietary processes, confidential technology, medical privacy, and information about vendors, customers, and suppliers.

- **Carve out “two-party consent” states.** Some states, such as California, Florida, Massachusetts, Pennsylvania, and Washington, require the consent of both parties to a conversation before recording. Those states potentially could be carved out with a revised narrow rule prohibiting workplace recording.
- **Say “cheese” (but not much more).** Perhaps the least risky option might be to rescind all rules prohibiting recording in the workplace, assume that everything is being recorded at all times, and act accordingly. If a workplace recording situation arises, an employer could address it on a case-by-case basis and determine whether the conduct violated another existing policy (e.g., anti-harassment) and whether the recording was otherwise protected by law. Another approach that an employer should consider is, in meetings, giving employees an opportunity to say what they wish to say while recording but keeping its own remarks to a minimum. An employer should take the comments under advisement and then respond in writing.

2. DOL Issues Final Persuader Rule: New Restrictions on Employer’s Communication with Employees and Enhanced Reporting Requirements

By Steven M. Swirsky and Laura C. Monaco

On March 23, 2016, the DOL issued its long-awaited [final “persuader rule”](#) (“Final Persuader Rule”), which [drastically expands](#) the agency’s prior interpretation of the types of legal and consulting activities that will be subject to the extensive reporting requirements of Section 203 of the Labor-Management Reporting and Disclosure Act (“LMRDA”). In particular, the Final Persuader Rule seeks to narrow significantly the scope of the so-called “Advice Exemption” to the statute’s reporting requirements. [As a result](#), a wide range of services provided by labor relations counsel and consultants may—for the first time—be deemed by the DOL to constitute reportable “persuader activity” under the LMRDA.

Changes to the Advice Exemption

The LMRDA requires employers and their consultants to report any conduct that constitutes “[persuader activity](#)”—that is, activity undertaken with a direct or indirect purpose to persuade employees to exercise (or not exercise) their rights to organize and bargain collectively, i.e., to be represented by a union. Under the statute’s Advice Exemption, however, “advice” given to employers by outside consultants does not constitute reportable persuader activity.

For the past 50 years, the DOL has used a bright-line test to interpret whether or not the activities of consultants, including lawyers, constituted reportable persuader activity. When an employer’s consultants (including labor counsel) *directly communicated* with the employer’s employees to persuade them about unionization, that activity was reportable. If, on the other hand, an employer’s lawyer or consultant did not directly communicate with the employer’s employees, but simply provided advice that the employer was free to accept or reject, such activity fell within the Advice Exemption and

did not need to be reported. Under the DOL's previous statutory interpretation, therefore, labor counsel did not engage in reportable persuader activity when assisting an employer during a union election campaign by providing strategy and guidance, or assisting in the preparation and drafting of materials (speeches, letters, or other written communications).

Under the new Final Persuader Rule, the DOL has significantly narrowed the scope of the Advice Exemption. Specifically, the agency has abandoned the long-standing bright-line test that distinguished between consultants' direct communications with employees (which were clearly reportable) and other consultant activities that did not involve direct communications with employees and that the employer was free to accept or reject (which was clearly not reportable). Assuming that the Final Persuader Rule takes effect, employers and their consultants must report a broad range of activity that formerly fell within the Advice Exemption—even activity that does not involve a consultant directly communicating with employees. According to the DOL, only communications between the employer and its consultants that pertain solely to legal advice remain within the scope of the Advice Exemption.

Impact on Employers

The Final Persuader Rule, which will apply to arrangements and agreements made on or after July 1, 2016, will require both employers and consultants to report that they have engaged in the following activities, whenever they are taken with a direct or indirect object to persuade employees about unions:

- planning, directing, or coordinating supervisors or managers;
- drafting or providing persuader materials (including speeches or materials intended for distribution or dissemination to employees);
- conducting seminars for supervisors or other employer representatives; or
- developing or implementing personnel policies to persuade employees.

If a labor consultant or counsel reports engaging in even a single act of reportable persuader activity, the consultant or counsel must also file an annual Form LM-21, listing the names and addresses of *all* the employers for which the consulting or law firm provided "labor relations advice or services" during the year—regardless of whether or not such advice or services involved persuader activity.

Legal Challenges to the Final Persuader Rule

The Final Persuader Rule, which was first proposed by the Obama administration in June 2011, has been the subject of intense criticism over the past five years from a wide range of sources (including Senators, employer and employee rights groups, and the [American Bar Association](#)), all of whom objected to the rule's potential for compromising and interfering with the attorney-client relationship, and for mandating the release and disclosure of information long understood to be protected by the attorney-client, work product, and other legal privileges.

Three federal lawsuits challenging the Final Persuader Rule have already been filed in U.S. district courts across the country, and the plaintiffs in one such suit have sought a

preliminary injunction and expedited hearing on their motion. There has also been ongoing activity before Congress, as the business community, management lawyers, and other employer advocates have criticized the rule. During a recent hearing before a House Education and the Workforce subcommittee, management-side lawyers emphasized that the Final Persuader Rule's negative effects will likely be compounded by other recent union-friendly rules. For example, the recent "quickie election" rules adopted by the Board drastically reduced the time that an employer has to prepare for an election campaign. The Final Persuader Rule will likely increase the already onerous burdens on these employers as they seek expedited assistance from their consultants and labor counsel.

3. Retailers Navigate Conflicting Laws Regarding Transgender Protections

By Nathaniel M. Glasser and Jonathan L. Shapiro

On March 23, 2016, the North Carolina Legislature passed House Bill 2, the "Public Facilities Privacy and Security Act" ("HB2"), that overturned a Charlotte ordinance extending anti-discrimination protections to lesbian, gay, bisexual, and transgender ("LGBT") individuals and allowing transgender persons to use the bathroom of their choice. Instead, HB2 requires individuals to use public bathrooms that match the gender listed on their birth certificates. A swift public outcry followed, with many celebrities denouncing the law and canceling appearances in North Carolina, companies threatening to boycott, and the American Civil Liberties Union filing a lawsuit challenging HB2 as unconstitutional and for violating federal law. North Carolina officials have refused to disavow HB2 and, on May 9, filed a lawsuit against the federal government seeking a ruling that HB2 is not discriminatory. The Justice Department has countersued, alleging that HB2 violates Title VII of the Civil Rights Act of 1964 ("Title VII"). Regardless of the ultimate outcome of these lawsuits, it's clear that discriminating against LGBT individuals has real consequences, from both a business and legal perspective. What should retailers know and, more importantly, do to survive in this current environment?

At a minimum, retailers should familiarize themselves with their state's employment nondiscrimination laws (if any) that apply to private employers. Twenty states (including California, Illinois, New Jersey, and New York) and the District of Columbia have passed employment non-discrimination laws that prohibit discrimination by private employers based on both sexual orientation and gender identity. Two states (New Hampshire and Wisconsin) have such laws covering sexual orientation only. These laws protect LGBT persons from discrimination in hiring and in the workplace.

Retailers also are encouraged to review their municipality's nondiscrimination laws and regulations, if any. For example, New York City law prohibits gender identity discrimination, and the New York City Commission on Human Rights recently announced guidance ("NYC Guidance") that makes clear what constitutes gender identity and gender expression discrimination under the NYC Human Rights Law. The NYC Guidance warns employers and business owners that they may violate New York City law if they intentionally fail to use a transgender employee's preferred name, pronoun, or title, or refuse to allow a transgender employee to use single-sex facilities,

such as bathrooms or locker rooms, and participate in single-sex programs consistent with their gender identity.

Retailers also should know that the EEOC has aggressively pursued transgender discrimination claims on theories of sex stereotyping and gender nonconformity under Title VII, which bars employers from discriminating against employees on the basis of their sex.² In cases involving government employees, the EEOC has held that: (i) an employer's restriction on a transgender woman's use of a common female restroom facility constituted illegal sex discrimination under Title VII,³ (ii) an employer's intentional references to a transgender female as "he" may constitute sex-based discrimination and/or harassment,⁴ and (iii) a transgender employee stated a valid Title VII sex discrimination claim based on his allegation that his employer took over a year to correct his name in the company's computer system.⁵

The EEOC has taken further action against private companies. For example, it recently entered into a consent decree with a Minnesota financial services company for allegedly refusing to let a transgender employee use the women's restroom and subjecting her to a hostile work environment.⁶ In another action, a Florida eye clinic paid \$150,000 to settle an EEOC lawsuit that sought relief for an employee who was allegedly discriminated against when transitioning from male to female.⁷

In light of this climate, retailers are encouraged to accommodate the needs of transgender workers proactively rather than reactively responding to potential claims of discrimination. Retailers, particularly those operating in states with anti-discrimination laws that cover sexual orientation and/or gender identity, should implement a policy designed to foster workplace inclusion. Retailers can avoid significant business and legal risk if they follow these two directives:

- *Call transgender employees by their preferred names, pronouns, and titles, and promptly update internal databases (pay accounts, training records, benefits documents, etc.) with this information upon an employee's request.* The NYC Guidance, for example, advises employers to use the employee's preferred name regardless of whether the employee has legally changed his or her name "except in very limited circumstances where certain federal, state, or local laws require otherwise (e.g., for purposes of employment eligibility verification with the federal government)." This is a sound policy that retailers beyond New York City

² See "Five EEOC Initiatives to Monitor on the Agency's Golden Anniversary" (June 22, 2015) (noting EEOC's increased emphasis on transgender protections), available at <http://www.ebglaw.com/news/five-eeoc-initiatives-to-monitor-on-the-agencys-golden-anniversary/>.

³ *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015).

⁴ *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013)

⁵ *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014).

⁶ EEOC, Press Release, "Deluxe Financial to Settle Sex Discrimination Suit on Behalf of Transgender Employee" (Jan. 21, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-21-16.cfm>.

⁷ EEOC, Press Release, "Lakeland Eye Clinic will Pay \$150,000 to Resolve Transgender / Sex Discrimination Lawsuit" (April 13, 2015), available at <https://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm>.

should consider following. In addition, employers may choose to offer new business cards and email aliases for their employees.

- *Provide transgender employees access to bathrooms that correspond to their gender identity.* On May 3, the EEOC issued a "[Fact Sheet](#)" stating that the denial of equal access to a bathroom corresponding to an employee's gender identity qualifies as sex discrimination prohibited under Title VII and that contrary state law is no defense. The Fact Sheet encourages employers to refer to the more comprehensive "[Guide to Restroom Access for Transgender Workers](#)," which was issued by the Occupational Safety and Health Administration ("OSHA") and offers model practices for restroom access for transgender employees. Like the EEOC, OSHA advises that "all employees should be permitted to use the facilities that correspond with their gender identity." Where possible, employers should provide employees with additional options, including single-occupancy gender-neutral (unisex) facilities and use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

While the North Carolina Legislature has rolled back protections for the LGBT community, the media attention surrounding HB2 has been largely negative and has affected the businesses of companies operating in the state. Given the number of other states that have enacted laws expressly prohibiting sexual orientation and/or gender identity discrimination, the federal government's enforcement position, and changing public opinion on the issue, retailers are on notice that such discrimination may have negative business or legal ramifications.

4. The Focus of Equal Pay Laws Is Redefined

By Susan Gross Sholinsky and Nancy L. Gunzenhauser

Several states have recently passed laws (California, Louisiana,⁸ Maryland, and New York) or have bills currently pending in their state legislatures (California,⁹ Colorado, Massachusetts, and New Jersey) seeking to eliminate pay differentials on the basis of sex (and, in some cases, other protected categories) (collectively, "Equal Pay Laws").

Among other provisions, most of the Equal Pay Laws contain four components. They aim to (i) strengthen current equal pay standards, (ii) create pay transparency rules, (iii) expand equal pay protections beyond gender, and (iv) redefine the geographic reach of existing equal pay laws.

Strengthening of Current Equal Pay Standards

The Equal Pay Laws modify the standards required for plaintiffs to prevail on equal pay claims. Previously, these laws tracked the federal Equal Pay Act, which permits

⁸ Louisiana's equal pay law becomes effective on August 1, 2016. Maryland's equal pay law was signed by Governor Larry Hogan on May 19, 2016, and becomes effective October 1, 2016. New York's and California's laws are currently effective.

⁹ California has introduced a second equal pay amendment addressing wage disparity based on race and ethnicity. The first equal pay amendment became effective on January 1, 2016.

exceptions to equal pay for equal work, “where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” The Equal Pay Laws, however, each modify the fourth prong, so that they now permit pay differentials based on a “*bona fide factor* other than sex” (emphasis added). This additional language allows plaintiffs to bring claims alleging that a neutral factor produced a wage differential that disparately impacts employees based on their sex, and notwithstanding this impact, the employer did not adopt an alternative business practice that would serve the same purpose without resulting in the wage differential. The new standard also broadens a plaintiff’s ability to allege a *prima facie* case of wage disparity.

Pay Transparency

Many of the Equal Pay Laws include pay transparency provisions, meaning that employers cannot create policies or enforce rules that would restrict an employee’s ability to discuss his or her wages with co-workers. The Massachusetts bill, which is still in the state legislature, has another unique twist (one that actually passed the legislature in California earlier this year but was vetoed by the governor). The Massachusetts equal pay law would prohibit employers from asking about an applicant’s salary history on an application or during interviews for employment. This would mean that an employer could no longer ask applicants how much they earned at their past jobs when considering making an offer of employment to an applicant. This twist aims to ensure that prior pay discrepancies are not compounded when an applicant’s pay rate with a new employer is based on unequal pay rates that the applicant received in the past.

Expanding Beyond Pay Equality Based on Gender

While the Equal Pay Laws were initially intended to ensure that women received equal pay in relation to men, some of the Equal Pay Laws seek to expand equal pay protection to other protected categories. The proposed California law, which is intended to amend the recently amended equal pay law in that state, would expand protections to race- and ethnicity-based pay differentials. Further, Maryland’s recently enacted law requires equal pay based on gender identity.

Geographical Reach

Finally, the Equal Pay Laws differ as to their geographical scope. For example, the New York law limits the reach of pay differentials to “no larger than a county.” In other words, women cannot compare themselves to other employees outside the county where they work. Some of the other Equal Pay Laws have significantly broader reach, such as California, which has no geographic limit. The New Jersey law, which was vetoed on May 2, 2016, but may be reintroduced in the state legislature, would permit wage comparisons based on compensation rates “in all of an employer’s operations or facilities.” This could mean that New Jersey employees could base their equal pay claims on the pay differential between their own compensation and that of employees of the employer in other jurisdictions (even in locations where the standard of living is considerably higher). Unlike New Jersey, the law proposed in Massachusetts would

permit employers to base pay differentials on geographic location if one location has a lower cost of living based upon the Consumer Price Index.

Conclusion

As a result of the Equal Pay Laws, employers should consider whether to perform an internal audit (with the assistance of counsel) in order to identify and address any potential pay disparities. Indeed, in light of the recently published regulations on the overtime exemption status of various employees, this summer may be a good time for employers to review their pay practices for all employees.

5. EEOC Targets Religious and National Origin Discrimination Against Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern

By Susan Gross Sholinsky and Ann Knuckles Mahoney The EEOC has released several new guidance tools, for both employers and employees, focused upon religious and national origin discrimination against people who are (or are perceived to be) Muslim. This focus on religious and national origin discrimination is particularly important for retail employers because retailers often require employees to follow dress codes or work at times that may conflict with religious observance.

In December 2015, EEOC Chair Jenny Yang released a statement highlighting the need for employers to “remain vigilant” in light of the recent terrorist attacks. Yang commended employers that have “taken steps to issue or re-issue policies preventing harassment, retaliation, and other forms of discrimination in the workplace.” At the same time this statement was released, the EEOC also released two technical guidance tools regarding religious discrimination: [“Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern”](#) (“Employer Q&A”) and a similar guide for [employees](#).

The Employer Q&A does the following:

- provides helpful insight on the various measures that employers should undertake to avoid violations of Title VII, which prohibits discrimination based on religion and national origin, among other protected categories;
- addresses questions about hiring and other employment decisions, harassment, religious accommodation, and background investigations;
- reminds employers that they may not discriminate against an individual because the individual’s religious garb may make customers feel uncomfortable; and
- emphasizes the need to engage in an interactive process with employees who request a religious accommodation, such as time off for religious holidays and exceptions to dress and grooming codes.

When evaluating whether the religious accommodation will cause an undue hardship, the EEOC (through the Employer Q&A) explains that employers may not speculate on whether other employees may seek the same accommodation and make decisions based on those speculations. Rather, each accommodation request must be addressed on a case-by-case basis.

Earlier this year, the EEOC joined forces with other federal agencies, including the Department of Justice, to create an interagency initiative aimed at religious bias. As part of this initiative, in March 2016, the EEOC released another technical guidance tool titled "[What You Should Know About Religious and National Origin Discrimination Against Those Who Are, or Are Perceived to Be, Muslim or Middle Eastern](#)" ("What You Should Know Guidance").

Among other things, the What You Should Know Guidance:

- summarizes some of the ways in which discrimination against individuals who are (or could be perceived to be) Muslim or Middle Eastern can materialize in the workplace;
- reminds employers of their obligations to prevent and correct unlawful discrimination or harassment, and provide reasonable religious accommodations;
- points out several recent cases brought against retailers that involve claims of religious and national origin discrimination and harassment, or a failure to accommodate based on these factors; and
- highlights the increase in litigation in these areas (in particular, the What You Should Know Guidance reports that, since 9/11, there has been a 250 percent increase in EEOC charges involving religious discrimination against Muslims).

These guidance tools serve as a follow up to the EEOC's previously released [guidance on religious garb and grooming in the workplace](#), which provides even more detail on how employers should address these issues. Given the EEOC's increased scrutiny of religious and national origin discrimination against people who are, or are perceived to be, Muslim or Middle Eastern, retailers should be particularly wary of religious or national origin bias. Retailers can work toward preventing this type of bias in the workplace by reviewing and disseminating their anti-discrimination policies and providing training to employees and managers.

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