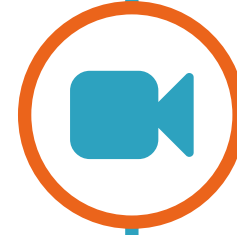


Attracting Talent without Attracting Litigation: Avoiding Pitfalls in Managing the Modern Workplace



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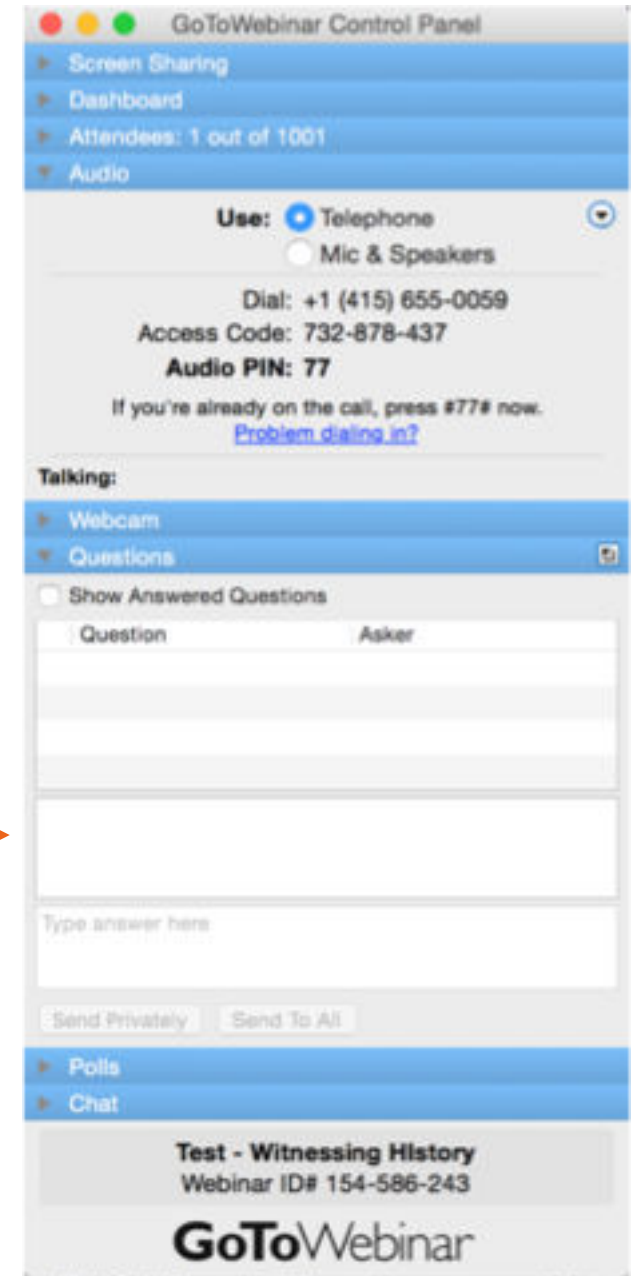
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Q&A

How do you ask questions?

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☐ Show Answered Questions

Question	Asker

Type answer here

- Polls
- Chat

Test - Witnessing History
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Speaker



Bill Robinson

*Shareholder – Corporate and
Employment Law*

Zimmerman, Kiser & Sutcliffe

Overview

- ▶ Hiring Issues & Discrimination
- ▶ EEO Updates



Hiring Discrimination updates

- ▶ Ban the Box
- ▶ Prior Salary
- ▶ Adverse Impact



“Ban the Box”–Fair Chance Laws

- ▶ 31 states and over 150 cities have adopted laws or policies requiring public employers to consider an applicant’s qualifications before their criminal or arrest records
- ▶ 11 states and 17 cities and counties have extended this ban to private employers
- ▶ The goal of these initiatives is to provide applicants with a criminal history a fair chance at employment by delaying background checks until later in the hiring process



Image source: Newton Software

“Ban the Box”–Fair Chance Laws

- ▶ Various states & municipalities have adopted different front-end thresholds or standards:
 - Can only check after an applicant is considered “qualified”
 - Can only check after an in-person interview
 - Can only check after a making a conditional job offer

Each of these brings different considerations to the process




“Ban the Box”

► Overview of key state laws:


◦ California

- Early adopter with a ban prohibiting all state and local agencies from making criminal background checks until an applicant is determined to be “qualified” for the position
- Municipalities, including Los Angeles County and San Francisco, also passed Ban the Box ordinances. Los Angeles requires an individualized assessment of criminal history and job requirements
- January 1, 2018 any public or private employer with 5+ employees cannot inquire into criminal background until after a conditional job offer is made. Then the employer can review the criminal records/background, **but...**


“Ban the Box” – California

- Upon receipt of the criminal background information, employers must conduct an “individualized assessment” of the criminal history and job requirements
 - If the employer wants to rescind the conditional offer, it must provide written notice to the applicant advising them of their decision and provide a copy of the background report
 - The employee has 5 business days to respond and challenge the report or otherwise explain the circumstances
 - If applicant is challenging the report, the employer cannot make a final decision for 5 additional days.
 - If final decision is to rescind, must advise applicant of decision and of their right to file a complaint with the Department of Fair Employment and Housing
- 

“Ban the Box” – Individualized Assessment

- ▶ Most states requiring an “Individualized Assessment” follow the EEOC guidelines for criminal history review:
 - First – Review the nature and gravity of the offense
 - Next – Review the time that has elapsed since the offense occurred and any time that has been served
 - Finally – Review the nature of the position
- 


“Ban the Box” – Individualized Assessment

- ▶ Examples of the individualized assessment:
 - Violent offenses and positions where employees are alone with customers or other employees?
 - Driving while impaired/under the influence and positions involving operation of a vehicle?
 - Theft, embezzlement or offenses involving dishonesty and finance or bookkeeping positions?
 - Deferred prosecution for disorderly conduct during college and an account manager position 15 years later?
- 

“Ban the Box”

- ▶ Brief overview of key state laws:
 - Texas
 - Austin became the first city in Texas to “ban the box” in 2016
 - No criminal history questions or criminal background check until conditional offer is made
 - At this time no statewide ban
 - Washington:
 - Effective June 7, 2018, private employers can no longer include questions on an application or ask about arrest or conviction questions before applicant is deemed “qualified” for the position.
 - Florida:
 - No prohibition on criminal background checks (but federal law still applies)

“Ban the Box”


- 
- ▶ Recent Update: Michigan bans “ban the box” laws
 - Governor Snyder signed a Senate bill in March 2018 which limits the powers of local governmental bodies to enact ban the box laws that would apply to private employers
 - Still some restrictions on public employers in certain cities
 - *Private employers cannot ask about detention or arrests that did not lead to conviction

Other Hiring Traps – Adverse Impact

- ▶ Disparate Impact Theory

- Questions that seem “facially neutral” may be discriminatory when used to screen out candidates disproportionately in a protected class
- “The touchstone is business necessity. . . . Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.”
 - – *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–2 (1971).


Other Hiring Traps – Adverse Impact

- ▶ Any application question or pre-employment inquiry can have an adverse impact on a protected class – Even if it appears to be neutral, such as questions about marital status, military discharge, or political beliefs
 - ▶ Make sure all questions/inquiries are both job related and have been examined for adverse impact – Is there another way to gather the information or ask the question?
 - ▶ Check EEOC guidelines or ask your attorney if you have any question about the potential impact
- 


Adverse Impact Example – Car Ownership

- ▶ Whether an employer can ask about car ownership depends on both Federal and State law
- ▶ The EEOC considers this question to be regarding financial circumstances, which is allowed so long as the employer does not use that information to discriminate against minority groups
 - A financial requirement is not acceptable if it fails to help the employer accurately identify responsible and reliable employees AND has an adverse impact on a protected class
- ▶ Potential solution:
 - Consider asking “do you have consistent and reliable means of transportation to work” instead.

Adverse Impact Examples – criminal history

- ▶ Criminal History – Statistics show that African Americans, hispanics and other persons of color are arrested, convicted, and incarcerated at significantly higher rates
 - ▶ Ban the Box laws have the additional purpose of avoiding race and ethnic discrimination in the hiring process
 - ▶ Adverse/Disparate impact is more difficult to discern and the basis for an increasing number of discrimination claims
- 


“Salary History” and the Hiring Process

- ▶ Purpose of the laws:
 - To help women and members of minority groups who have been paid less to perform the same job as get hired at salaries or wage rates equal to those of men
 - ▶ Multiple states and cities have now passed pay history laws
 - Includes Massachusetts, Oregon, Delaware
 - California, Massachusetts, New York City, Philadelphia, Oregon, and Puerto Rico have banned this question for all employers.
 - Pittsburgh and New Orleans have banned for public employees, and Maryland has a bill pending.
- 

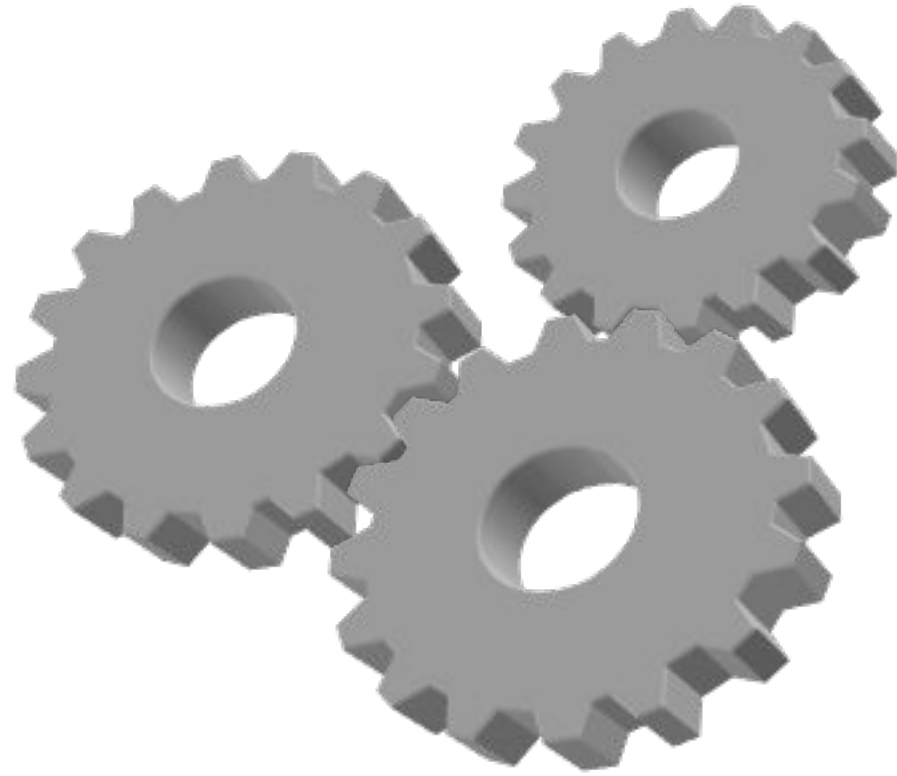
Salary History in the Hiring Process

- ▶ On the other hand...
 - ▶ Michigan and Wisconsin have recently passed laws banning local governments from enacting salary history ordinances
 - ▶ Michigan's new law:
 - ▶ “[a] local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or a potential employee.”
 - ▶ It will go into effect at the end of June, 2018


Salary History and the Hiring Process

- ▶ Role out of these laws is very new, and will be clarified in the coming months as regulations are added and court decisions provide clarity
 - ▶ At least one court has ruled that employers can ask about prior pay history but cannot use this information to rely on setting the applicants new salary
 - ▶ This is a slippery slope; if you ask the question and the affected employees find out they are being paid less than their white/ male counterparts, it would be difficult to argue there was no pay discrimination
 - ▶ Watch for more details as you look to implement these laws
- 


Switching Gears...




EEO Updates

- ▶ Title VII & LGBT Issues
 - ▶ Religion
 - ▶ Age Discrimination in Employment Act
 - ▶ Healthcare & Wellness
 - ▶ ADA & Prescription Drug Use Policies
- 

Title VII – Generally

- ▶ Prohibits discrimination in employment on the basis of:
Race / Color / Religion / Sex / National Origin
 - ▶ Broadly interpreted to cover all aspects of employment– hiring, promotions, demotions, discipline and termination
 - ▶ “Sex” includes pregnancy and childbirth and related medical conditions and treatments
 - ▶ Most states and some municipalities have similar EEO laws with many expanding Title VII’s scope: marital status, sexual orientation, etc
- 

Title VII & LGBT: State of the Law

- ▶ The law is unsettled as to whether gender identity and sexual orientation are protected classes under Title VII
 - ▶ Despite the broad interpretation of sex-based discrimination there are conflicting opinions from courts, the DOJ & the EEOC
 - ▶ Employers should err on the side of caution and take action to prevent workplace discrimination and harassment of these classes of individuals while the law is still developing
- 

Title VII & Transgender

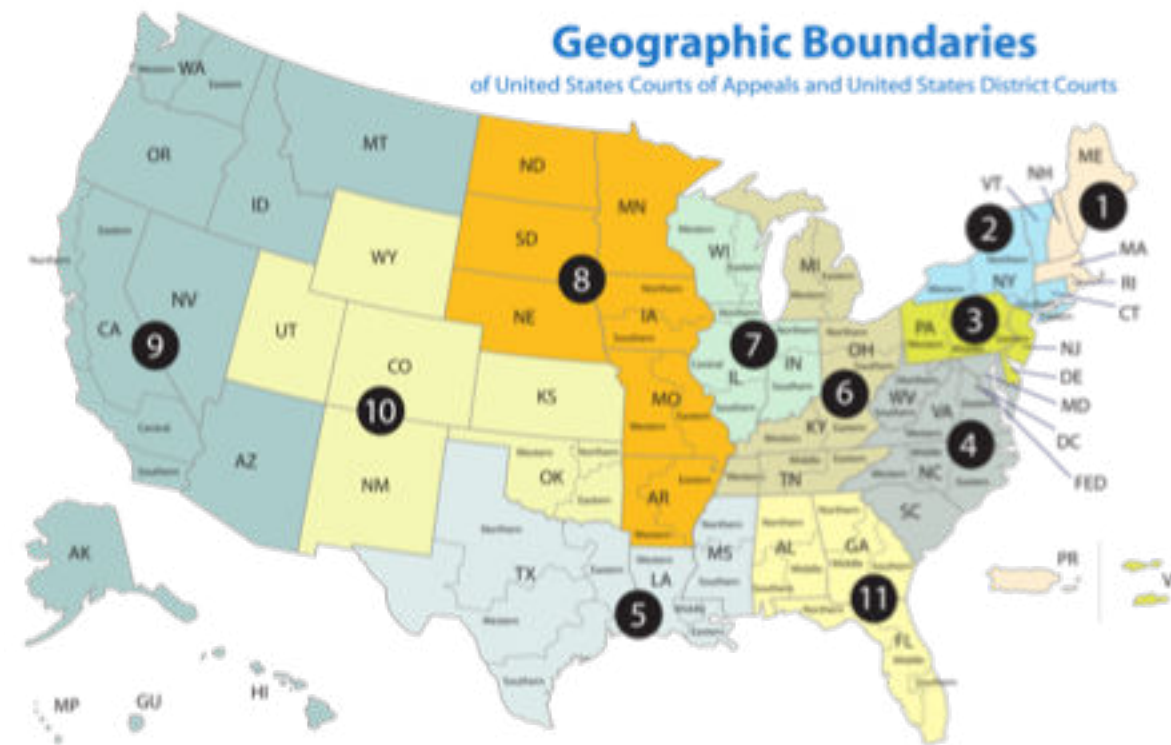
- ▶ Is Transgender a protected class?
 - Some courts have concluded that transgender falls under “sex discrimination” under Title VII
 - Under Obama administration: DOJ held that it was within the protected class
Under Trump administration: DOJ reversed this position in October 2017
 - The EEOC has consistently held the position that transgender is within the “sex” protected class under Title VII
 - In one of the first cases to be decided since the DOJ reversal in October, the court in Tudor v. S.E. Oklahoma State University departed from the DOJ’s new position that transgender is not a protected class and denied Defendant’s Motion for Summary Judgment when it found that there were issues of triable fact as to whether transgender is protected by Title VII
 - The case went to the jury, who awarded the professor \$1.1 million

Title VII & Sex Discrimination based on Gender Non-Conformity

- ▶ Gender Non-conformity / Gender Stereotype
 - Sex-based discrimination prohibition includes failure to conform to gender stereotypes
 - See Price Waterhouse v. Hopkins, 490 U.S. 229 (1989) (holding that an employer discriminated against a female employee on the basis of sex when denying her partnership because the employee did not “look” like what a female employee should look like)
 - More recently, this theory of sex discrimination has been applied to transgender people
 - Almost all Circuits have affirmatively held that discrimination against a transgender person is sex discrimination under a theory of gender non-conformity

Title VII – LGBT Cases Circuit Breakdown

- Transgender discrimination is covered under a gender non-conformity theory of Title VII sex discrimination:
 - 1st Circuit
 - 6th Circuit
 - 9th Circuit
 - 11th Circuit
 - & at district court level in all other Circuits
- Sexual Orientation is sex discrimination:
 - 2nd Circuit
 - **Most recent case – See *Zarda* below**
 - 7th Circuit



Title VII & LGBT – Litigation Examples

Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018)

- ▶ In February, the 2nd Circuit joined only one other Circuit so far (the 7th) in holding that discrimination based on sexual orientation is sex-based discrimination covered under Title VII.
- ▶ Don Zarda was a skydiving instructor who claimed that he was fired for being gay.
- ▶ He was frequently strapped to female skydivers during tandem jumps and would make comments about being gay in order to make them more comfortable about being connected to a man.
- ▶ After complaint from a customer, he was fired.


**“WE NOW CONCLUDE THAT SEXUAL
ORIENTATION DISCRIMINATION IS
MOTIVATED, AT LEAST IN PART, BY SEX AND
IS THUS A SUBSET OF SEX DISCRIMINATION”**

Source: National Law Journal



Title VII & Transgender– Litigation Examples

Broussard v. First Tower Loan, (E.D. La. 2015)

- ▶ An applicant for a management trainee position gave his driver's license to a manager.
 - ▶ The license listed him as "F." The manager asked why his license said that. The applicant said he was a transgender man.
 - ▶ The employer asked him to sign a statement agreeing to act and be treated like a female at work.
 - ▶ The employee refused and he was fired.
 - ▶ The EEOC intervened and the case went to arbitration.
- 

Title VII & Gender Non-Conformity – Litigation Examples

Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017) (certiorari denied)

- ▶ A gay female security officer worked at a hospital for a year. She was subjected to harassment because she did not carry herself in a “traditional womanly manner.”
- ▶ She complained to HR, but harassment continued, and resigned and later sued under Title VII
- ▶ The **11th Circuit** ruled that her claim of gender– non-conformity was actionable under Title VII.
- ▶ Her claim for sexual orientation discrimination was not actionable under Title VII in the 11th Circuit.

Title VII & Gender Non-Conformity – Litigation Examples

Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011)

- ▶ A transgender woman who underwent gender transition while working for the Office of Legislative Counsel brought suit claiming sex discrimination under Title VII after she was discharged from employment
- ▶ The court held that:
 - “[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.”
 - “All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.”

Title VII & Transgender– Litigation Examples

- ▶ Roberts v. Clark County School District, 312 F.R.D. 594 (D. Nev. 2016)
 - A transgender school police officer sued employer because employer's policies prevented him from using the men's or women's bathroom.
 - “At one point, Roberts was told he would be required to use the female restroom. To avoid this awkward situation, Roberts was told to avoid and did avoid using any CCSD restroom facilities. For a period of time he was forced to use outside commercial facilities.”
 - The district court entered summary judgment for the police officer because he was treated differently than people of his “biological sex” and “the gender he identifies as.”



Title VII & LGBT – Practical Examples


- ▶ A few LGBT-related examples of discrimination...
 - Failing to hire an applicant because she is a transgender woman
 - Firing an employee because he is planning to or has transitioned
 - Denying an employee equal access to common restroom corresponding to their gender identity
 - Denying a promotion because an employee is gay
 - Discriminating against or harassing an employee because of sexual orientation or gender identity
 - Failing to use pronouns that the employee prefers

Source: EEOC



Title VII & Religion

Ahmed v. Astoria Bank, 2017 WL 1906726 (2nd Cir. 2017)

- ▶ A Vice President of a bank “constantly” told an employee to remove her hijab. He referred to her hijab as a “rag.”
 - ▶ The supervisor told her she was “suspicious” and he was thankful to work “in the other side of the building in case you guys do anything.”
 - ▶ The employee was terminated for “tardiness and carelessness in checking important documents.”
 - ▶ The trial court granted the bank’s motion for summary judgement on the hostile work environment claim, but the 2nd Circuit reversed.
- 

Title VII & Religion

EEOC v. United Health Programs of America, Inc., (April 25, 2018)

- ▶ Jury awarded \$5.1 million in compensatory and punitive damages to employees who were required to participate in religious activities at work
- ▶ Title VII prohibits employers from coercing employees to engage in religious practices at work and from retaliating against the employees who oppose such practices
- ▶ Facts:
 - Employees were required to participate in religion that promoted concepts known as "Onionhead" and "Harnessing Happiness"
 - Employees were required to light candles to prevent demons from entering the workplace, conduct chants and prayers, and respond to emails related to God
 - The Claimants allege they were terminated because they rejected Onionhead's beliefs or had other religious beliefs of their own

What's New in the ADEA

EEOC v. Darden Restaurants

- ▶ Seasons 52 is paying \$2.85 million to settle lawsuit claiming discrimination against applicants on the basis of age
- ▶ Facts:
 - Darden allegedly discriminated against applicants age 40 and older by denying them front-of-the-house and back-of-the-house positions around the counter
 - More than 135 applicants provided sworn testimony that managers made age-related comments in interviews clearly indicating a preference for younger applicants
 - Seasons 52 also hired applicants over 40 at a significantly lower rate than younger applicants
- ▶ Seasons 52 must make significant changes to its recruitment and hiring processes and pay for a decree compliance monitor to prevent future discrimination

ADA & Prescription Drug Use Policies

- ▶ In light of two recent EEOC settlements, employers should use caution in enacting policies regulating and prohibiting Rx drug use in the workplace
- ▶ In *Foothills Child Development* case, a pre-school teacher was terminated 30 minutes into his first day for disclosing that he was prescribed Suboxone, which is used in the treatment of addiction. The employer settled for \$5,000 and is required to amend its drug policy
- ▶ In *M.G. Oil*, the employer is paying out \$45,000 to settle an EEOC case for withdrawing an offer of employment after the employee tested positive for a prescribed medication

Healthcare & Wellness

▶ Wellness Programs

- Generally, HIPPA prohibits discrimination in health care plan eligibility or premiums based on health-related factors, but there were exceptions for certain wellness programs
- The Affordable Care Act (“ACA”) expanded those exceptions to allow employers to offer up to 30% incentive for participating in wellness activities, which could include answering health-based questions
- These exceptions created issues with ADA and Genetic Information Nondiscrimination Act (“GINA”) where employees were asked to answer health-related questions
- Because of that issue, the EEOC promulgated regulations that provided that employers were allowed to offer employees an incentive of up to 30% of the cost of health coverage for participating in wellness programs if the program was voluntary
- The AARP challenged this exception and won on summary judgment
 - Argued that EEOC failed to show that the wellness would be considered “voluntary” where a 30% discount was offered
- The EEOC regulations will be vacated as of January 1, 2019, and new regulations have been stalled because of the vacant EEOC Chair and Commissioner positions

Q&A



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