Employment Law Issues Facing Corporate Employers

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Presenters

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CAUTION! Restrictive Covenants

What Is *Currently* Enforceable?

Restrictive Covenants – Take-Aways

- What are they
- What purpose do they serve
- How can they benefit your enterprise
- How to determine which ones to use
- How to use them effectively
- How to avoid issues when hiring employees who may be subject to them

IMPORTANT INFORMATION

Restrictive Covenants – Types

- **Non-compete -** prevents a former employee from working for a competitor or starting a competing business
- **Non-solicit -** prevents a former employee from soliciting or accepting their former employer's clients, customers, or other employees to leave the company
- **Non-disclosure -** prevents a former employee from disclosing confidential or proprietary information

Restrictive Covenants – Impact

Non-Compete:

- Offers greatest protections to employer
- Restricts employee movement most significantly

Non-Solicit:

- Offers less but still significant protection to employer
- Enforcement more difficult
- Does not restrict employee movement

Non-Disclosure:

- Offers some protection to employers
- Enforcement more difficult
- Does not restrict employee movement

How are Restrictive Covenants Regulated?

The regulation of restrictive covenants is dependent upon the type of covenant.

- The validity of non-compete agreements varies by state and restrictions must be reasonable
- Non-solicitation agreements are generally not regulated
- Non-disclosure agreements governed by both state and federal law
  - State protections
  - Uniform Trade Secrets Act

Restrictive Covenants – Non-Disclosure

- Crucial considerations
  - What information is considered confidential
  - What steps are taken to maintain confidentiality of the information
    - Use and enforcement of NDAs
    - Restrictions to access confidential information
    - Limitation on who may access
    - Steps taken when confidential information disclosed
  - When, if ever, is disclosure permitted
  - Who is allowed to authorize disclosure

Non-Compete Agreements

Non-competes are enforceable in most states with restrictions governed by common and statutory law

- Common law
  - Ohio, Kentucky, and Indiana courts have held non-compete agreement must be reasonable to be enforceable
- Statutory law
  - Georgia – must be reasonable in time, geographic area, and scope of prohibited activities (GA Code 13-8-53(a))
- Both Statutory and Common Law
  - 1 year and common law restrictions (reasonableness)

Non-competes are unenforceable/illegal in some states

Non-Compete Agreements & Growing Disfavor

Illegal

- California, Oklahoma, Minnesota, and North Dakota

Income Threshold

- Colorado, Illinois, Maine, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Virginia, and Washington

Greater Scrutiny

- New York

Elements Required for Enforceability

- Consideration
- Good Faith
- Narrowly tailored and necessary to protect goodwill or legitimate business interests of company
- Reasonable in duration, geographic scope, scope of restricted activity, and types of employees
- Carefully describe employer’s legitimate business purpose and avoid unnecessarily restricting employee's ability to provide services

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Restrictive Covenants – Non-Compete (cont’d)

- Validity varies by state
- What is considered reasonable varies?
  - Uses can be limited to certain employment levels
    - E.g., High-level employees only (Georgia, Maryland, Massachusetts, Virgina)
  - Certain professions can be excluded
    - E.g., lawyers, beauticians/cosmetologists (Vermont); technology professionals (Hawaii), broadcasters (Maine)
    - Subject to increased scrutiny by courts

Restrictive Covenants – Enforcement

- Cease and Desist letters
  - Former employee
  - Competitor
- Injunctive relief
  - TRO
  - Preliminary injunction
  - Permanent injunction
- Damages
  - Compensatory
  - Profits
  - Punitives

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FTC Attempts to End Non-Competes

In April 2024, the Federal Trade Commission (FTC) announced a new rule:

“It is an unfair method of competition—and therefore a violation of Section 5 of the FTC Act—for employers to enter into non-compete clauses with workers."

This rule would have invalidated most preexisting non-compete agreements and banned nearly all future non-compete agreements (with very limited exceptions).

For workers other than a senior executive, unfair method of competition for a person (i) to enter into or attempt to enter into a non-compete; (ii) to enforce or attempt to enforce a non-compete; or (iii) to represent that the worker is subject to a non-compete.

The rule was set to go into effect on September 4, 2024.

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FTC Attempts to End Non-Competes

Lawsuits were filed in federal courts in Texas, Florida, and Pennsylvania challenging the FTC's authority to engage in "substantive rulemaking" under Section 6 of the FTC Act.

Texas and Florida federal district courts ordered the rule to be set aside, finding that the FTC exceeded its statutory authority and the rule is arbitrary and capricious.

- Pennsylvania federal district court sided with FTC
- The FTC immediately appealed the rulings to the Fifth and Eleventh Circuit

On September 5, 2025 the FTC voluntarily dismissed its appeals.

FTC Attempts to End Non–Competes

- The FTC continues to heavily target overbroad non-competes through enforcement actions under Section 5 of the FTC

- On February 26, 2025, the FTC announced that it created a joint task force that will focus on rooting out and prosecuting anti-competitive labor practices

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Major Developments

New York- the legislature passed a bill banning non-competes, with exceptions for individuals earning over $500,000 a year or in specific situations, but this has not been signed into law

California- expanded enforcement of its longstanding noncompete ban, employers must notify current and former employees if they have signed an unenforceable non-compete

Major Developments

Pennsylvania

- Noncompetition agreements with health care practitioners are prohibited

Washington

- New “noncompetition covenant” definition clarifies that a noncompete agreement includes agreements that directly or indirectly prohibit the acceptance or transaction of business with a customer
- Nonsolicitation of customers relates only to “any current customer of the employer”
- Employers must provide the language of the noncompete in writing at the time of the initial offer

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Major Developments

Illinois

- Non-compete and non-solicitation provisions entered into after January 1, 2025, are unenforceable if enforcement would likely increase cost or make it more difficult for a veteran or first responder to obtain mental health services.
- Non-competes and non-solicitation agreements with a person employed in construction are void and illegal

Restrictive Covenants – Non-Compete

EXAMPLE

EMPLOYEE agrees that, during the period of employment with Company and for twelve months following the termination of employment with EMPLOYER, whether such termination is voluntary or involuntary, EMPLOYEE shall not directly or indirectly, either personally or in association with any other person, partnership, corporation or entity, own, operate, maintain, consult with, be employed by (including self-employment), render services for, or otherwise engage in any business or activity that competes with EMPLOYER within the geographic territory in which EMPLOYER does business. EMPLOYEE acknowledges that the geographic restriction and other restrictions set forth in this paragraph are both necessary and reasonable.

Restrictive Covenants – Non-Solicit

EXAMPLE – Customer Solicitation

Employee agrees that during the period of employment with Employer, and for a period of eighteen (18) months following termination of Employee's employment, whether such termination is voluntary or involuntary, Employee will not, directly or indirectly: (i) solicit, attempt to solicit, or accept any business from any entity doing business with Employer; (ii) cause, induce or attempt to cause or induce any business relation of Employer to cease doing business with Employer, to deal with any competitor of Employer, or in any way interfere with its relationship with Employer; or (iii) take any other action with the intent or result of diverting business from Employer or interfering with any actual or prospective contractual or other relationship of Employer.

Restrictive Covenants – Non-Solicit (cont'd)

EXAMPLE – Co-Worker Solicitation

Employee understands and acknowledges that Employer has expended and continues to expend significant time and expense in recruiting and training its employees, and that the loss of employees would cause significant and irreparable harm to Employer. Employee agrees that during Employee's employment with Employer, and for a period of eighteen (18) months after termination of employment for any reason whatsoever, regardless of whether such termination was voluntary or involuntary, Employee shall not directly or indirectly, solicit to hire, hire or employ in any fashion, any employee, service provider to or consultant to Employer, or in any way interfere with the relationship between Employer and any of its employees, service providers or consultants.

Restrictive Covenants – Non-Disclosure

Example

You will not, except as authorized or required by your duties, reveal to any person, persons, entity or company any Company information of a confidential or proprietary nature, including, but not limited to, any customer lists or other trade secrets, confidential operations, processes or dealings or any information concerning the organization, business, finances, transactions, plans or affairs of the Company or their existing or potential customers, which may come to your knowledge during the period of your employment with the Company ("Confidential Information").

You will keep all Confidential Information strictly confidential and will not use or attempt to use any Confidential Information except for the benefit of the Company. You will not use Confidential Information in any manner which may or is likely to, injure or cause loss either directly or indirectly to the Company or its existing or potential customers.

This restriction will continue to apply after the termination of your employment without limit in point of time, but will cease to apply with respect to information or knowledge which may reasonably be said to have come into the public domain other than by reason of breach of the provisions of this agreement

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Navigating the New Terrain:
Emerging Trends in Employment Discrimination Law

Roadmap

- EEOC Overview
- Religious Discrimination & Accommodations
- Gender Identity
- Diversity, Equity, & Inclusion
- Disparate Impact
- Reverse Discrimination

Functions of the EEOC

Charge Processing	Investigate charges of discrimination filed by employees and applicants Evaluate claims of discrimination based on race, religion, sex, national origin, age, disability, and genetic information Provide mediation and settlement opportunities to resolve disputes
Enforcement	Enforce federal laws prohibiting employment discrimination File lawsuits against employers on behalf of individuals or groups to address discriminatory practices Monitor compliance with court orders and settlement agreements
Informal Rulemaking	Issues guidance and interpretive rules to clarify anti-discrimination laws Provides technical assistance to employers and employees on compliance with federal laws Conducts public hearings and solicits feedback on proposed regulations and policies
Member Selection	Composed of five commissioners and a General Counsel, all appointed by the President and confirmed by the Senate Commissioners serve staggered five-year terms to ensure continuity The General Counsel oversees litigation and provides legal advice to the Commission

EEOC Lack of Quorum

What is a quorum?

EEOC is a five-member Commission, and there must be at least three members for formal voting.

In January 2025, President Trump removed two Commissioners, leaving only two members. A third member was appointed on October 7, 2025 effectively restoring the quorum.

How did the absence of a quorum affect the EEOC?

- The EEOC could not initiate formal rulemaking
- Could not issue, modify, or revoke formal guidance
- Could not initiate "systemic" or "pattern-and-practice" cases

EEOC Strategic Redirection

1. Concentrated efforts on religious discrimination
2. Focus on DEI (Diversity, Equity, and Inclusion)
3. Narrower interpretation of sex for enforcement purposes

Key Cases: Religious Discrimination

Groff v. DeJoy (Supreme Court 2023)

- Originated in U.S. District Court for the Eastern District of Pennsylvania
- Under Title VII, an employer that denies a religious accommodation must show that the burden of grating an accommodation would result in substantial increased costs to conduct its business
- This case clarified that the standard to prove undue hardship is no longer anything greater than a de minimus cost
- The inquiry is fact-specific, and courts must consider all relevant factors including the accommodation at issue and its practical impact considering the nature, size, and operating cost of the employer

Key Cases: Religious Discrimination

Barrett v. Vilsack (2024)

- EEOC decision that is illustrative of EEOC's approach to religious accommodation as it pertains to LGBTQI+ employees, discrimination, and harassment training
- Complainants wanted a religious exemption from attending mandatory LGBTQI+ training
- Agency found that complainants were unable to establish that such trainings conflicted with their religious beliefs and did not require their religious observance or practice
- Held that it was an undue hardship to provide exemptions from training on EEO laws and anti-discrimination policies

Why are Religious Discrimination Cases Increasing?

COVID-19 Vaccine Mandate and Exemptions

Massive increase in claims and EEOC filings related to COVID-19 vaccine mandates and requests for religious exemptions

Accommodation Challenges

Failure to accommodate employees' religious beliefs and practices in relation to vaccine mandates

Increasing scrutiny on employers' handling of religious accommodation requests

Conflicts with Other Rights

Emerging conflicts between religious rights and gender identity or LGBTQ+ rights

Balancing religious accommodations with anti-discrimination protections for gender identity and sexual orientation

Potential Challenges & Best Practices

Challenges:

Increase in religious accommodation requests

More lawsuits against employers and increased scrutiny from the EEOC

The EEOC has been directed to follow the ruling in Groff rather than the precedent set in Barrett

Best Practices:

Seriously consider all requests for religious accommodation

Intentionally engage with the employee to determine the appropriate accommodation

Refrain from making personal remarks or verbalizing personal opinions

DOCUMENT EVERYTHING- this is the best defense to a failure to accommodate claim

Gender Identity & Potential Issues

Gender Identity - a person's inner deeply held sense of being male, female, both, neither or somewhere else along the gender spectrum, which may or may not align with the sex assigned at birth

Potential Issues:

- Misgendering (using the wrong pronouns)
- Discriminatory hiring or promotion practices based on gender identity
- Denying access to bathrooms aligning with a person's identity
- Harassment such as derogatory comments or jokes
- Unequal pay for transgender and gender non-conforming employees
- Discrimination based on identity/gender assignment
- Right to ignore gender identity

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Bostock v. Clayton County, Georgia

Title VII applies to gender identity, but the ruling is primarily confined to termination and hiring practices. Bostock does not address specific issues. Employers face issues beyond terminations, and the ruling does not instruct how to handle those issues.

Day-to-day challenges include:

- Bathroom and locker room access
- Dress code policies
- Name and pronoun usage
- Health benefits
- Training and education
- Privacy and confidentiality
- Support systems for transitioning employees

EEOC Priorities for Gender Identity

- Executive Order 14168 “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to Federal Government.”
- Potential recission of EEOC guidance on gender identity, related resources, and the use of non-binary gender markers in the EEOC process.
- On February 15, 2025, the EEOC dismissed six cases on behalf of workers alleging gender identity discrimination arguing that it conflicts with Executive Order 14168. All claims filed by employees alleging gender identity discrimination will be accepted, although complaints that implicate the executive order will be elevated to headquarters for review.
- On May 15, 2025, a U.S. District Court for the Northern District of Texas held that the EEOC overstepped its authority under Title VII by interpreting “sex” to include gender identity and sexual orientation.

Navigating the Future

Challenges:

EEOC will not reimburse state and local agencies for investigating gender identity and transgender discrimination claims

Enforcement actions will be taken by state and municipal administrative agencies under state and local anti-discrimination laws

These cases are now “C” level cases for the EEOC and will be a low priority

Plaintiffs will have more difficulty bringing gender identity claims

Best Practices:

Recognize that Bostock is the law at the federal level, and ensure compliance with applicable state law

Communicate with aggrieved employees

Evaluate requests for religious accommodations

Approve requests to use sex-designated spaces that align with an employee’s gender identity under the ADA

EEOC: Shift in Enforcement Priorities Diversity, Equity, and Inclusion

EEOC advises against segregating employees for DE&I activities

Employee Resource Groups must be:

- Inclusive and open to all employees
- Indicated intent to review DE&I programs that may exclude certain workers and reflect bias
- Emphasized that employment actions based on protected characteristics are prohibited even if aimed at fostering diversity. Use of quotas or workforce balancing is unlawful

What is disparate impact?

Disparate impact: practices in employment, housing, or other areas that adversely affect one group of people of a protected characteristic more than another, even when the rules applied are formally neutral.

Title VII of the Civil Rights Act of 1964: Prohibits employment practices that cause a disparate impact on the basis of race, color, religion, sex, or national origin.

The Supreme Court held in *Griggs v. Duke Power Co.* (1971) that employment practices that are neutral on their face but have a discriminatory effect violate Title VII of the Civil rights Act of 1964 unless the employer can prove they are directly related to job performance.

EEOC: Shift in Disparate Impact Enforcement Priorities

Executive Order Restoring Equality of Opportunity and Meritocracy

- This order instructed all federal agencies to cease using the disparate impact theory of liability under federal civil rights laws, including Title VII.

The EEOC closed all pending charges based solely on allegations of disparate impact discrimination on September 30, 2025.

Parties will be issued right-to-sue letters to charging parties, allowing them to proceed on their own in federal court.

The agency will continue to take charges that allege both disparate impact and disparate treatment. However, agency staff have been directed to investigate only the disparate treatment claims.

Examples of Disparate Impact

Pre-Employment Tests:

- An employer who uses a standardized test that disproportionately screens out minority applicants, even though the test is not related to job performance.

Height or Weight Requirements:

- A workplace policy requiring employees to be above a certain height or weight can disqualify women or certain ethnic groups more often, without being necessary for job duties.

Facial Hair or Grooming Standards:

- A grooming policy banning beards and certain hairstyles (i.e. locs or braids) can disproportionately impact Black employees or those with religious obligations.

Best Practices

- Comply with federal and state law
- Review policies and practices
- Communicate with employees
- Inform HR staff
- Consult with counsel

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What is Reverse Discrimination?

- Reverse discrimination refers to discrimination against members of a dominant or majority group, often as a result of policies intended to correct historical discrimination against minority or disadvantaged groups.
- Claims of reverse discrimination typically involve perceptions of unfair treatment or preferential treatment of minority groups.
- Often arises in the context of affirmative action policies aimed at increasing opportunities for underrepresented groups.

Legal Framework for Reverse Discrimination Claims

Title VII

Prohibits employment discrimination based on race, color, religion, sex, or national origin against majority group members.

Equal Protection Clause

The Fourteenth Amendment's Equal Protection Clause can be invoked in cases of reverse discrimination involving public institutions.

Ames v. Ohio Dep't of Youth Services

The Court unanimously held that Title VII does not impose a heightened evidentiary burden on majority-group plaintiffs in employment discrimination cases.

The barrier for majority group employees to file reverse discrimination lawsuits has been removed.

Potential Challenges & Best Practices

Challenges

- Increase in reverse discrimination lawsuits
- Heightened legal risk
- Increased scrutiny of DEI programs

Best Practices

- Regularly assess lawful programs to ensure compliance
- Thoroughly document all hiring, firing, promotion, and demotion practices
- Centralize decision making
- Update training for managers and HR personnel

What should attorneys do?

Evaluate	Evaluate the client's risk tolerance for potential legal challenges
Review	Review clients' policies to ensure they are compliant with Title VII and state law
Revise	Revise training materials to ensure legal compliance and effectiveness
Assess	Assess the purpose, design, implementation, and outcomes of all initiatives
Eliminate	Eliminate quotas, set-asides, and preference

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Leverage Talent Pools

- Implement skills-based hiring and promotion criteria
- Formalize hiring and promotion
- Require transparent promotion criteria
- Focus on demonstrated performance rather than potential
- Establish a standardized rubric for employee evaluation

Communication Evaluation

- Review internal and external DEI-related communications
- Are the communications reflecting how initiatives are implemented?
- Do all communications reflect a commitment to equal employment opportunities?
- If implementing changes, be prepared to explain the “why”
- Document all bases for decisions

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