Legal Update

EEOC Pittsburgh Area Office

June 30, 2016

"requiring employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work"
S2995, Supplementing P.L.1945, c.169.

"It shall be an unlawful employment practice ...
[f]or any employer to fail to provide reasonable
Accommodations to an employee for needs
related to pregnancy, childbirth, or a
related medical condition ...."
Amending Chapter 9-1100 of The Philadelphia Code

"requiring an employer, if an employee requests a reasonable accommodation for a disability caused or contributed to by pregnancy, to explore with the employee certain means of reasonably accommodating the disability; requiring an employer to transfer an employee to a less strenuous or less hazardous position for a certain period of time under certain circumstances; ...."

Article : State Government, Section 20 –
601(a) through (d);20--606(a)(4); and 20--609
Annotated Code of Maryland (2013)

It shall be an unlawful employment practice for an Employer to ...
Fail or refuse to make reasonable accommodations to the known limitations related to the pregnancy of an applicant for employment or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such employer ....
Chapter 7, Title 19, Delaware Code Section 711(a)(3)(b)
Sept. 9, 2014

[W]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs***, as other persons not so affected but similar in their ability or inability to work….***
42 U.S.C. § 2000e(k).

[P]laintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed – give rise to an inference of intentional discrimination.

Significant burden exists if "the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."

Young v. United Parcel Service
575 U.S. ___, 135 S.Ct. 1338, 1354 (2015)

U.S. Equal Employment Opportunity Commission

[redacted]	*NOTICE*	**Number**
EEOC		915.003
		Date
[redacted]		June 25, 2015

JECT: EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues

POSE: This transmittal covers the issuance of the Enforcement Guidance on Pregnancy Discrimination and Related Issues. This document provides guidance regarding the Pre

ECTIVE DATE: Upon receipt.

IRATION DATE: This Notice will remain in effect until rescinded or superseded.

SOLETE DATA: This Enforcement Guidance supersedes the Enforcement Guidance on Pregnancy Discrimination and Related Issues dated July 14, 2014. Most of this revised gu atment), and I.C.1 (Light Duty) in response to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*, --- U.S. ---, 135 S.Ct. 1338 (2015). Section I A.5 of the July 14, 201

GINATOR: Office of Legal Counsel.

Jenny
Chair

ENFORCEMENT GUIDANCE:

bercrombie & Fitch Stores, 731 F.3d 1106)13); rehearing den., 2/26/14; cert. granted, 10/2/14

Religion, Headscarves, Accommodations Never Mentioned

Friend says hijab okay

I assume she's Muslim and wears headscarf because of her religion.

An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.

Actual knowledge NOT REQUIRED.

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (June 1, 2015)

Adding Pay Data to the EEO-1

Purpose and Authority

- Results from President's National Equal Pay Task Force to identify ways to improve enforcement of federal laws prohibiting pay discrimination.
- Section 709(c) of Title VII of the Civil Rights Act of 1964 provides for employer retention of records relevant to whether unlawful employment practices have been or are being committed and to produce reports as prescribed by EEOC.
- 29 CFR 1602 Subpart B authorizes EEO-1 reporting.
- EEO-1 reporting will be expanded for this purpose.

Who reports and how?

Any private industry employer and/or federal contractor already filing EEO-1 reports and having at least 100 employees.

Reporting begins in 2017 cycle and reports must be filed by September 30, 2017.

There are:

12 pay bands;
10 job categories;
7 race and ethnicity categories;
2 sex categories.

SECTION D - EMPLOYMENT DATA

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

SECTION D - EMPLOYMENT DATA

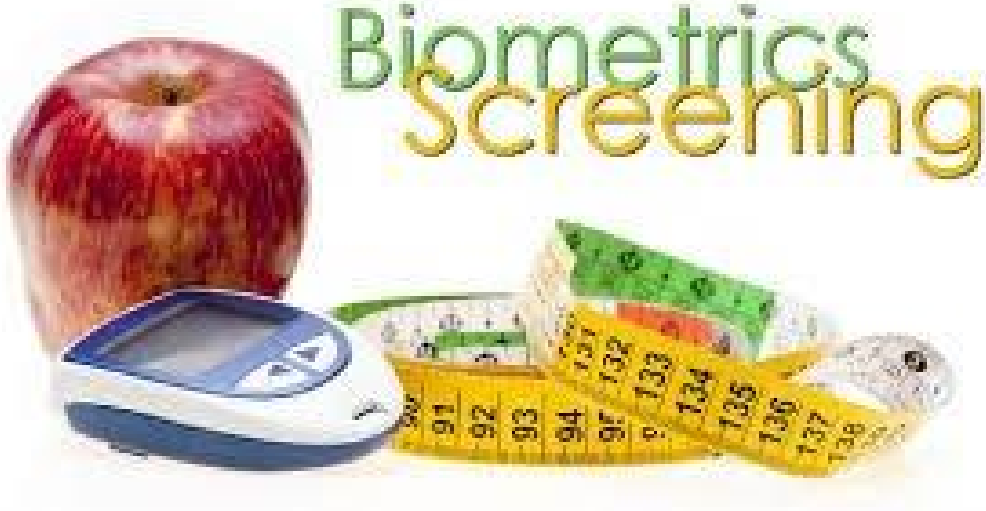
| | | |

What data source generates the report?

- W2 earnings for the past 12 months as of a pay period occurring in the months of July through September

- Hours worked …….but …
  - Employers will report only data that they alre
- Must be filed electronically
- But wait and see …..

Employer Wellness Programs



It's Time to Complete Your Health Risk Assessment!

Under the ADA:

(A)Prohibited examinations and inquiries. - A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job related and consistent with business necessity.

(B) Acceptable examinations and inquiries. - A covered entity may conduct **voluntary** medical examinations, including **voluntary** medical histories, which are part of an employee health program available to employees at that work site.

Under the Genetic Information Nondiscrimination Act

It shall be an unlawful employment practice for an employer to request … genetic information* with respect to an employee or a family member of the employee except … where health or genetic services are offered by the employer including such services offered as part of a wellness program ….

the employee provides prior, knowing, **voluntary**, and written authorization

*(i) such individual's genetic tests,
(ii) the genetic tests of family members of such individual, and
(iii) the manifestation of a disease or disorder in family members of such individual.

PRESS RELEASE
5-16-16

EEOC Issues Final Rules on Employer Wellness Programs

Rules Address Incentives; Protect Confidentiality

WASHINGTON, DC--The U.S. Equal Employment Opportunity Commission (EEOC) today issued final rules that describe how Title I of the Am Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA) apply to wellness programs offered by employers th health information from employees and their spouses. The two rules provide guidance to both employers and employees about how workplace programs can comply with the ADA and GINA consistent with provisions governing wellness programs in the Health Insurance Portability and Act, as amended by the Affordable Care Act (Affordable Care Act).

The rules permit wellness programs to operate consistent with their stated purpose of improving employee health, while including protections f against discrimination. The rules are available in the Federal Register at https://www.federalregister.gov/articles/2016/05/17/2016-11558/regu the-americans-with-disabilities-act and https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination- also published question-and-answer documents on both rules today, available at https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-f and https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm, and two documents for small businesses https://www.eeoc.gov/laws/regulations/facts-ada-wellness-final-rule.cfm and https://www.eeoc.gov/laws/regulations/facts-gina-wellness-final-ru

Many employers offer workplace wellness programs intended to encourage healthier lifestyles or prevent disease. These programs sometimes questionnaires or health risk assessments and biometric screenings to determine an employee's health risk factors, such as body weight and c blood glucose, and blood pressure levels. Some of these programs offer financial and other incentives for employees to participate or to achie

To promote consistency between ADA/GINA and HIPPA as amended by the Affordable Care Act

An employee health program must be reasonably designed to promote health or prevent disease, and

Voluntary

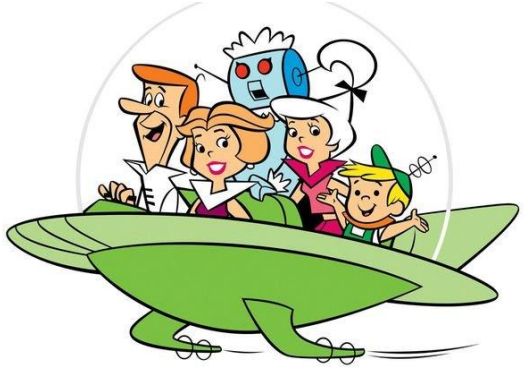
- the employee/spouse is not required to participate,
- may not be denied access to health insurance for non-participation,
- may not be limited in health care coverage for non-participation,
- may not be subjected to any adverse action for non participation.

- Confidentiality of medical information,
- Notification to employee/spouse of information to be obtained,
- Written employee/spouse consent

- Incentives/Penalties up to 30% of the total cost of employee-only coverage are permissible
- Still voluntary
- Employer must accommodate, absent undue hardship, employee's participation in wellness program
- Effective the first day of the first plan year that begins on or after 1/1/17

Section 703 (a) of Title VII: "because of such individual's … sex"

- *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)(Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes")



- *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998)("statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.")

LGBT

- **3. Addressing Emerging and Developing Issues.** …. coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply.
  - *Macy v. Holder*, Appeal No. 0120120821 (April 20, 2012)("claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition")
  - *Baldwin v. Foxx*, Appeal No. 0120133080 , 2015 WL 4397641 (July 16, 2015)("sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination under Title VII")

First EEOC litigation filings on Title VII sexual orientation

- ***Equal Employment Opportunity Commission v. Pallet Companies d/b/a IFCO Systems NA, Inc.,*** C.A. No. 1:16-cv-00595 (D. Md. Mar. 1, 2016)

- ***Equal Employment Opportunity Commission v. Scott Medical Health Center, P.C.,*** C.A. No. 2:16-cv-00225 (W.D. Pa. Mar. 1, 2016)

Sexual Harassment Complaint

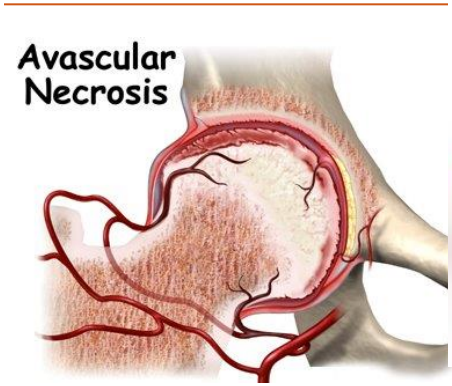
Stop the harassment

Is violence against a harasser protected activity?

8th and 9th Circuit yes: when an employee is fired because he acted to defend himself against harassment, which employer had failed to prevent or correct, the termination process cannot be said to be free from discrimination. Reasonable defense against physical violence may be protected oppositional activity.

No retaliation. We have zero tolerance for violence.

***Speed v. WES Health System*, 93 F.Supp.3d 351 (E.D. Pa. 2015)**



Capps v. Mondelez Global, LLC,
2015 WL 7450539 (E.D. Pa. Nov. 24, 2015)
No. 15-3839 (3d Cir.) EEOC Amicus brief filed 3/7/16

= I cannot work at all.

≠ Request for ADA accommodation

Qualified individual with a disability → Essential functions of the job with or without a reasonable accommodation

Stephenson v. Pfizer, Inc., 2016 WL 806071 (4th Cir. Mar. 2, 2016)(unpublished)

Driving vs. Travelling as the essential function of the job

666

Instruction
Manual

© Can Stock Photo - csp5643954

Resign or Get Fired?

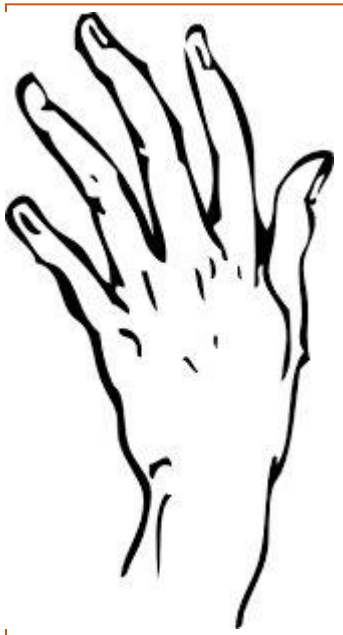
EEOC v. Consol Energy, Inc. and Consolidation Coal Company, 1:13-cv-00215 (N.D.W.Va.)

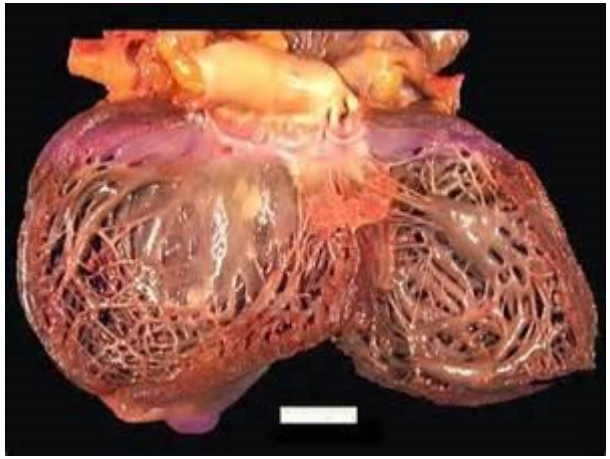
$150,000 comps

+$436,860.74 backpay/frontpay=

$586,860.74

+Equitable Relief





U.S. Equal Employment Opportunity Commission v. Weis Markets Inc., C.A. No. 1:15-cv-02004 (D. Md. June 10, 2016)

$90,000 plus full equitable relief

EEOC v. Randstad US, LP,
C.A. No. RDB-15-3354
injunctive relief and $50,000

ADA coverage exists for individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use .... 42 U.S.C. §12114(b)

Don't send me any more old people.

You're too old!

Neutral 3rd party witness

EEOC v. Coatesville Chicken, LLC d/b/a Popeyes Louisiana Kitchen, C.A. No. 15-5287 (E.D. Pa. 2016)
$36,000 + full injunctive relief

Questions?