Agencies Expand Employee Protections

Is Your Club Prepared?

By Jonathan Judge, Esq., and Thomas A. Lenz, Esq.

During the last few years, clubs have seen increased activity from federal agencies issuing rules and regulations protecting employee rights. The Department of Labor (DOL) announced groundbreaking proposed changes to its exempt employee tests in July 2015, the Equal Employment Opportunity Commission (EEOC) attempted to expand sex discrimination protections based on sexual orientation and transgender status, and the National Labor Relations Board (NLRB) continued to scrutinize employee handbook policies in all workplaces.

This article highlights the trends emerging as a result of these agency efforts, and provides tips for clubs to address these emerging legal issues. Naturally, truly private clubs will not be impacted by some of these federal agency trends to the extent they involve the enforcement of the Civil Rights Act of 1964—a law from which truly private clubs are exempt. However, clubs must ensure that they are, in fact, truly private to avoid the possible penalties and liability before the EEOC. (See NCA's "Privacy Checklist" on page 7.)

Even if your club is truly private, these issues may still impact your club based on state and local laws. As such, the following examples illustrate the increased need for all employers to treat employees equally.

The NLRB's Attacks on Employee Handbooks Continue

On March 3, 2016, the NLRB found that Dish Network, LLC's employee handbook violated the National Labor Relations Act (NLRA). Dish Network's policy stated:

> **Solicitation in the Workplace**
> In the interest of maintaining a proper business environment and preventing interference with work and inconvenience to others, employees ... may not distribute literature ... of a personal nature by any means, ... or solicit for any other reason during work time or in work areas except as specifically authorized in advance by a vice president or higher. Employees who are not on work time ([e.g.] ... on lunch or break) may not solicit employees who are on work time.

The underlying NLRB charge arose after Dish Network terminated call center employee David Rabb in 2014 for violating the policy when Rabb attempted to solicit colleagues to join Rabb's lawsuit against Dish Network.

Dish Network paid its call center employees a base salary plus commissions, but maintained a policy where call center employees would be punished with commission deductions if the employees committed certain violations, such as not properly marking when they take breaks. Dish Network imposed such deductions against Rabb for putting his phone on hold instead of pressing a button to reflect that Rabb was on break.

Rabb sought assistance from an attorney on the deduction policy. Rabb then attempted to recruit 15 other call center employees to join his lawsuit.

Two weeks later, Rabb's supervisor approached human resources to fire Rabb for solicitation of his coworkers, but human resources decided to issue Rabb a written warning instead.

Some weeks later, Rabb violated the company's hold procedure again and was fired.

The NLRB administrative law judge (ALJ) found that the hold policy violation was a pretext to terminate Rabb for the solicitation. The NLRB agreed with the ALJ's decision, and found that Dish Network's firing of Rabb evidenced its hostility towards employees' rights under the NLRA. The NLRB ordered Dish Network to reinstate Rabb, delete negative marks from his personnel records, and provide Rabb with back pay.

With the Dish Network decision, the NLRB continues the recent trend of attacking employer policies in non-union settings that the NLRB considers to discourage concerted activities—as in the Dish Network case, soliciting coworkers to join a class action lawsuit. As pointed out by the ALJ, a solicitation policy may not contain a blanket prohibition of solicitation in all work areas that include solicitations that occur during non-work time. In addition, it is prohibited to require employees to obtain managerial approval prior to engaging in protected NLRA activity, as the Dish Network policy attempted to do. On the other hand, according to the NLRB General Counsel, employers may maintain policies that prohibit: "solicitation and distribution during employees' working time."

Clubs are encouraged to review their solicitation policies in light of this decision.

Fifth Circuit Court of Appeals Ruling on Overtime Exemption

Exemptions for overtime and job classification issues make up many workplace lawsuits. Vasilios Zannikos, a marine superintendent, filed suit against his employer, Oil Inspections U.S.A., alleging the employer misclassified him as exempt and failed to pay him overtime wages under the Fair Labor Standards Act (FLSA). Zannikos' job duties were to monitor and observe oil transfer operations, ensuring these operations were performed accurately, legally and safely. Oil Inspections alleged that marine superintendents were exempt from the FSLA requirements because some of their duties were administrative and they were highly compensated. The District Court held that the while Zannikos was exempt from the FLSA due to the fact he was highly compensated, the court found that other marine superintendents did not qualify as exempt administrative employees. Both parties filed appeals.

The Fifth Circuit Court of Appeals agreed with the lower court that while the marine superintendents' primary duty of inspecting, recommending and overseeing was related to the management and general business procedures of the employer, the marine superintendents lacked the necessary "discretion and independent judgment" for the administrative exemption to apply.

However, the Fifth Circuit found that Zannikos, who was paid more than $100,000 annually, qualified as exempt under the FSLA's *highly compensated exemption*. This exemption generally applies to employees who earn $100,000 or more over a 52-week period. To qualify, an employee must: perform office or non-manual work; earn a total annual compensation of at least $100,000; customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. Accordingly, a showing of independent judgment was not required to be exempt under the highly compensated exemption.

The *administrative exemption* for white-collar employees poses the most risk for misclassification. To qualify as exempt, among other requirements, the administrative employee's duties must be directly related to the employer's management policies or the general business operations of the employer or its customers and require the exercise of discretion and independent judgment with respect to matters of significance. As illustrated in the Zannikos and many other cases, establishing both of these requirements is a challenge for many office employees. This case offers a novel twist on the analysis where the employee in question earns more than $100,000, and there is a lesser burden to establish exempt job duties. Clubs considering potential defenses to exempt claims or classification of potentially exempt highly compensated employees should also keep in mind that the DOL's proposed new annual compensation level for highly compensated employees will likely be increased to $122,148.

The EEOC's Strategic Plan to Expand Sex Discrimination Enforcement Under Title VII

Last summer, Caitlyn Jenner revealed her gender identification as a transgender woman, making appearances on "20/20" and *Vanity Fair* magazine. Gender identity has come to the forefront of workplace issues that employers, including private clubs, must manage on a day-to-day basis.

In 2012, the EEOC released its strategic plan for 2012-2016, detailing the areas where the agency intended to focus its attention during the next few years. As part of the plan, the EEOC has been slowly, but increasingly, expanding sex discrimination litigation to include sexual orientation and transgender-based complaints. While truly private clubs are exempt from Title VII of the Civil Rights Act of 1964 (Title VII), many state and local laws that protect transgender employees do not feature similar exemptions. Where guidance on best practices is lacking from such local jurisdictions, courts and administrative agencies enforcing such laws may look to the EEOC for guidance and model practices. Additionally, many clubs, despite the exemption, follow best practices consistent with policies applicable to the general employer population. See NCA's checklist on page 7 to determine if your club is truly private.

As part of the strategic plan, the EEOC also drafted a strategic enforcement plan (SEP), which established enforcement priorities for fiscal years 2013-2016. One trend that has been developing through the SEP is the EEOC's attempt to push the boundaries of Title VII's prohibition against "sex" discrimination to cover transgender employees. At the end of the EEOC's 2015 fiscal year, the EEOC's trend of focusing on sex/pregnancy discrimination continued to rise with 54 percent of all of the Title VII filings based on sex/pregnancy.

In July 2015, the EEOC issued a decision in *Baldwin v. Foxx, et al.*, holding that claims of discrimination based on sexual orientation are valid claims of sex discrimination under Title VII. This decision by the EEOC is inconsistent with federal courts, which have held that Title VII does not include sexual orientation. The EEOC's decision is not binding precedent on federal courts, but may have an impact on employers. While courts determine whether to adopt the EEOC's position on sexual discrimination, clubs may be subject to increased administrative charges based on sexual orientation discrimination. As a result, clubs should stay aware of these developments and trends, whether or not a club is subject to Title VII.

Furthermore, the EEOC has filed lawsuits on behalf of transgender employees and filed multiple amicus briefs on

behalf of private sector employees who alleged discrimination based on their transgender status.

On Jan. 20, 2016, the EEOC settled a transgender discrimination and harassment lawsuit against Deluxe Financial Services, Inc. through a voluntary consent decree. The EEOC alleged that Deluxe subjected Britney Austin to a hostile work environment and disparate treatment because of her sex. Specifically, the lawsuit stated that Austin was a transgender woman who transitioned from male to female during her employment with Deluxe, and alleged that Austin was subjected to sex discrimination and retaliation under Title VII, as well as retaliation under the Americans with Disabilities Act (ADA).

In the settlement, Deluxe agreed to pay Austin a monetary award including attorneys' fees, provide Austin with a letter of reference and letter of apology, and post a notice at all of its facilities for three years.

In March 2016, for the first time, the EEOC sued a pair of different employers on behalf of employees alleging sexual orientation discrimination. The EEOC filed lawsuits in Baltimore and Pittsburgh, alleging that the employers violated the civil rights of gay and lesbian employees by treating them unfairly because of their sexual orientation.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion, but Title VII does not specifically protect sexual orientation. The EEOC is now arguing that Title VII protects harassment based on sexual orientation under the prohibition against discrimination based on sex.

One of the lawsuits alleges that a female employee was harassed because she is a lesbian and was fired after she complained. The employee, whose sexual orientation was known to her co-workers, al-

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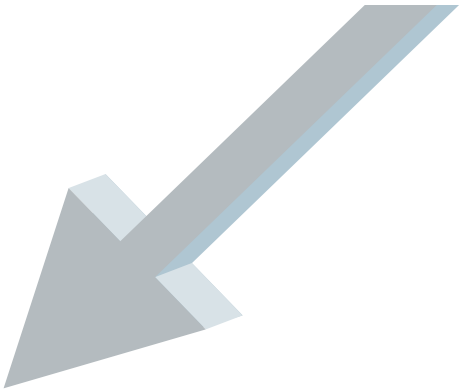

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leged her supervisor made numerous comments regarding her orientation and appearance.

The EEOC filed another lawsuit that alleges that a manager harassed a gay male employee by repeatedly referring to the employee with anti-gay epithets and offensive comments about the employee's sexuality. The employee complained to management, who allegedly took no action. The employee eventually quit and filed a complaint with the EEOC.

These two cases illustrate the implementation of the EEOC's national strategic plan to make it a priority to address problems that lesbian, gay, bisexual and transgender employees face in the workplace. Accordingly, clubs can expect to see continued focus by the EEOC on these emerging issues.

In the *Deluxe* case, the EEOC required Deluxe to agree to a consent decree as part of the settlement. The terms of the consent decree serve as a roadmap for clubs adapting policies and procedures to this emerging area of law. The consent decree required Deluxe to:

- Establish policies that prohibit sex discrimination or harassment "based on disability (including gender dysphoria), sex-stereotyping, gender identity, and transgender status."
- Establish policies prohibiting discrimination or harassment of transgender individuals by "employees, customers, agents, contractors, sub-contractors, clients, and any other persons."
- Permit employees to change their name and male/female designation in the company's internal records, computers or communication systems without requiring medical documentation.
- Permit transgender employees to use restrooms "commensurate with their gender identity."
- Ensure that health insurance provided does not exclude medically necessary care solely on the basis of sex (including transgender status and gender dysphoria).
- Provide annual training to all employees, covering what constitutes prohibited sex and disability discrimination, and discrimination based on sex-stereotyping, gender identity, transgender status, and gender dysphoria.
- Provide further training for supervisors and managers on their responsibilities under the employer's discrimination, harassment, and anti-retaliation policies, and on management's role when an employee complains about or reports harassment.
- Provide enhanced training for Human Resources employees regarding Title VII, the ADA, and other federal anti-discrimination laws, with annual training for those employees in charge of investigating discrimination or harassment complaints.

Clubs may desire to review and update their policies and training programs to address sexual orientation and transgender protection to keep pace with the EEOC's efforts to expand sex discrimination litigation into these areas. Claims with state agencies and under state anti-discrimination laws should be expected to track these trends.

Staying Vigilant

The government is often slow to respond to societal changes. With transgender and sexual orientation discrimination issues, however, the EEOC was ahead of the major media coverage and attention in devising its strategic course in 2012. Now, the EEOC's strategic planning is gaining momentum coincident with the increased media and societal coverage of gender issues. The NLRB, too, has been proactive in analyzing workplace policies, especially on the social media front. As the unionized workforce has declined, the NLRB has increased efforts to protect concerted activity in non-union settings and scrutinize employer policies as a result. Clubs should expect to continue to see increased activity from administrative agencies, including the NLRB and EEOC, in 2016. Club leaders are well advised to pass on information coming from NCA to their subordinates regarding rulings from the NLRB, EEOC, DOL and the courts, and adapt their policies and procedures accordingly. Most importantly, club leaders must ensure that they are operating as a truly private club so that they are exempt from many of these EEOC regulations and rulings in the first place. CD

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