

8th ANNUAL COLORADO EMPLOYMENT LAW SUMMIT

October 20, 2016
The Four Seasons Denver

BREAKOUT SESSION I

LGBT and Gender Issues in the Workplace: Welcome to the "New Normal"

From EEOC's and Department of Justice's interpretation of Title VII, to the Department of Justice's interpretation of Title IX, to new OFCCP regulations, to interpretation of the bathroom battles between Charlotte and the state of North Carolina, to Caitlin Jenner, recent news -- and laws -- have focused on the rights of lesbian, gay, bisexual, and transgender individuals. In February, EEOC initiated its first lawsuit claiming sexual orientation discrimination, with certainly more to come. If it hasn't already, this cultural and legal shift is coming to your workplace as well. This session will address LGBT rights in the workplace and how to prepare your workforce for the "new normal" in LGBT issues.

The Burgeoning Obligations of Federal Contractors: Where Are We Now?

The regulatory obligations imposed upon federal contractors continue to mount making it more complicated than ever to do business with the federal government as a contractor or subcontractor. The burdens reach far beyond an OFCCP audit -- to payroll, HR, Information Technology, and beyond. This session will provide a status update on current and proposed obligations, including e-security requirements, mandatory paid sick leave, federal "ban the box," more whistleblower protections, human trafficking prevention, pay transparency, federal minimum wage requirements, and the still pending "fair pay and safe workplaces" (blacklisting) regulations.

Top 10 Immigration Trends in 2016

During this session our speaker will cover recent trends in immigration law and enforcement, including recent Executive Order litigation, proposed revisions to Form I-9, recent I-9 remediation guidance, the H-1B cap, and key rules of thumb and the tolls necessary to maintain a culture of immigration compliance.

Best Practices in Internal Wage & Hour Audits

The U.S. Department of Labor ("DOL") reports that 78% of businesses are out of compliance with wage and hour laws. Combined with the DOL's increased wage and hour enforcement efforts, employers are exposing employers to liability for unpaid wages, penalties and fees. At the same time, the DOL has increased its wage and hour enforcement efforts. Comprehensive self-audits and effective corrective measures are essential to avoid costly compliance errors. This program will review the areas currently targeted by the DOL in its enforcement efforts and strategies for employers to conduct self-audits and correct errors.

BREAKOUT SESSION II

Best Practices in the Application/Pre-Employment Process

Employers face an increasingly fragmented patchwork of applicable hiring restrictions: here, you can't require pre-employment drug testing; there, you can't ask for prior salary information. The "Ban the Box" movement and limits on the use of credit and background check information are spreading. And, under new guidance there is increased risk of sexual orientation and gender identity discrimination. All of this in addition to the potential for well-intentioned pre-employment test to result in discrimination. In this session, we will survey the landscape of the most common and noteworthy laws that your organization may face as well as provide practical consideration on how to ensure your hiring practice "checks" the right "boxes."

Plaintiff's Counsel Roundtable

Ever wonder how plaintiffs approach employment cases? What does plaintiffs' counsel look for in determining which cases to take and which to decline? Or what about the kinds of plaintiffs, facts, or employers that converge to create the "perfect storm" for a plaintiff's attorney? This roundtable discussion with practicing plaintiffs' attorneys -- some of which you may have already faced -- will address these and more questions to give you a "peak behind the curtain."

Professional Responsibilities and Ethics in Workplace Investigations

In-house counsel are often called upon to conduct workplace investigations on everything from sexual harassment to securities fraud. This session will focus on ethical and practical issues triggered by internal investigations, including determining who is the client, which communications are privileged, and under what circumstances the privilege can be lost.

ADA Interactive Process Workshop

Dealing with issues related to workplace accommodation requests can be a daunting task—even for seasoned HR and legal professionals. The path to a successful interactive process and a meaningful analysis of an accommodation request is fraught with landmines at every turn. This interactive workshop will examine actual examples to provide develop strategies to effectively manage the interactive process, including reviewing requests for accommodation, best practices for the interactive process, undue hardship analysis, and resources for employers to assist in the process.

LUNCH AND GENERAL SESSION

Pay Equity is "Comp"licated: New Laws, New Reporting, & How to Protect Your Organization

The Obama administration has long sought to close the gender "pay gap" – noting that women on average make 79 cents on the dollar compared to men. So too employers are facing pressure from shareholders to analyze the "pay gap" in their workforces and publicize the results. The Administration has pushed this agenda down to the federal agencies, which have made pay discrimination among their top enforcement priorities. In a new development with sweeping implications for employers with 100 or more employees, the EEOC has now proposed requiring those employers to annually provide detailed compensation information for all employees on EEO-1 reports beginning in September 2017. The EEOC will share this data with OFCCP to determine what companies to investigate for pay discrimination. In addition, several states have implemented, or are in the process of proposing, state laws on pay equity, such as the California Fair Pay Act, to make it easier for employees to bring and win pay discrimination claims. After this session, employers will better understand the pay discrimination landscape and how they can proactively run privileged pay analyses, what to consider in making pay decisions going forward, and how to defend themselves in EEOC charges, OFCCP audits, and litigation.

BREAKOUT SESSION III

Surveying the New Labor Law Landscape: A Rocky Road Ahead

Whether your company is unionized or non-union, the NLRB affects all employers. This lively session will cover the latest labor updates, trends and practical recommendations for employer consideration. The NLRB's laser-like focus on expanding employee Section 7 rights makes business-as-usual a risky approach. Long accepted employer policies and practices, social media practices and handbook language continue to be upended by the NLRB. What is an employer to do?

Handbook Best Practices and Updates

This session offers a comprehensive overview of personnel policies every employer needs, mistakes to avoid in drafting policies, and how to identify and correct exposure areas. Additionally, this session will clear up the differences between non-compete, non-solicitation and non-disclosure agreements.

Do's and Don'ts of Diversity Preference

Many employers place preferences in their hiring, promotion, and retention processes based on protected characteristics, often without knowing it. For example, if recruiters are tasked with presenting a diverse interview slate (ensuring that a certain number of percentage of the interviewed candidates are diverse), they may have unknowingly and unlawfully provided a hiring preference. Similarly, many employers are now using algorithms to determine what candidates to interview, employees to promote and retain, and where to make pay adjustments that take protected characteristics into account. And, there is a growing pressure on employers to attract and retain diverse talent (and publish diversity statistics in the media) pushing many employers to unknowingly consider diversity in their employment decisions. In this session, we will discuss common trends in considering diversity in the employment process, risks in doing so and how to mitigate these risks in your processes.

"No Good Deed Goes Unpunished:" Your Organization is Conducting Analyses – How to Use the Attorney-Client Privilege to Protect Them

Fair pay, diversity, performance, leaves of absence, worker's compensation, turnover, promotions – every organization is conducting analyses to identify and eradicate issues in employee recruitment and retention. Whether executives see issues like fair pay in the media and want to know how “we stack up” or diversity data requested in RFPs, the information your organization is analyzing may be discoverable. The attorney-client privilege is one of the most important tools to protect sensitive analyses from disclosure to potential adversaries; however, the rules for establishing (and maintaining) the privilege can be tricky... During this session, we will discuss what analyses and projects within your organization need protection, how to put protocols in place to protect them, and how to proactively protect your organization under the privilege.

BREAKOUT SESSION IV

The Modern Audit: What To Expect When OFCCP Comes A Knockin'

OFCCP audits have changed and are more aggressive than ever. The way employers prepared for audits even a year ago will no longer protect them. OFCCP continues to aggressively focus on pay in all audits with compensation interviews and detailed requests for information. OFCCP also routinely asks for data on “expressions of interest,” not applicants, even without statistical red flags. In addition, OFCCP is still developing its approach to analyze employers' compliance with the “new” vets and disability regs, including how it will evaluate required outreach and recruiting efforts and mental and physical qualifications for jobs. Audits are even beginning to involve compliance with the “federal minimum wage” (with potential violations referred to the Department of Labor's Wage & Hour Division). As such, it's more important than ever to prepare your organization in advance and ensure that any audit submission presents your data and policies in the best possible light. This session will discuss these new trends and how you can prepare for and respond to OFCCP requests.

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Mitigating Data-Based Risks

In the digital age, employers are creating huge databases of not just time, pay or other employment records, but also hidden data from employees interacting with the colleagues and the world via the work computers. Many employers are beginning to leverage these data to optimize HR decision making. At the same time, employee databases are fueling class-based employment law claims. Wage-hour class claims increasingly live or die based upon meta-data from robust timekeeping and payroll systems. EEOC and private plaintiffs know this and use these data to transform individual claims of discrimination into systemic issues. This session will discuss potential legal ramifications of Big Data in the workplace and will provide best practices to mitigate data-based risks, including knowing what data your company generates, where data are being maintained (and by whom) and what the data show concerning wage & hour and discrimination issues and best practices in responding to a charge of discrimination without opening the door to a systemic claim.

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