

# Court and Federal Developments in Employment Law

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# Court and Federal Developments in Employment Law

## Topics

1. **Pregnancy and Accommodation policies**
2. **Religious Accommodation**
3. **Employment Benefits Regardless of Sex**
4. **Employer Wellness Programs**



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# Class Learning Objectives

1. Identify when an employer may offer a reasonable accommodation for some employees without also accommodating pregnant employees.
2. Identify when an employer/hiring manager should offer an applicant or employee an accommodation based on religion.



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# Class Learning Objectives

3. Identify the employment protections regarding family medical leave and discrimination based on an applicant's/employee's sexual orientation and transgender status.
4. Identify factors employer should consider when offering or developing a Wellness Plan/Program for employees.



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# Court and Federal Developments in Employment Law

## DISCLAIMER

None of the information presented is intended nor shall be interpreted as legal advice.

Please consult your attorneys for advice applicable to your specific issues/situations/problems.



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# Pregnancy and Accommodation Policies

## 1. Pregnancy Discrimination Act (PDA)

“ERs treat pregnant women “the same for all employment related purposes as other persons not so affected but similar in their ability or inability to work.”

- ♦ **Example:** Use the same interview questions for all applicants and employees; Use same production standards



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# Pregnancy and Accommodation Policies

2.EEOC: Pregnancy Anti-Discrimination Guidelines 2014

3. US Supreme Court: 2015 test (Young v. UPS)-  
"Pregnant EE must show that no accommodation policy  
is "significant burden" AND

ER has not raised a "sufficiently strong" reason to  
justify the burden..



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# Pregnancy

## 4. FML Reminder:

For nursing mothers that want to continue nursing after they return to work, according to the **FMLA upon request ERS should provide these EES with break time and a private place to express milk.**



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# Religion- Employment Protections

## Federal law- Title VII

Prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment.

Requires employers to reasonably accommodate the religious practices unless to do so would pose an undue hardship to the employer.



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# Religious Accommodations- in 2015

- *Question: Is an employer/supervisor required to offer an accommodation based on an employee's or applicant's religion prior to an accommodation request?*
- **Answer:** Maybe. Issue under review by US Supreme Court in EEOC v. Abercrombie & Fitch. **STAY TUNED**

If yes, applicants and employees who display conduct that may be interpreted as religious may allege religious discrimination in response to adverse employment actions.



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# Sexual Orientation and Sexual Identity- Employment Rights

**Title VII EEOC interprets employment discrimination prohibition based on sex** includes sexual orientation (gay, bisexual and lesbian), and transgenders.

After 1989 federal courts have recognized intentional sex discrimination for failure to conform to gender based expectations (not acting/dressing as male and female stereotypes)

Additionally, courts have applied the same analysis when plaintiffs are gay, bisexual, heterosexual or transgender.



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# Sexual Orientation in the Courts

1. 2013 US Supreme Court decision: U.S. v. Windsor  
*Results: a. Defense of Marriage Act (DOMA) held as unconstitutional*  
*Workplace Impact: March, 2015 FMLA term 'spouse' revised*
2. Preliminary Halt (**3-27-15**) in Texas, Arkansas, Nebraska and Louisiana (TANK)  
*See Article "FMLA Now Protects Same-Sex Spouses Regardless of Residence"*
3. **2015** Pending US Supreme Court oral argument:  
Whether Constitution gives same-sex couples the right to marry.



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# Transgender/Sexual Identity- Employment Protections

- ◆ 17 states, including Maryland, and DC ban gender identity bias in the workplace.

- ◆ **Maryland- Effective October 1, 2014. “Gender identity” definition:**

*“Gender-related identity, appearance, expression, or behavior of a person, regardless of the person’s assigned sex at birth, which may be demonstrated by: consistent and uniform assertion of the person’s gender identity or any other evidence that the gender identity is sincerely held as part of the person’s identity.”*



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# Transgender/Sexual Identity- Employment Protections

## Federal level-

- ♦ July, 2014 Executive Order 13672; prohibiting federal Contractors from discriminating against LGBT employees and applicants.
- ♦ December, 2014 OFCCP issued a final rule implementing Executive Order 13672.
- ♦ 2014 EEOC reaffirmed that sex based discrimination includes gender identity and transgender status.



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# Transgender/Sexual Identity- Lawsuits

- ♦ 2014 EEOC reaffirmed that sex based discrimination includes gender identity and transgender status.
  - a. EEOC v. R.G.& G.R. Harris Funeral Homes Inc. (embalmer was discriminated against because she was transitioning from male to female)
  - b. \*EEOC v. Lakeland Eye Clinic (satisfactory performing EE terminated when she began to present as a transitioning woman)  
<http://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm>



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# Employer Wellness Programs

## *Variety of Programs - Some Distinguishing Features*

- ◆ Voluntary (Participatory) or Mandatory
- ◆ Activity-only v. Outcome-Based programs
- ◆ Rewards or Penalties
- ◆ Employer limited access to EE medical information or unlimited access



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# Employer Wellness Programs

## Possible legal/compliance issues:

1. Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination protections.

2. ADA or GINA protections of employee's confidentiality of medical information. ER must file EE's medical data separate from personnel records.



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# Employer Wellness Programs

## Possible legal/compliance issues:

3. Violations of GINA for making health care plan related decisions based on EE genetic information.

4. If wellness program provides medical care or benefits may also be subject to Employee Retirement Income Security Act, COBRA or state laws.



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# Employer Wellness Programs- Lawsuits

## Pending EEOC lawsuits

- ♦ EEOC v. Orion Energy Systems (2014)- alleging involuntary program because steep penalties for not participating in medical exam or not answering its disability related questions.
- ♦ EEOC v. Flambeau (2014)-ER threatened insurance cancellation and discipline if EE did not submit to biometric testing & health risk assessment for wellness program.



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# Employer Wellness Programs- Legislative and Proposed Federal Regulatory Actions

Proposed actions:

1. H.R.1189 and S.620- reaffirms ERS legally may offer financial incentives, ACA allows Wellness programs tied to financial reward for participating EE.

2. EEOC Guidelines on Wellness (Statement on 3-20-15 on Interplay of ADA and Affordable Care Act (ACA)

♦ <http://www.dol.gov/ebsa/newsroom/fswellnessprogram.html>



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# Employer Wellness Programs- Employer Considerations

Prior to implementing a wellness program ERS may take the following preventive steps:

- a. Conduct risk-benefit analysis to determine if program is good fit
- b. Update Personnel/Employee Manuals consistent with ADA and GINA
- c. Keep training managers on changes in law and policies
- d. Keep current on all anti-discrimination laws.



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# Class Conclusions

## 1. Accommodations for pregnant employees-

New Criteria: "Pregnant EE must show that the no accommodation policy is "significant burden" AND ER has not raised a "sufficiently strong" reason to justify the burden.. "

## 2. Accommodations based on Religion-

Employers should continue to offer reasonable requests from employee's and applicants, and approve unless to do so would pose an undue hardship to the employer.



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# Class Conclusions (cont'd)

## 3. Employment Protections Based on Sexual Orientation and Transgender status-

- a. Same sex marriages recognized if union was made in state that recognized these marriages.
- b. Currently FML definition of “spouse” includes spouse in same sex marriage.

## 4. Employer Wellness Programs –

- a. **ERS should be aware of possible legal/compliance issues**



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Thank you.

You may contact me to further discuss today's issues or other developing issues in Employment law.



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