CUT AND PASTE POST
JULY 2020

For nothing going on, a lot has happened since the last Cut N Paste!

Supreme Court Blocks Attempt to Kill DACA

On June 18, 2020, the U.S. Supreme Court issued an opinion blocking the Trump administration's efforts to rescind the Deferred Action for Childhood Arrivals (DACA) program.

In a 5-4 decision in *Department of Homeland Security v. Regents of the University of California*, the Court said the Administration, through HHS "failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients." It further states, "That [this] dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner." The case was remanded to the agency to "consider the problem anew". Chief Justice John Roberts penned the opinion, and was joined by Justices Ruth Bader Ginsburg, Elena Kagan, Stephen Breyer, and Sonia Sotomayor. Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh dissented.

Jacob Monty, an attorney with Monty & Ramirez, LLP in Houston, Texas, says the decision means employers can now rely on work authorization documents from DACA recipients, often called "Dreamers". Before the ruling, employers faced a lot of uncertainty as to whether employees with DACA status faced threat of deportation. "That is a great win for not only the DACA employees but also for DACA employers", Monty says.

But, according to people who read these cases carefully, the Court's decision leaves the door open for a President to try again to rescind the program. Jonathan Eggert, an attorney with Hilton Head Island, SC firm Burr Forman McNair, says the ruling doesn't mean the program can't be rescinded. It just means that proper procedures must be followed. Eggert added, "In fact, the majority opinion lays out a pretty straightforward roadmap for the types of things the administration would need to consider in order to lawfully rescind the program." Eggert also noted there is litigation pending in Texas which directly challenges the lawfulness of DACA on constitutional and other grounds.

Professional Pointer: Stay tuned for further developments.

High Court Further Defines "Sex" Discrimination

*"**Held**: An employer who fires an individual merely for being gay or transgender violates Title VII. … Title VII makes it unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. 42 U. S. C. §2000e–2(a)(1). **The straightforward application of Title VII's terms interpreted in accord with their ordinary public meaning at the time of their enactment resolves these cases**."*

INSIDE

On June 15, 2020, by a vote of 6 to 3, the U.S. Supreme Court ruled that Title VII of the Civil Rights Act of 1964, which makes it illegal for employers to discriminate because of a person's sex, also covers sexual orientation and transgender status. This decision upheld rulings from lower courts that said sexual orientation discrimination was a form of sex discrimination.

The ruling was a victory for Gerald Bostock, who was fired from a county job in Georgia after he joined a gay softball team. The case came through the 11th Court of Appeals and was consolidated with *Altitude Express Inc. v. Zarda* and with *R.G. & G.R. Harris Funeral Homes v. EEOC*.

The Court's decision, written by Justice Neil Gorsuch, said: "An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex". Of this case, Gorsuch wrote, "Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Professional Pointers: Two things.

- The Court based its opinion in a large part on the "ordinary public meaning" of the law at the time the law was enacted. Make sure your policies reflect what you intend, and make sure you update them as needed.
- While your organization may already prohibit discrimination based on sexual orientation and transgender status, it's important to review all employment practices to ensure none of them discriminate against lesbian, gay, bisexual, transgender, and questioning (or queer) (LGBTQ) employees. For example:
  - Review your medical plans to ensure they provide transgender medical benefits, and your leave policies to make sure they don't discriminate against homosexual employees.
  - Consider whether to amend your policies to specifically list sexual orientation and gender identity within the classes protected from discrimination in their workplace.
  - Educate and train your employees on your anti-discrimination and anti-harassment policies and focus some of that training on LGBTQ bias.

Uncertain Impacts - On June 12, 2020, the U.S. Department of Health and Human Services (HHS) announced a final rule eliminating anti-discrimination protections based on gender identity in health care and health insurance. Under the new HHS rule, health care providers and insurance companies that receive federal funding could refuse to provide or cover services such as transition-related care for transgender individuals. This Rule conflicts with the Supreme Court's 6/15/20 ruling. The HHS has not commented on how it intends to proceed given the disparity. Once again, stay tuned!

Read the decision:: *Bostock v. Clayton County*
Related SHRM Article: 3 Checklists for Avoiding LGBTQ Discrimination in Your Benefit Programs,

U.S. Supreme Court Addresses Discrimination in Religion

The decision in *Bostock* created a potential 'rub' for religious employers who routinely make employment decisions based on religious factors. For example, religious schools frequently deny contraceptive coverage for female employees when it conflicts with their moral and religious teachings.

On July 8, 2020 the Supreme Court issued a ruling in *Our Lady of Guadalupe School v. Morrissey-Berru* which strengthened the law shielding religious institutions from job discrimination complaints.

The case involved two Roman Catholic Schools in California that were sued after not renewing teacher contracts:

- Agnes Morrissey-Berru taught at Our Lady of Guadalupe School (OLG). Morrissey-Berru claimed that OLG demoted her and failed to renew her contract in order to replace her with a younger teacher in violation of the Age Discrimination in Employment Act of 1967. OLG obtained a summary judgement, but the Ninth Circuit reversed, holding that Morrissey-Berru did not fall within the ministerial exception because she did not have the formal title of "minister," had limited formal religious training, and did not hold herself out publicly as a religious leader.
- Kristen Biel taught at St. James School and alleged that St. James discharged her because she had requested a leave of absence to obtain breast cancer treatment. Like OLG, St. James obtained summary judgment under the "ministerial exception." And, like OLG, the Ninth Circuit reversed, reasoning that Biel did not meet the ministerial exemption.

In a 7-2 decision written by Justice Samuel Alito, the high court held that the "ministerial exception" to nondiscrimination laws applies to "certain important positions" at religiously affiliated schools. These are positions that perform "vital religious duties, such as educating their students in the Catholic faith and guiding their students to live their lives in accordance with that faith." The Court further found that, even though these employees' job titles not include the term

"minister" and the employees had less formal religious training than "ministers" would have, their responsibilities were essentially religious based, and their employers saw them as playing a vital role in carrying out the church's mission. Therefore, the ministerial exemption applied.

With the criteria for applying a "ministerial exception" reached, the Court found that the employees were barred from filing employment discrimination claims against their schools. The Court remanded the case to the lower court for future action consistent with this ruling.

Professional Pointer: This decision does not create a *carte blanche* for religious discrimination. The Court made it clear that the ministerial exception will only apply to those whose job duties are 'ministerial' in nature: job titles will not be sufficient. Religious organizations need to make sure their practices do not discriminate against non-ministerial employees.

Happy Birthday, ADA

The Americans with Disabilities Act (ADA) will turn 30 years old on July 26, 2020. It was signed into law by President George H.W. Bush and was a landmark piece of civil rights legislation that worked to increase the inclusion of people with disabilities in all aspects of community life, including employment.

"The Americans with Disabilities Act broke down barriers to opportunity for millions of American workers," U.S. Secretary of Labor Eugene Scalia said. "On this anniversary, we recognize and celebrate the access to opportunity created by the ADA."

The U.S. DOL's "ADA30" program celebrates the 30th Birthday of the ADA. For more information, visit the Department of Labor's ADA30 pages.

RIP Congressman John Lewis

Congressman John Lewis (D-GA) was born the son of sharecroppers outside of Troy, Alabama and attended segregated public schools in Pike County, Alabama. As a young boy, he was inspired by the words of the Rev. Martin Luther King Jr. and made a decision to become a part of the Civil Rights Movement.

By 1963, he was dubbed one of the "Big 6" leaders of the Civil Rights Movement. At the age of 23, he was an architect of and a keynote speaker at the historic March on Washington. He began serving in Congress in 1987. According to an article in the Washington Post, "Mr. Lewis'… reputation as keeper of the 1960s' flame defined his career in Congress."

Mr. Lewis' leaves a big legacy for those who practice human resource management. In 1990, President George H.W. Bush vetoed a bill easing requirements to bring employment discrimination suits. In response, Mr. Lewis rallied support for its revival, which resulted in the Civil Rights Act of 1991.

On July 17th, Congressman Lewis passed away at the age of 80.

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As always, please email me (bergpersonnelsolutions@live.com) with any suggestions for a *Cut N Paste* topic!

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Legislative Chair