



## Employment Law Update and Trends

Recent and Pending US Supreme Court Cases  
EEOC's Current Focus and Priority Areas of Enforcement  
Trends in Employment Laws

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## Employment Law Update and Trends

- Recent and Pending US Supreme Court Cases
- EEOC's Current Focus and Priority Areas of Enforcement
- Trends in Employment Laws



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## Supreme Court Update

### “Supervisor Liability” Vance v. Ball State University (June 24, 2013)

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## Supreme Court Update

Faragher v. City of Boca Raton (1998) and Burlington Industries, Inc. v. Ellerth (1998) cases were issued 15 years ago.

- “Tangible employment action”  
Strict liability
- No “tangible employment action”  
Affirmative defense may be available

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## Supreme Court Update

- Company is strictly liable for acts of its supervisors if harassment results in a tangible job action
- If harassment does not result in a tangible job action, defense to liability may be available if it exercised reasonable care to prevent and correct harassing behavior and complainant unreasonably failed to use preventive or corrective opportunities (i.e., failed to report it)

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## Supreme Court Update

### **Vance v. Ball State University**

#### Facts:

- Vance began working for the Ball State University Banquet and Catering Division of University Dining Services in 1989.
- Vance claimed that Sandra Davis, a catering specialist, had made her life at work contentious through physical acts and racial harassment.

#### Issue:

- Whether the “supervisor” liability rule established by Supreme Court precedent applies to harassment by an employee (Davis) whom the employer vests with the authority to direct and oversee a harassment victim’s (Vance) daily work or whether the rule is limited to those harassers who have the power to “hire, fire, demote, promote, transfer, or discipline” their victim

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## Supreme Court Update

### Issue:

- Whether the “supervisor” liability rule established by Supreme Court precedent applies to harassment by an employee (Davis) whom the employer vests with the authority to direct and oversee a harassment victim’s (Vance) daily work or whether the rule is limited to those harassers who have the power to “hire, fire, demote, promote, transfer, or discipline” their victim.
- Two approaches in the lower courts:  
Direct and Oversee.  
Hire and fire.

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## Supreme Court Update

### Ruling:

- An employee is a “supervisor” for purposes of vicarious liability under Title VII of the Civil Rights Act of 1964 only if he or she is empowered by the employer to take tangible employment actions against the victim.
- The Court rejected the definition of “supervisor” found in the EEOC’s Enforcement Guidance and ruled that the “ability to direct another employee’s tasks is simply not sufficient” to warrant employer liability.

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## Supreme Court Update

### Practical Impact:

- The Supreme Court has provided an important clarification of the term “supervisor” for purposes of harassment under Title VII and has limited it to those who have the power to take tangible employment actions—such as hiring, firing, demoting, transferring, and disciplining.

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## Supreme Court Update

### “Retaliation”

University of Texas Southwestern  
Medical Center v. Nassar  
(June 24, 2013)

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## Supreme Court Update

- Retaliation claims are on the rise
- 2013 - retaliation is the most common type of charge filed with the EEOC
- 41% of workplace discrimination charges allege retaliation

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## Supreme Court Update

### Why the Increase?

- Relatively easy to establish:
  1. "Protected activity"
  2. "Adverse action"
  3. Causal link between the two
- Juries are predisposed to find retaliation

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## Supreme Court Update

### Title VII Section 2000e-3(a)

- “It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

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## Supreme Court Update

### What is the standard?

- “But-for”  
 An employer would not have taken an adverse employment action but for an improper motive
- Motivating factor”  
 An improper motive was one of multiple reasons for the employment action

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## Supreme Court Update

Univ. of Texas Southwestern Med. Ctr. v. Nassar

### Facts

- Dr. Naiel Nassar, who is of Middle Eastern descent, was a faculty member at the University of Texas Southwestern Medical Center (UTSW) and a clinician at UTSW-affiliated Parkland Hospital.
- Nassar alleged that the university sabotaged his job prospects with Parkland Hospital because he previously had complained to UTSW about a supervisor's alleged bias against Arabs and Muslims.

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## Supreme Court Update

### Issue

- Whether Title VII requires Nassar to prove retaliation was the “but-for” cause of the adverse employment action or instead was a “motivating factor,” among others, for his employer taking the adverse action

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## Supreme Court Update

### Ruling

- Title VII retaliation claims must be proved according to traditional principles of but-for causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive)
- Court expressly rejected the EEOC's view that the plaintiff need only show that retaliation was one of several motivating factors
- Court relied on *Gross v. FBL Financial Services Inc.* (2009)  
ADEA disparate treatment claims, plaintiff must prove that age was the "but for" cause of the challenged employer decision

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## Supreme Court Update

- Practical Impact
- The immediate impact of **Nassar** is that Title VII retaliation claims became harder to prove.
- Recognizing that "retaliation claims are being made with ever-increasing frequency," the Court noted that a lesser causation standard might "contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment."

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## Supreme Court Update

“Wage and Hour”  
 Sandifer v. United States Steel Corp.  
 (January 27, 2014)

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## Supreme Court Update

This is a donning and doffing case under a Collective Bargaining Agreement

- Section 203(o) of the Fair Labor Standards Act provides that:  
 “Hours Worked.—In determining for the purposes of [the minimum-wage and maximum-hours sections] of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.”

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## Supreme Court Update

### Facts

- United States Steel Corporation requires the steelworkers in its Gary, Indiana plant to wear gear to protect themselves from hazards at the plant.
- The collective bargaining agreement does not require compensation for the time spent changing into and out of their gear.
- Approximately 800 former and current employees filed suit seeking back pay for the time that they had spent donning and doffing their protective gear.

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## Supreme Court Update

### Issue

- What constitutes “changing clothes” within the meaning of Section 203(o) of the FLSA?

### Ruling

- In a very limited ruling, the Supreme Court held that the employer was not required to pay the employees for the time that they spent donning and doffing their protective gear when their collective bargaining agreement did not provide for compensation for that time.

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## Supreme Court Update

### Practical Impact

- The decision reinforces employers' ability to negotiate the compensability of such activities through a collective bargaining agreement.
- For nonunion employers, this ruling does not change the donning and doffing rules under the FLSA.

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## Supreme Court Update

### "Arbitration"

American Express Co. v. Italian Colors Restaurant (June 20, 2013)

Oxford Health Plans LLC v. Sutter (6/10/13)

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## Supreme Court Update

American Express Co. v. Italian Colors Restaurant (June 20, 2013)

### Facts

- The case concerned the contract governing the relationship between American Express and a group of merchants that accepted American Express charge cards.
- Since 1999, this contract had contained a mandatory arbitration clause including the following provision: "There shall be no right or authority for any Claims to be arbitrated on a class action basis."
- The merchants filed a class action accusing American Express of violating federal antitrust laws. American Express moved to compel arbitration.

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## Supreme Court Update

### Issue

- The Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

### Ruling

- The FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

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## Supreme Court Update

### Practical Impact

- Not an employment case, but . . .
- The Supreme Court once again confirmed its long-standing rule that arbitration clauses under the FAA will be enforced as a matter of contract in accordance with the parties' agreement.

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## Supreme Court Update

### Oxford Health Plans LLC v. Sutter (6/10/13)

- Issue: Whether an arbitrator "exceeded [his] powers" under section 10(a)(4) of the FAA by finding that the parties' contract provided for class arbitration
- Held: Section 10(a)(4) permits courts to vacate an arbitral decision only when the arbitrator strayed from his "delegated task of interpreting a contract, not when he performed that task poorly."
- Practical Impact: Parties are stuck with the arbitrator's decision

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## Supreme Court Update

"Severance Pay"  
United States v. Quality Stores, Inc.  
Appealed from 6th Circuit  
(March 25, 2014)

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## Supreme Court Update

- Issue: Whether severance payments made to employees whose employment was involuntarily terminated are taxable under the Federal Insurance Contributions Act
- Held: Severance payments are taxable under the Federal Insurance Contributions Act (FICA) when made to employees whose employment is involuntarily terminated. The Court reasoned that FICA's definition of wages encompasses severance payments and that the severance at issue in this case, which was not linked to the receipt of state unemployment benefits, was not exempt from FICA tax.

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## Supreme Court Update

### The DOMA case

#### United States v. Windsor (6/26/13)

- Issue: Whether section 3 of the Defense of Marriage Act violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state
- Held: DOMA, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes, is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.

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## Supreme Court Update

### Whistleblower case

#### Lawson v. FMR LLC (3/4/14)

- Issue: Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by Section 806 of the Sarbanes-Oxley Act
- Held: The whistleblower protections of the Sarbanes-Oxley Act protect not only the employees of regulated public companies but also the employees of contractors and subcontractors of those companies.

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## Supreme Court Preview

“NLRB Authority”  
 NLRB v. Noel Canning  
 Appealed from D.C. Circuit  
 Oral Argument: January 13, 2014

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## Supreme Court Preview

- Issue
- Whether the president’s recess appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate
- Whether the president’s recess appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess
- Ramifications
- All decisions and other actions of the Board requiring a quorum since January 4, 2012, and possibly since August 27, 2011, are invalid.
- Board decisions since those dates must be reconsidered by a validly-reconstituted Board.

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## Supreme Court Preview

“Health Care/Religion”  
Sebelius v. Hobby Lobby Stores, Inc.  
Appealed from 10<sup>th</sup> Circuit  
Oral Argument: March 25, 2014

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## Supreme Court Preview

Issue:

- Whether the Religious Freedom Restoration Act allow a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law based on the religious objections of the corporation's owners

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## Supreme Court Preview

“Wage and Hour”  
Integrity Staffing Solutions v. Busk  
Appealed from 9th Circuit  
Oral Argument: TBD

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## Supreme Court Preview

- Issue: Whether time spent by warehouse workers in security screenings at the end of their work shifts is compensable under the FLSA

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## Recent Development - FLSA

### Fair Labor Standards Act Part 541 Regulations

- On March 13, President Obama signed a presidential memorandum instructing the Secretary of Labor to update regulations regarding overtime protections.
- The new rule is expected to extend the availability of overtime compensation for hours worked over 40 in a workweek to managers working at fast-food restaurants, loan officers, computer technicians, and other workers who are currently classified as “executive or professional.”
- Increase \$455 per week salary threshold

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## EEOC Focus and Enforcement Priorities

Enforcement	Data		
	2013	2012	2011
Total Charges:	93,727	99,412	99,947
Retaliation:	38,539	37,836	37,334
Race:	33,068	33,512	35,395
Sex/Gender:	27,687	30,356	28,534
Disability:	25,957	26,379	25,742
Age:	21,396	22,857	23,465
National Origin:	10,642	10,883	11,833
Religion:	3,721	3,811	4,151
Equal Pay Act:	1,019	1082	919
GINA:	333	280	245

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## EEOC Focus and Enforcement Priorities

### EEOC Priorities: Strategic Enforcement Plan

#### A. Eliminating Barriers in Recruitment and Hiring:

The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities

1. Consideration of Arrest and Conviction Records in Employment Decisions.
2. Religious Garb and Grooming in the Workplace: Rights and Responsibilities

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## EEOC Focus and Enforcement Priorities

- Enforcement Guidance issued March 25, 2012  
[http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)
- Questions and Answers about the Enforcement Guidance  
[http://www.eeoc.gov/laws/guidance/qa\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm)
- Questions and Answers (March 6, 2014):  
[http://www.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming.cfm](http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm)
- Fact Sheet (March 6, 2014):  
[http://www.eeoc.gov/eeoc/publications/fs\\_religious\\_garb\\_grooming.cfm](http://www.eeoc.gov/eeoc/publications/fs_religious_garb_grooming.cfm)

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## EEOC Focus and Enforcement Priorities

### EEOC Priorities: Strategic Enforcement Plan

#### B. Protecting Immigrant, Migrant and Other Vulnerable Workers.

The EEOC will target disparate pay, job segregation, harassment, trafficking, and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

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## EEOC Focus and Enforcement Priorities

1. EEOC v. Hill Country Farms, Inc. (S.D. Iowa May 1, 2013) - Jury awarded EEOC damages totaling \$240 million - the largest verdict in the federal agency's history - for disability discrimination and severe abuse. The jury agreed with the EEOC that Hill County Farms, doing business as Henry's Turkey Service, subjected a group of 32 men with intellectual disabilities to severe abuse and discrimination for a period between 2007 and 2009, after 20 years of similar mistreatment.
2. EEOC v. Hamilton Growers, Inc. (N.D. Ga. Dec. 10, 2012) - Consent decree provided \$500,000 to a class of American and African American farm workers who, EEOC alleged, were terminated, segregated, and subjected to inferior terms and conditions based on national origin and race and otherwise treated less favorably than H-2A guest workers. Defendant is required to offer rehire to all former non-H-2A workers.

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## EEOC Focus and Enforcement Priorities

3. EEOC v. Global Horizons (D. Haw.) - In April 2011, the EEOC filed suit charging that Global Horizons, a labor contractor, and six farm defendants engaged in conduct that constituted national origin and race discrimination, harassment, and retaliation in their treatment of farm workers recruited from Thailand. The EEOC alleged that the Thai farm workers were trafficked to the U.S. under H-2A visas and subjected to deplorable working conditions, including but not limited to harassment, lower wages, physical isolation, and threats of deportation.

In November 2013, Del Monte Fresh Produce, one of the farm defendants, agreed to settle the lawsuit. As part of the settlement, Del Monte will pay \$1.2 million in monetary damages. It has also agreed to institute comprehensive protocols and accountability measures to ensure that all farm labor contractors that work with Del Monte comply with federal laws against discrimination and retaliation, including issuance of EEO policies written in Thai and other native languages of guest workers and designation of a compliance officer to oversee Del Monte's compliance with Title VII.

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## EEOC Focus and Enforcement Priorities

### EEOC Priorities: Strategic Enforcement Plan

C. Addressing Emerging and Developing Issues. The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations. Examples of such issues include:

#### 1. ADA

- Updates of Technical Assistance Documents:
- Diabetes in the Workplace and the ADA  
<http://www.eeoc.gov/laws/types/diabetes.cfm>
- Epilepsy in the Workplace and the ADA  
<http://www.eeoc.gov/laws/types/epilepsy.cfm>

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## EEOC Focus and Enforcement Priorities

- **Persons with Intellectual Disabilities in the Workplace and the ADA** [http://www.eeoc.gov/laws/types/intellectual\\_disabilities.cf](http://www.eeoc.gov/laws/types/intellectual_disabilities.cf)
- **Cancer in the Workplace and the ADA** <http://www.eeoc.gov/laws/types/cancer.cfm>
- **New Technical Assistance Document:**
- **The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work**
- [http://www.eeoc.gov/eeoc/publications/ada\\_mental\\_health\\_provider.cfm](http://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm)

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## EEOC Focus and Enforcement Priorities

2. First EEOC suits under Genetic Information Nondiscrimination Act (GINA)
  - EEOC v. Founders Pavilion (Case No. 6:13-cv-06250) filed May 16, 2013 (W.D.N.Y.) EEOC alleged that rehab center requested family medical history in post-offer medical exams. As part of a five-year consent decree resolving the suit, Founders Pavilion will provide a fund of \$110,400 for distribution to the 138 individuals who were asked for their genetic information. Founders Pavilion will also pay \$259,600 to the five individuals who the EEOC alleged were fired or denied hire in violation of the ADA or Title VII.
  - EEOC v. Fabricut, Inc. (Case No. 13-CV-248-CVE-PJC), consent decree May 7, 2013 (N.D. Okla.) – EEOC alleged that contract medical examiner requester family medical history in post-offer medical exam – case settled for \$50,000.

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## EEOC Focus and Enforcement Priorities

3. Accommodation of pregnancy-related limitations under the ADA and the Pregnancy Discrimination Act (PDA)
  - Commission Meeting on Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities - <http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm>
  - Expanded ADA Coverage: *Heatherly v. Portillo's Hot Dogs, Inc.*, 2013 WL 3790909 (N.D. Ill. July 19, 2013). Temporary light duty restrictions, including no heavy lifting, due to "high risk" pregnancy could substantially limit plaintiff in the major life activity of lifting (citing to EEOC's ADAAA regulations ("[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting")).

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## EEOC Focus and Enforcement Priorities

The Pregnancy Discrimination Act: The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women 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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion. 42 U.S.C. § 2000e(k).

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## EEOC Focus and Enforcement Priorities

### 4. Coverage of lesbian, gay, bisexual, and transgender individuals under Title VII's sex discrimination provisions

#### Federal Sector Decisions Finding Sex Discrimination in Cases Involving Gender Identity and Sexual Orientation:

- *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. April 20, 2012) (discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex in violation of Title VII of the Civil Rights Act of 1964).
- *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873, 2011 WL 2663401 (E.E.O.C. July 1, 2011) (discrimination based on sex stereotype that men should only marry women can constitute discrimination based on sex).
- *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649, 2011 WL 6960810 (E.E.O.C. December 20, 2011) (discrimination based on sex stereotype that women should only have sexual relationships with men can constitute discrimination based on sex).

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## EEOC Focus and Enforcement Priorities

### 5. Enforcing Equal Pay Laws. The EEOC will target compensation systems and practices that discriminate based on gender.

- About 5000 charges of gender-based wage discrimination were received in FY 2012

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## EEOC Focus and Enforcement Priorities

6. Preserving Access to the Legal System. The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.

- EEOC v. CVS Pharmacy, Inc. (N.D. Ill., filed Feb. 2014). EEOC alleges that CVS's standard severance agreement constitutes a pattern or practice of interference with employees' Title VII rights in violation of Section 707(a) of the statute. Among other provisions, the agreement requires release of "charges ... of any kind" and provides that the employee agrees not to accept any relief even if a court rules the waiver is unenforceable. The Commission contends that these and other provisions interfere with employees' right to know that they are entitled to file discrimination charges and/or communicate and cooperate with EEOC investigations notwithstanding their receipt of severance. The case is in furtherance of strategic enforcement priority of preserving "access to the legal system" because it targets a practice that discourages and prohibits exercising the right to file a charge or participate in an EEOC investigation

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## EEOC Focus and Enforcement Priorities

7. Preventing Harassment Through Systemic Enforcement and Targeted Outreach

- EEOC v. Red Lobster (D. Md.) (suit filed 9/30/13) – EEOC alleged that the employer subjected a class of female employees to pervasive sexual harassment at its Salisbury, Maryland location when its culinary manager subjected female employees to longstanding unwelcome conduct, including pressing his groin against them, grabbing and groping them, and making sexually offensive comments.
- EEOC v. Wells Fargo (D. Nev.) (suit filed 9/25/13) – EEOC alleged that a female service manager subjected four female bank tellers to graphic sexual comments, gestures, and images. The alleged harassment included invasive comments about their bodies and sex lives, inappropriate touching and grabbing, and suggestions that the female bank tellers wear sexually provocative clothing in order to attract or retain customers or to advance in the workplace.

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## EEOC Focus and Enforcement Priorities

- EEOC v. U-Haul (W.D. Tenn. 9/24/13) – Respondent entered into a two-year consent decree requiring it to pay \$750,000 to eight African-American current and former employees and to provide other relief to settle a race and retaliation discrimination lawsuit. EEOC alleged that Black employees were subjected to racial slurs and other racially offensive comments by their White supervisor at a facility in Memphis. The supervisor regularly referred to black employees with the "N" word and other derogatory slurs. The company also engaged in retaliation by firing one employee for complaining about racial harassment. The settlement also requires U- Haul to conduct annual employee training regarding equal employment opportunity laws and to provide written reports to the EEOC on any future race discrimination complaints.

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## Trends in Employment Laws

- background investigations
- social media issues
- weapons in the workplace.
- bullying
- workplace flexibility

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