



LGBT, Religion, and Diversity in the Nonprofit Workplace

December 11, 2014

Venable LLP

Washington, DC

Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

Douglas B. Mishkin, Esq., Venable LLP

Todd J. Horn, Esq., Venable LLP

Keith A. Mong, Esq., Venable LLP



Presentation



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Thursday, December 11, 2014, 12:30 p.m. – 2:00 p.m. ET
Venable LLP, Washington, DC

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Agenda

- Employee Challenges to Diversity Policies
- LGBT Employees and the Nonprofit Workplace
- Employee Benefits for Same-Gender Spouses
- Healthcare Coverage for Gender Reassignment Surgery



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Employee Challenges to Diversity Policies

The Story of Mr. B – The Facts

- Mr. B is a Christian who believes that the Bible is divinely inspired.
- Because the Bible requires that he treat others as he would like to be treated, Mr. B values and respects all other employees as individuals.



The Story of Mr. B – More Facts

- He never has, nor would he, discriminate against another employee due to differences in belief, behavior, background, or other attribute.
- However, his religious beliefs prohibit him from approving, endorsing, or esteeming behavior or values that he believes are repudiated by Scripture.



“A Summary of Our Business Philosophy”

“Each person is charged with the responsibility to fully recognize, respect, and value the differences among all of us.”



The Certificate of Understanding

*“...that you will abide by our
employment policies and practices.”*



Mr. B's Objection

- “I believe it’s wrong...to attempt to persuade me to fully respect and fully value any differences that are contrary to God’s word.
- **In order for me to comply with this diversity statement in the company handbook, I would have to deny my faith...”**



The HR Manager's Response

No “philosophical debates”



What Happened?

- Mr. B refused to sign.
- Mr. B was fired.
- Mr. B sued.



Mr. B's Legal Theory

Religious Discrimination Based on Failure to Accommodate



Company's Burden

- Offered a reasonable accommodation

OR

- Unable to reasonably accommodate employee's religious needs without undue hardship



The Judge's Reaction

- The policy was “ambiguous”
- The company failed to communicate with Mr. B about:
 - The intent of the language
 - His concerns about the policy



The Result: Mr. B Wins

- Back pay
- Pension contribution
- Emotional distress
- Front pay
- Total: \$146,269



The Story of Mr. J.

- Mr. J goes to work as an engineer
- Intro to company handbook:
 - “It is important that you read, understand, and comply with all of the provisions of this handbook.”
 - Handbook has EEO policy
 - Handbook Acknowledgment: Employee responsibility “to know and to understand the Company’s policies and procedures”



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The Story of Mr. J (cont.)

- Mr. J is told to read and sign acknowledgment
- Mr. J reads
- Mr. J does not sign
- Mr. J works for 17 months
- Company revises handbook, insists he sign



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The Story of Mr. J (cont.)

- Mr. J: Signing would violate firmly held religious beliefs
- “If I sign it, it basically states that I gave my stamp of approval on things that the Lord looks at as immoral. Signing it would mean I must comply with sin.”



The Story of Mr. J (cont.)

- Mr. J signs the acknowledgment ***with reservations***
- “Within God’s law”
- His “signature is subject to change at the sole discretion of the signer.”



The Story of Mr. J (cont.)

- HR refused to accept
- “Sign it that you understand and you will abide by the rules of our company while working for us.”
- Mr. J: “Just couldn’t do it”
- Company: Refusal might subject company to liability if Mr. J ever violated EEO policies



The Story of Mr. J (cont.)

- “Sign it or else” – “No” – “You’re fired”
- Mr. J: religious discrimination
- Possible accommodations:
 - Allow him not to sign
 - Allow him to sign with reservations
 - Have witnesses acknowledge his receipt
- * Trial court: Summary judgment for employer



The Story of Mr. J (cont.)

- The Court (Judge Brogan): Refusal to sign meant he wanted to be allowed to discriminate based on sexual orientation
- Dissent (Judge Donovan): Insufficient information whether actual conflict between policy and his belief, and if possible accommodation



The Story of Mr. J (cont.)

- Judge Donovan (cont.): Maybe Mr. J was talking about beliefs, not conduct.
- “There is an obvious distinction between conduct and belief. **Like Mr. B**, all that Mr. J asked is that he not be forced to endorse views contrary to his religion as a condition of continued employment.”



The Story of Mr. J (cont.)

- Judge Donovan: “I shall not discriminate on the basis of...”
- He was terminated for beliefs, not conduct



Other Stories



Morals of the Stories

- Is it employee **conduct** or **belief**?
- Does a real conflict exist?
 - If so, can an accommodation resolve the conflict?
 - Does your policy identify a mechanism for raising such questions?
 - Are the people responsible for your policy trained on how to respond?



LGBT Employees and the Nonprofit Workplace

LGBT – Consider if you will....

- Joe, who is “straight,” complains to you that Walt, who also is “straight,” privately makes comments about their bodies and sex lives. Problem?



LGBT – Consider if you will....

- Loretta from marketing comes in your office, announces that “his” name is now “Larry,” and then walks into the men’s restroom. Problem?



LGBT – Consider if you will....

- Hank from accounting comes to work in a mini-skirt and full make-up. He does not shave his beard. He is scheduled to make a presentation to your Board that morning. Problem?



LGBT – Consider if you will....

- Joanne presents herself at work as a “straight” woman. A supervisor, Margaret, sees her in a restaurant holding hands with and kissing a woman. Margaret tells co-workers that Joanne is a lesbian. Problem?



LGBT – The Terminology

- Sexual orientation
 - An individual's physical/emotional attraction to the same or opposite gender
 - L – lesbian
 - G – gay
 - B – bisexual
 - Heterosexual/straight
- Gender identity
 - An individual's innate, deeply-felt psychological identification as being male or female
 - May not correspond to the individual's biology or designated gender at birth



LGBT – The Terminology

- Gender expression
 - The manner in which a person publicly displays or signals masculinity or femininity
 - How one “looks, acts, and dresses”
 - Hair, clothes, shoes, jewelry, makeup
 - Speech, behavior, movement
 - Gender reassignment surgery
 - May be an extension of gender identity
- Sexual orientation is distinct from gender identity



LGBT – The Terminology

- Transgender person
 - A person whose gender self-identity is different from the gender they were assigned at birth
- Not always binary (male **or** female)
 - Can be a function of gender stereotypes



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LGBT – The Statistics

- 2013 Department of Health and Human Services Sexual Orientation Survey
 - Over 5 million adults identified as gay or lesbian (1.6%)
 - Over 2 million adults identified as bisexual (0.7%)
 - Over 3.5 million adults identified as “I don’t know,” “something else,” or “NOYB” (1.1%)
- Transgender – no formal, reliable statistics
 - Definitional problem
 - Not “out”
 - Estimates from 1 million to several million (0.3% to ?%)



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LGBT – Federal Law

- No comprehensive federal law that expressly prohibits private sector employment discrimination based on sexual orientation or gender identity.

But.....

- E.O. 13672 applies to federal government contractors
 - Sexual orientation and gender identity protected
- Same-gender harassment can violate Title VII
 - Sexual orientation/gender identity irrelevant
- Gender stereotyping under Title VII
 - Potential for “quasi” gender identity and sexual orientation claims
 - EEOC ruling



LGBT – State and Local Laws

- Over 20 states and the District of Columbia prohibit employment discrimination based on sexual orientation, gender identity, or gender expression
- Dozens of local government ordinances
- Some have exceptions for religious organizations



LGBT – Prohibited Actions

- Laws generally cover all aspects of the employment relationship, including:
 - Hiring
 - Compensation
 - Evaluations
 - Promotion
 - Demotion
 - “Environment” claims
 - Discipline
 - Termination
 - Severance pay



LGBT – Remedies

- Remedies include:
 - Reinstatement
 - Money
 - Back pay
 - Front pay
 - Emotional distress
 - Punitive damages
 - Attorneys’ fees



LGBT – “Environment” Claims

- Hostile work environment
 - Unwelcome severe or pervasive conduct based on a person’s protected status that a reasonable person would consider hostile or abusive
- Overt harassment
 - Slurs – verbal or email
 - Off-color jokes, comments, pranks
 - Teasing and mocking appearance and voice
 - Improper pronouns or name (he/she)
 - Sexual overtures (sarcastic)
 - Threats
 - Physical abuse



LGBT – “Environment” Claims (cont.)

- Subtle actions
 - Ostracizing
 - Questioning or interrogating
 - Gossip or rumors
 - Denial of mentoring or training
 - Limited customer or client contact
 - Dress code enforcement
 - Restroom assignments



LGBT – Risk Avoidance

- Revise policies/practices to include protections
 - EEO commitment
 - Harassment/complaint procedure
 - Dress codes, *etc.*
- Train staff and management
- Prompt action if complaint or awareness of potential problem
 - Investigation
 - Remedial action
 - Document process
- Confer with legal counsel



LGBT – Now what about....

- Joe
- Loretta
- Hank
- Joanne



Employee Benefits for Same-Gender Spouses

What Is DOMA?

- The Defense of Marriage Act was enacted in 1996. It did two things:
 1. Allowed states to refuse to recognize same-gender marriages performed under the laws of other states (Section 2)
 2. Defined marriage for all federal law purposes as only a legal union between one man and one woman and spouse as a person of the opposite gender who is a husband or wife (Section 3)



United States v. Windsor (133 S. Ct. 2675)

- On June 26, 2013, the U.S. Supreme Court declared Section 3 of DOMA unconstitutional
- *Windsor* was an estate tax refund request, but the ruling has significant implications for employer-sponsored benefit plans
- There are more than 200 Internal Revenue Code provisions and regulations that include the term “spouse,” “marriage,” “husband,” and/or “wife”



State Laws

- Same-gender marriage is legal in: AK, AZ, CA, CO, CT, DE, HI, ID, IL, IN, IA, KS, ME, MA, MD, MN, MT, NE, NJ, NH, NM, NY, NC, OK, OR, PA, RI, SC, UT, VA, VT, WA, WI, WV, WY, and the District of Columbia
- Same-gender marriage is still prohibited in: AL, AR, FL, GA, KY, LA, MI, MS, MO, NE, ND, OH, SD, TN, TX

As of 12-4-2014



Retirement Plan Implications

- Right to survivor annuities, including pre-retirement survivor benefits
- Spousal consent rights
- Spousal rollover rights
- QDRO rights
- Delay of required minimum distribution until deceased participant would have been 70 ½
- Safe harbor hardship withdrawals for unreimbursed medical, post secondary education, and funeral expenses



Health and Welfare Implications

- Tax-free health plan coverage – no more imputed income
- Special enrollment and status change rights under cafeteria plans
- COBRA – independent spousal election rights/qualified beneficiary status
- Qualified tuition reduction for spouses - Sec. 117(d)
- Dependent care expenses
 - Higher dollar limits for married couple
 - Care of spouse's child qualifies
- Medical flexible spending accounts – coverage of spouse claims/tax free reimbursement



IRS Revenue Ruling 2013-17

- For federal tax purposes:
 - The Place of Celebration Rule: A same-gender marriage sanctioned under the laws of the state or territory in which it was performed will be recognized, even if the married couple lives in a state that does not recognize same-gender marriage.
 - A same-gender (or opposite-gender) couple is not considered married by virtue of entering into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law (but not classified as a marriage under the laws of that state).



IRS Revenue Ruling 2013-17 (cont.)

- For federal tax purposes (cont.):
 - “Marriage” includes two individuals of the same gender, provided those individuals are lawfully married under state law (or the laws of a territory or foreign jurisdiction).
 - The terms spouse, husband and wife do not include individuals in a registered domestic partnership, civil union or other relationship not denominated as a marriage under state law



Impact on Qualified/403(b) Retirement Plans – IRS Notice 2014-19

- Operational compliance
 - Retirement plans should have begun operating in compliance with *Windsor* as of June 26, 2013 (the date of the decision)
 - Could have recognized same-gender spouses before June 26, 2013, for all or only certain designated purposes
 - From June 26, 2013, to September 16, 2013 – either place of celebration or place of domicile rule
 - On and after September 16, 2013 – only place of celebration rule



Impact on Qualified/403(b) Retirement Plans – IRS Notice 2014-19 – (cont.)

- Plan amendments
 - Generally required if:
 - Plan terms are inconsistent with the *Windsor* decision
 - Plan chooses to apply the *Windsor* decision before June 26, 2013
 - IRS encouraged “clarifying” amendments regardless of current plan terms
 - Required or clarifying amendments should be adopted by the later of (i) the close of the plan’s remedial amendment period, or (ii) December 31, 2014
 - 403(b) plans not required to be amended until IRS designates deadline in the future



Family & Medical Leave Act (FMLA)

- The FMLA provides certain leave rights to eligible employees, permitting them to attend to family matters (e.g., qualifying events related to a spouse's military leave) and serious health conditions (e.g., to care for a spouse with a serious health condition).
- Following the *Windsor* decision, the DOL issued guidance initially adopting the "place of domicile" rule for FMLA purposes.



Family & Medical Leave Act (FMLA) (cont'd)

- On June 20, 2014, the DOL proposed new rules that would adopt a place of celebration rule – which would allow eligible employees in legal same-gender marriages to take FMLA-protected leave to care for a same-gender spouse with a serious medical condition, regardless of whether the couple resides in a state where same-gender marriage is recognized.



Action Steps

1. Check plan documents and SPDs to see if definition of spouse needs to be amended
2. No requirement to seek out information about employee's marital status, but consider sending a reminder of need to keep personnel records and beneficiary designations current
3. Check open enrollment and other communication materials for needed changes



Action Steps (cont.)

4. Stop imputing income where know of same-gender marriage
 - Response to claim for benefits
 - Review handbooks – no references to DOMA and check references to spouse
5. Check FMLA policy to ensure that it is not outdated (e.g., remove any DOMA references)



Action Steps (cont.)

6. Develop or confirm the existence of your FMLA approval process, and make certain that this process does not discriminate against same-gender couples by placing any extra burdens on them.
7. Continue to monitor for changes in the law, new guidance and clarifications.



Healthcare Coverage for Gender Reassignment Surgery

Gender Reassignment Surgery

- *O'Donnabhain v. Commissioner*
(134 T.C. 34 [2010])
 - Expenses for gender reassignment surgery and hormone therapy to treat gender identity disorder are tax deductible
 - IRS acquiesced in November 2011
- No federal laws that require employer-provided health care plans to cover gender reassignment surgery
- Several states have adopted laws or policies that prohibit categorical exclusions of transition-related care including gender reassignment surgery (CA, CO, CT, IL, MA, OR, VT, WA, and DC)

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Gender Reassignment Surgery (cont.)

- More plans are expressly covering gender reassignment surgery and other transition procedures
- Issues remain about what is medically necessary versus cosmetic
- Issues with respect to plans that do not expressly cover or exclude such coverage
 - The extent to which such procedures are covered
 - Denials based on:
 - Not medically necessary
 - Experimental
 - Cosmetic

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Questions?

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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, one of only eight in the 2013 rankings, and one of only nine in the 2014 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-15 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014 edition of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
 Air Conditioning Contractors of America
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 American Alliance of Museums
 American Association for the Advancement of Science
 American Bar Association
 American Bureau of Shipping
 American Cancer Society
 American College of Radiology
 American Friends of Yahad in Unum
 American Institute of Architects
 American Institute of Certified Public Accountants

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

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MEMBERSHIPS

American Society of Association Executives

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New York Society of Association Executives

American Society for Microbiology
American Society of Anesthesiologists
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America's Health Insurance Plans
Association for Healthcare Philanthropy
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Association of Fundraising Professionals
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Design-Build Institute of America
Endocrine Society
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
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Goodwill Industries International
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National Association of College and University Attorneys
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Council of Architectural Registration Boards
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National Propane Gas Association
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National Retail Federation
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Project Management Institute
Public Health Accreditation Board
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Recording Industry Association of America

Romance Writers of America
Telecommunications Industry Association
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U.S. Chamber of Commerce
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HONORS

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-14
Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.), 2012-15
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Recipient, The Center for Association Leadership Chairman's Award, 2004
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ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.



SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.



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U.S. District Court for the Eastern
District of Virginia
U.S. District Court for the District

Doug Mishkin is a partner in Venable's Labor and Employment Group with over 30 years of experience litigating on behalf of businesses and nonprofits. He focuses on litigating about and counseling on theft of trade secrets and breach of noncompetes, with significant experience as well in discrimination, harassment, wage and hour, and employment contract disputes. Mr. Mishkin is a trained mediator, and both represents clients and has served as a mediator.

An experienced trial attorney, Mr. Mishkin has represented clients in state and federal courts across the country. He frequently handles matters in proceedings initiated by the Equal Employment Opportunity Commission and human rights agencies.

Prior to joining Venable, Mr. Mishkin co-chaired the employment law practice at an international law firm for over 15 years. In 1992, he served on President Bill Clinton's transition team for the Equal Employment Opportunity Commission. He has been interviewed on National Public Radio's "All Things Considered" and the CBS "Early Show."

HONORS

Super Lawyers "Super Lawyer," Washington, DC, Employment Litigation (2013, 2014)

Super Lawyers Business Edition "Super Lawyer," Washington, DC, Employment Litigation (2013)

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"Best Lawyers," *Washingtonian Magazine* (December 2011)

"Top Employment Lawyer," *Washingtonian Magazine* (2009)

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Winner, The Burton Award for Legal Achievement (2005)

ACTIVITIES

From 2001 to 2004, Mr. Mishkin served as a faculty member for Georgetown University Law Center's GULC/NITA Intensive Session in Trial Advocacy Skills and in 2002 for the school's GULC/NITA Depositions Seminar. He has also participated in various Georgetown University Law Center CLE programs on employment litigation.

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EDUCATION

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MEMBERSHIPS

Chair, Legalink, a worldwide
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Legal Editor, Society for Human
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Workplace Flexibility 2010 Legal
Working Group and Member,
National Advisory Commission

Member, The Advanced Science
and Technology Adjudication
Resource Center, Inc. (ASTAR)
National Programs Committee

RECENT PUBLICATIONS

- Fall 2014, Jurisdictions Cuffing Asks About Arrests
- November 6, 2014, Advertising Law News & Analysis - November 6, 2014, Advertising Alert
- November 2014, Department of the Army Found to Have Discriminated Against Transgender Employee, Labor & Employment News Alert
- September, 2014, DC's New "Ban-the-Box" Law: Nonprofits May No Longer Question Applicants about Arrests
- September, 2014, DC's New "Ban-the-Box" Law: Employers May Not Question Applicants About Arrests, Labor & Employment News Alert
- July 29, 2014, Government Contractors Now Prohibited From LGBT Discrimination, Client Alerts

RECENT SPEAKING ENGAGEMENTS

- December 11, 2014, LGBT, Religion, and Diversity in the Nonprofit Workplace
- December 9, 2014, Legal Quick Hit: "LGBT, Religion, and Diversity in the Nonprofit Workplace: What Every In-House Counsel Needs to Know" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- December 1, 2014, "Ebola and Beyond: Managing Your Workplace, Insuring against Risk, and Addressing Misconceptions about This and the Next Public Health Crisis," a Venable Luncheon and Webinar
- September 3, 2014, "What President Obama's Executive Order On LGBT Means For Government Contractors" for the Professional Services Council



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AREAS OF PRACTICE

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Employment Law
Financial Services Wage
Compliance
Healthcare Cost Reduction
Regulatory

INDUSTRIES

Life Sciences

BAR ADMISSIONS

Maryland
District of Columbia

COURT ADMISSIONS

U.S. Court of Appeals for the D.C.
Circuit
U.S. Court of Appeals for the Third
Circuit
U.S. Court of Appeals for the
Fourth Circuit
U.S. District Court for the District
of Columbia
U.S. District Court for the District
of Maryland
U.S. Supreme Court

With over 25 years of courtroom experience in employment cases, Todd Horn was selected as Maryland's "Lawyer of the Year" for Employment Law in 2011 by the peer-review publication, *Best Lawyers in America*.

Mr. Horn also co-authors the comprehensive legal treatise, *Maryland Employment Law* (Lexis 2013), a book that Federal and State Courts have cited as a leading reference for over two decades.

Focusing on employment law, Mr. Horn ranks as a top "Band 1" lawyer by *Chambers USA*, which reported that he "is admired as a fantastic litigator – one of the best in the courtroom, with a tremendous presence," is "very professional and efficient," and is "particularly sought out for high-stakes litigation."

After a four-week jury trial in 2013, Mr. Horn and his team obtained a defense verdict in a 13-plaintiff, multi-million dollar age discrimination lawsuit. Mr. Horn regularly handles cases involving "whistleblowing," discrimination, compensation, disability accommodations, retaliation, sexual harassment, ERISA, wrongful discharge, and defamation.

Mr. Horn also has significant experience successfully defending employers in "class action" wage and hour lawsuits under the Fair Labor Standards Act (FLSA) and Maryland law. He litigated one of the only cases in Maryland resulting in the complete denial of class certification under the FLSA. *Syrja v. Westat, Inc.*, 756 F. Supp. 2d 682 (D. Md. 2010).

Mr. Horn also helps his clients avoid employee lawsuits and obtain strategic advantages in sensitive investigations, workforce reductions/reorganizations, disgruntled employee issues, and ADA/FMLA compliance.

SIGNIFICANT MATTERS

Mr. Horn regularly represents Fortune 500 companies involved in employment-related litigation in the Washington, DC - Baltimore region. His experience covers a wide range of industries including healthcare, government contractors, financial, retail, hospitality, construction, biotechnology, food service and telecommunications.

Mr. Horn served as a lead defense counsel in one of the nation's largest employment-discrimination class-action lawsuits. His other cases include:

Adedje v. Westat, Inc., 214 Md. App. 1 (2013).

Rashad v. WMATA, 945 F. Supp. 2d 152 (D.D.C. 2013).

Walters v. Transwestern Carey Winston, LLC, 2012 U.S. Dist. LEXIS 60380 (D. Md. 2012).

Panagodimos v. CNS, Inc., 2012 U.S. Dist. LEXIS 31013 (D. Md. 2012).

Mwabira-Simera v. Sodexo Marriott, 786 F. Supp. 2d 395 (D.D.C. 2011).

EEOC v. WSSC, 631 F.3d 174 (4th Cir. 2011).

EDUCATION

J.D., William and Mary Marshall-Wythe School of Law, 1987

Moot Court

B.S., Economics, *with honors*,
University of Mary Washington,
1984

Phi Beta Kappa

MEMBERSHIPS

American Bar Association,
Sections of Labor and Employment
Law and Litigation

Maryland State Bar Association
Maryland Association of Defense
Trial Counsel

Syrja v. Westat, Inc., 756 F. Supp. 2d 682 (D. Md. 2010).

Smith v. Westat, Inc., 09-CV-140-CAP (N.D. Ga. 2009).

Montgomery v. General Dynamics, 2008 WL 4546262 (S.D. Ohio 2008).

King v. Marriott International, Inc., 160 Md. App. 689, 866 A.2d 895 (2005).

Covance Laboratories, Inc. v. Orantes, 338 F. Supp. 2d 613 (D. Md. 2004).

Sherman v. Marriott Hotel Services, Inc., 317 F. Supp. 2d 609 (D. Md. 2004).

Higgins v. Food Lion, Inc., 197 F. Supp. 2d 364 (D. Md. 2002).

King v. Marriott International, Inc., 337 F.3d 421 (4th Cir. 2003).

Arbabi v. Fred Meyers, Inc., 205 F. Supp. 2d 462 (D. Md. 2002).

Lane v. Wal-Mart Stores, Inc., 2000 U.S. Dist. LEXIS 13935 (D. Md. 2002).

Aheart v. Sodexho, Inc., 2000 U.S. App. LEXIS 7779 (4th Cir. 2000).

Hogue v. Sam's Club, Inc., 114 F. Supp. 2d 389 (D. Md. 2000).

Gedeon v. Host Marriott Corp., 1998 U.S. App. LEXIS 16903 (4th Cir. 1998).

Milton v. IIT Research Institute, 138 F.3d 519 (4th Cir. 1998).

Farasat v. Paulikas, 32 F. Supp. 2d 249; (D. Md. 1998), *aff'd*, 166 F.3d 1208 (4th Cir. 1998).

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Gaskins v. Marshall Craft Associates, Inc., 110 Md. App. 705 (1996).

Webb v. Baxter Healthcare Corp., 57 F.3d 1067 (4th Cir. 1995).

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Fusco v. GE Government Services, Inc., 897 F. Supp. 926 (D. Md. 1995).

Glocker v. W.R. Grace, Inc., 68 F.3d 460 (4th Cir. 1995).

Riggle v. CSX Transportation, Inc., 755 F. Supp. 676 (D. Md. 1991).

HONORS

Recognized in *Chambers USA* (Band 1), Labor and Employment, Maryland, 2007 - 2014

Recognized in *Chambers USA* (Band 2), Employment: Mainly Defendant, Maryland, 2006

He also is listed in *The Best Lawyers in America* for Labor and Employment Law and Labor and Employment Litigation, (Woodward/White, Inc.)

Recognized in *Super Lawyers Business Edition*, Employment and Labor, Baltimore, 2013

Selected for inclusion in *Maryland Super Lawyers*, 2009 - 2014

Named Baltimore Labor and Employment "Lawyer of the Year," *Best Lawyers*, 2011

Leadership in Law Award, *The Daily Record*, 2006

AV® Peer-Review Rated by *Martindale-Hubbell*

Sodexho, Inc., one of the largest companies in the United States, recognized Mr. Horn and his litigation team as an "outstanding large firm outside counsel"

Named as one of Maryland's Legal Elite by *Baltimore SmartCEO* magazine in 2006

While in high school, Mr. Horn earned the rank of Eagle Scout

ACTIVITIES

Mr. Horn provides employment advice *pro bono* to charities and nonprofit organizations and is a board member of Advocates for Children and Youth.

In 2005, he coached the University of Maryland School of Law's trial advocacy team in the ABA's Labor and Employment Law Section's Student Trial Advocacy Competition.

RECENT PUBLICATIONS

In addition to co-writing the legal treatise *Maryland Employment Law*, Mr. Horn also has been a contributing author to *Employment Discrimination Law*, the official book of the American Bar Association on this subject. It has been cited by the courts of every circuit and the U.S. Supreme Court.

- October, 2014, Labor Pains: Ebola at Work, Labor & Employment News Alert
- September 17, 2014, What's Ahead for 2015: Preparing Your Nonprofit's Group Health Plan for the Employer Mandate
- July 1, 2014, Storming the Castle: Employee Whistleblowing Under ACA, *Law360*
- May 2014, Labor Pains: The \$2 Million Part-Time Employee, Labor & Employment News Alert
- March 2014, A SOX in the Gut: Supreme Court Vastly Expands Workplace "Whistleblower" Law, SEC Update
- February 2014, Trojan Horse Privacy Laws: Facebook Snooping, Labor & Employment News Alert
- February 2014, Labor Pains: GINA's Turning 6, and She's Learned How to Sue!, Labor & Employment News Alert

RECENT SPEAKING ENGAGEMENTS

Mr. Horn conducts seminars covering the maze of state and federal employment laws. His dynamic presentations assist employers in complying with the expanding landscape of personnel laws and help minimize the risk of employee lawsuits at all phases of the employment relationship – from recruitment to exit interview.

Topics of his presentations include:

- accommodating employees' disabilities under the Americans with Disabilities Act
- affirmative action requirements under the Office of Federal Contract Compliance Programs regulations
- employee discipline and termination
- interviewing techniques and pitfalls
- leave issues under the Family and Medical Leave Act
- reductions in force under the federal WARN Act and the Older Workers Benefit Protection Act
- sexual harassment prevention and investigation
- wage and hour and other compensation matters under the Fair Labor Standards Act
- December 11, 2014, LGBT, Religion, and Diversity in the Nonprofit Workplace
- September 16, 2014, What's Ahead for 2015: Preparing Your Nonprofit's Group Health Plan for the Employer Mandate
- May 14, 2014, What's Ahead for 2015: Preparing Your Group Health Plan for the Employer Mandate



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AREAS OF PRACTICE

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Tax and Wealth Planning

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EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1987

University of Maryland, Baltimore County, 1984

Keith Mong is a veteran employee benefits and executive compensation attorney and a partner in Venable's Washington, DC office.

Mr. Mong counsels middle market and emerging business in the full spectrum of employee benefits and executive compensation matters. His work extends from qualified and nonqualified retirement plans to equity-based compensation arrangements, employment agreements, and health and welfare programs.

He also handles benefit questions that arise during the course of corporate mergers and acquisitions. Mr. Mong frequently represents clients before regulatory and governmental agencies, such as the Internal Revenue Service, Department of Labor and the Pension Benefit Guaranty Corporation.

HONORS

Mr. Mong has been recognized in *The Best Lawyers in America* for Employee Benefits Law (Woodward/White, Inc.).

SPEAKING ENGAGEMENTS

- December 11, 2014, LGBT, Religion, and Diversity in the Nonprofit Workplace
- December 9, 2014, Legal Quick Hit: "LGBT, Religion, and Diversity in the Nonprofit Workplace: What Every In-House Counsel Needs to Know" for the Association of Corporate Counsel's Nonprofit Organizations Committee

Additional Information



CLIENT ALERTS

July 29, 2014

GOVERNMENT CONTRACTORS NOW PROHIBITED FROM LGBT DISCRIMINATION

Beginning immediately, federal government contractors are prohibited from discriminating based on sexual orientation or gender identity in the performance of those contracts, under President Obama's **Executive Order** dated July 21, 2014. That Order amends Executive Order 11246, which already prohibits such discrimination on the basis of race, color, gender, religion, and national origin. Contractors who violate the amended Order may have their government contracts cancelled or suspended, and may be debarred from further government work.

What Do You Need to Do?

Although sexual orientation and gender identity are not protected categories under federal statutes prohibiting discrimination in employment, they are included in numerous state statutes. Thus, if you are a contractor in one of the 18 states and the District of Columbia that prohibit lesbian, gay, bisexual, and transgender (LGBT) discrimination in employment (including government-contractor rich jurisdictions such as Delaware, California, and Colorado), presumably your employment policies already reflect this legal obligation. But if you are a government contractor in any of the remaining states with no such prohibition (or in one of the states that ban only sexual orientation discrimination), then you will need to revise your anti-discrimination and anti-harassment policies accordingly, if they do not already prohibit such discrimination. Information regarding individual state laws can be found by accessing the [website for the American Civil Liberties Union](#).

Whether or not your policies already conform to the amended Executive Order, the new Order adds cancellation and debarment to the penalties to which you may be subject. Thus, for some contractors the obligation is new, but for all contractors the risks of noncompliance are heightened.

The expansion of Executive Order 11246 reflects the trend in the private sector. According to the Fact Sheet issued by the White House, 91% of Fortune 500 companies currently prohibit sexual orientation discrimination in their employment policies; 61% also include gender identity. Similarly, according to the Office of the Press Secretary, of the 50 largest federal contractors (who account for nearly 50% of all federal contracting dollars), 86% already bar discrimination on the basis of sexual orientation, and 61% extend this prohibition to gender identity as well.

The amended Order is effective now, but details about recordkeeping, reporting, and other matters of implementation will follow when the Department of Labor issues regulations by October 19, 2014 (90 days after the Order). Prudent government contractors will use this time to review the basics:

- Do your written policies include sexual orientation and gender identity as protected categories?
- Do those policies inform employees how and where to report such a complaint within the company?
- Are your human resource professionals, managers, and supervisors trained to investigate complaints of discrimination and harassment based on LGBT status, as well as the categories protected by federal and state statutes?

The amended Order addresses the confluence of employment and government contract law. Our employment and government contract lawyers will continue to monitor the development of the regulations. As questions arise, please feel free to contact us.

Please contact a member of Venable's [Labor & Employment](#) or [Government Contracts](#) practice groups or one of the authors of this alert if you have any questions about the Executive Order.

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December 3, 2014

NONPROFITS MAY NEED TO AMEND THEIR QUALIFIED RETIREMENT PLANS BY YEAR-END TO RECOGNIZE SAME-SEX SPOUSES RETROACTIVELY – 403(B) PLANS MAY NEED TO BE AMENDED LATER

AUTHORS

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Jeffrey S. Tenenbaum

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Background

Earlier this year, the IRS issued Notices [2014-19](#) and [2014-37](#) to provide additional guidance on the application of the U.S. Supreme Court's *Windsor* decision to qualified retirement plans and 403(b) plans. In *U.S. v. Windsor*, the U.S. Supreme Court essentially ruled that, for all Federal purposes, the term "spouse" includes any individuals who were lawfully married under any state law or other jurisdiction, including individuals married to a person of the same sex.

In Notice 2013-17, its **first item of guidance** following the *Windsor* decision, the IRS adopted a "place of celebration" rule for Federal tax purposes, which recognizes a marriage of same-sex individuals that was validly entered into in a state whose laws at the time authorized same-sex marriages, even if the married couple is domiciled in a state that does not recognize such marriages. That approach is in contrast to a "place of domicile" rule that would have recognized same-sex marriages only if a couple resided in a state that recognized such marriages.

The most recent notices from the IRS provide additional guidance regarding the application of *Windsor* to qualified retirement plans, including the retroactive application of the decision and the plan amendments that may be required to reflect the decision and plan operations.

Operational Compliance

The new guidance confirms that qualified retirement plans and 403(b) plans should have begun operating in compliance with the *Windsor* decision as of June 26, 2013, which is the date the decision was issued by the U.S. Supreme Court. For this purpose, the guidance clarifies that from June 26, 2013, until September 16, 2013, the date Revenue Ruling 2013-17 was published, a plan could operate under either the place of celebration rule or the place of domicile rule. On and after September 16, 2013, a plan must operate under the place of celebration rule.

The new guidance also provides that a plan can be amended and operated to reflect the outcome of the *Windsor* decision as of a date earlier than June 26, 2013. Such an amendment and plan operations could apply for all purposes under a plan or for only certain designated purposes. For example, a plan could treat same-sex and opposite-sex spouses the same solely for purposes of the qualified joint and survivor annuity (QJSA) and qualified preretirement survivor annuity (QPSA) requirements that apply to participants with annuity starting dates or dates of death on or after a specified date.

Plan Amendments

Nonprofit organizations that are exempt from Federal income tax under Code section 501(c)(3) and certain educational organizations can maintain 403(b) plans, which are tax-favored plans similar to qualified retirement plans, but with several key differences (e.g., the amounts contributed under a 403(b) plan generally must be invested in either annuity contracts or mutual funds). Although 403(b) plans generally must comply operationally with the IRS's interpretation of the *Windsor* decision as described above, 403(b) plans do not have to be amended by the end of this calendar year like qualified retirement plans. Rather, the deadline for amending 403(b) plans to reflect the *Windsor* decision is the end of the preapproved plan remedial amendment period, which has not yet been announced by the IRS.

Whether a qualified plan needs to be amended to comply with the new rules depends on the specific terms of the plan.

If the terms of a plan are consistent with the *Windsor* decision, then the plan generally does not need to be amended. For example, a plan that defines a spouse as "a spouse under Federal law" is consistent

with the *Windsor* decision and does not need to be amended. However, the recent guidance suggested that a plan sponsor in this situation may still want to consider making a clarifying amendment for purposes of plan administration.

In contrast, if the terms of a plan conflict with the *Windsor* decision, then the plan must be amended to comply with the decision. For example, a plan that defines a spouse as "the opposite-sex spouse of a participant" must be amended to comply with the *Windsor* decision.

In addition, if a plan chooses to apply the *Windsor* decision to a period of time before June 26, 2013, then the plan must be amended to specify the date as of which the decision will be applied and the purposes for which it will be applied. For example, if a plan will treat same-sex and opposite-sex spouses the same for QJSA and QPSA purposes for participants with annuity starting dates or dates of death on or after January 1, 2013, then the plan must be amended to include those specific terms.

If a plan amendment is required (or a plan sponsor decides to make a clarifying amendment), then a qualified retirement plan must be amended by the later of (i) the close of the plan's remedial amendment period, or (ii) December 31, 2014. The guidance includes a special amendment timing rule for governmental plans, which provides that an amendment does not need to be adopted before the close of the first regular legislative session of the legislative body with the authority to amend the plan that ends after December 31, 2014.

The IRS issued Notice 2014-37 to clarify the timing of *Windsor* plan amendments for safe harbor 401(k) plans. The IRS takes the position that safe harbor 401(k) plans generally cannot be amended during a plan year to make mid-year changes, with certain limited exceptions. The most recent notice clarifies that safe harbor 401(k) plans can make mid-year amendments to reflect the *Windsor* decision.

The recent notices also provide other guidance, including, but not limited to, special amendment rules that apply to single employer defined benefit plans that are subject to certain restrictions under Code section 436(c) because their funded status is below certain thresholds.

Action Items

If not already done, nonprofit organizations should begin immediately to review their qualified retirement plan and 403(b) plan documents and operations to determine whether any changes need to be made before the end of this year to reflect the *Windsor* decision.