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EEOC Trends from 2013

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The United States Equal Employment Opportunity Commission (EEOC) has compiled comprehensive data on the charges filed and litigation pursued for the 2013 fiscal year which ended September 30, 2013. This data, as well as the agency's performance report, identifies the specific types of employment discrimination on which the EEOC has focused its efforts and also helps to identify the discriminatory conduct that the agency is likely to target in the future.

Charge Data

The total number of charges filed with the EEOC in the 2013 fiscal year was 93,727, approximately 6,000 charges fewer than the number of charges filed per year from 2010 to 2012, and a 5.7% decrease from the charges received in 2012. While there was a decrease in charges filed, 2013 became one of the top five fiscal years for charges received since 1997. Retaliation charges made up 41.1% of the charges in 2013, followed by race (35.3%), sex (29.5%), disability (27.7%), age (22.8%), national origin (11.4%), religion (4.0%), color (3.4%), Equal Pay Act (1.1%), and Genetic Information Anti-Discrimination Act (0.4%). Race, national origin, religion, and disability charges saw decreases in the raw number of charges filed in 2013 when compared to 2012, however, their percentage of overall claims increased. Charges based on sex decreased by 1%. Charges based on color increased by 0.7%, and retaliation charges increased by 3%. EEOC, Charge Statistics FY 1997 through FY 2013, http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Mar. 31, 2014).

The EEOC resolved 97,252 charges in fiscal year 2013. The majority of the charges (66%) resulted in the EEOC determining that there was no reasonable cause to believe that any discrimination occurred, and 14.8% of the charges were closed for administrative reasons, such as the charging party failing to participate in the investigation process. Of the remaining charges, 8,625 were resolved by settlement, 5,497 were withdrawn by the charging party after receiving benefits, and 3,515 were resolved by conciliation. EEOC, All Statutes FY 1997-FY 2013, http://www1.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Mar. 31, 2014). The average time it took the EEOC to investigate and resolve charges was reduced by 21 days in 2013 to 267 days. EEOC, Fiscal Year 2013 Performance and Accountability Report: Performance Results, http://www1.eeoc.gov/eeoc/plan/2013par_performance.cfm (last visited Mar. 31, 2014).

The EEOC compiled a new data table this year which categorizes the charges

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by type of discriminatory act. The table provides additional insight to the types of actions that frequently result in charges being filed. For example, charges of racial discrimination in fiscal year 2013 were most often based on discharge (16,639 charges), harassment (8,475 charges), and terms/conditions (9,562 charges). EEOC, Bases by Issue FY 2010-FY 2013, http://www1.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited Mar. 31, 2014).

EEOC Litigation Data

The EEOC filed 148 enforcement lawsuits in fiscal year 2013. This is less than half of the lawsuits filed by the EEOC in fiscal year 2011 (300), but only a slight decrease in the number of suits filed in 2012 (155). The decrease in the amount of enforcement lawsuits may be partially attributed to the EEOC's reduction of staff and resources due to budget cuts. Of the 148 lawsuits filed, 78 contained Title VII claims and 51 contained ADA claims. Fiscal year 2013 also marked the first time the EEOC had filed an enforcement lawsuit under the Genetic Information Anti-Discrimination Act. The EEOC resolved 222 enforcement lawsuits in 2013 and obtained $38.6 million in monetary benefits. The majority of the resolved lawsuits involved Title VII claims, which can be attributed to $22 million of the EEOC's monetary benefits recovered in 2013. EEOC, EEOC Litigation Statistics, FY 1997 through FY 2013, http://www1.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Mar. 31, 2014).

2013 Strategic Enforcement Plan Achievements

On December 17, 2012, the EEOC approved the FY 2013-2016 Strategic Enforcement Plan (SEP), which established the agency's priorities in enforcement and set goals to improve coordination between the EEOC's various programs by 2016. The SEP sets several objectives for the agency, including using strategic law enforcement to combat employment discrimination, preventing discrimination through education and outreach, and delivering excellent and consistent service by having a skilled workforce and effective systems. The EEOC has reported its progress in meeting those goals in the 2013 Performance and Accountability Results. *See* EEOC, 2013 Performance and Accountability Report: Performance Results.

The SEP provides guidance regarding the direction the EEOC will take in enforcement and education over the next few years. In 2013, the agency began focusing heavily on systemic enforcement. The agency determines that a case is systemic when the alleged employment discrimination has a broad impact on the industry, occupation, or geographic area. The agency had a goal of increasing systemic cases to a range of 18% to 21% of the active EEOC docket in 2013. The agency exceeded their goal, by having systemic cases make up 23.4% of their docket in 2013, meeting its goal of 22-24% systemic cases making up the docket by 2016. The agency expects the quantity of systemic cases on the docket to remain at this rate or steadily increase in the future. In 2013, the agency resolved 29 systemic cases. Over 14 of those cases included at least 20 victims of discrimination, and seven of those cases had at least 50 victims of discrimination.

The EEOC is also progressing in the way it educates both employees and employers about employment discrimination. It has increased the number of relationships it has with organizations that serve vulnerable workers or underserved communities by over 10%, from 90 partnerships in 2012 to 102 partnerships in 2013. It has also increased its partnerships with organizations that represent small or new businesses from 71 in 2012 to 81 in 2013, exceeding its target goal of a 10% increase. The agency also began working on educating the general public in 2013 by implementing its social media plan. The agency has created a YouTube channel (http://www.youtube.com/user/theeeoc) and two Twitter accounts (@EEOCNews and @EEOCespanol), which are used to provide education and information about employment discrimination to the public at large.

The agency has also become more effective in its administrative enforcement proceedings. In 2013, the EEOC obtained $372.1 million in monetary benefits through private sector administrative enforcement activities

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that resulted in 17,600 resolutions. This total is the highest amount of monetary benefits ever recovered by the Commission. The agency also obtained both monetary and non-monetary benefits for more than 70,522 people in 2013 through mediations, settlements, conciliations, and withdraws of benefits.

Summary of Trends

The recent data from the EEOC confirms a number of trends. Retaliation remains the most frequently filed charge with the agency, as it has been since 2009, and a majority of the agency's litigation falls under Title VII. It is apparent that the EEOC is handling a significant amount of employment discrimination charges and litigation with less staff and financial support. The SEP addresses the agency's current challenges in these hard-economic times. While the number of charges filed with the agency has decreased, the number is still significantly high compared to previous years when the agency had more resources at hand. The agency's focus on efficiency and effectiveness has led it to pursue more systemic cases and provide education and other resources regarding employment discrimination to the public through social media. Employers and employment discrimination litigators should expect more systemic cases enforced by the EEOC, as well as an increased EEOC presence in social media in the future.

The Seventh Circuit Strips Employers of "Failure to Conciliate" Defense

by Jack J. Murphy
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In *Equal Employment Opportunity Commission v. Mach Mining, LLC*, 738 F.3d 171 (2013), the Court of Appeals for the Seventh Circuit, splitting with six other federal appellate courts, held that an employer may not escape liability in a suit filed by the Equal Employment Opportunity Commission by arguing the agency failed to engage in the conciliation process in good faith.

The case stems from a charge of discrimination filed by a female employee of Mach Mining in early 2008. The employee claimed that Mach Mining denied several of her applications for coal mining jobs at its mine near Johnson City, Illinois because of her gender. After investigating the charge, the EEOC determined there was reasonable cause to believe that Mach Mining had discriminated against a class of female job applicants. In late 2010, the EEOC notified Mach Mining of its intention to begin informal conciliation. The parties discussed possible resolution but failed to reach an agreement. In September 2011, the EEOC determined that the conciliation process had been unsuccessful and further efforts to engage in conciliation would be futile. The EEOC filed its complaint in the Southern District of Illinois two weeks later.

Mach Mining filed its answer denying unlawful discrimination and also asserted several affirmative defenses, including the defense that the suit should be dismissed because the EEOC failed to conciliate in good faith. The basis for the implied defense is found in two provisions of Title VII. Specifically, 42 U.S.C. § 2000e-5(b) states, in part, "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the

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charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The statute further states that the EEOC may sue only after it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." 42 U.S. C. § 2000e-5(f)(1). Courts have interpreted the statute to require the EEOC to participate in and complete the conciliation process in good faith.

The parties spent nearly two years litigating the affirmative defense. After extensive discovery, the EEOC moved for summary judgment solely on the issue of whether, as a matter of law, an alleged failure to conciliate is an affirmative defense to its suit for unlawful discrimination. Following the decisions of other circuits, the district court denied the motion. Nevertheless, recognizing that the EEOC's position had merit, the court certified for interlocutory appeal the question of whether an alleged failure to conciliate is subject to judicial review in the form of an implied affirmative defense to the EEOC's suit.

The parties spent nearly two years litigating the affirmative defense. After extensive discovery, the EEOC moved for summary judgment solely on the issue of whether, as a matter of law, an alleged failure to conciliate is an affirmative defense to its suit for unlawful discrimination. Following the decisions of other circuits, the district court denied the motion.

Reversing the district court's decision, the Seventh Circuit panel unanimously rejected the implied failure to conciliate affirmative defense finding that "the statutory directive to the EEOC to negotiate first and sue later does not implicitly create a defense for employers who have allegedly violated Title VII." *Id*. at 172. The panel relied on the language of Title VII, the lack of a meaningful standard for courts to apply, and the overall statutory scheme.

The panel first analyzed the statutory language spelling out the EEOC's enforcement procedures found in section 706 of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5. The process begins after the agency receives a charge of discrimination from an aggrieved employee or a Commission member. The agency is obligated to notify the employer and perform an investigation to determine whether reasonable cause exists to support the allegations. "If the Commission determines after such investigation that there is a reasonable cause to believe that the charge is true, the Commission *shall endeavor* to eliminate any such alleged unlawful employment practice by *informal* methods of conference, conciliation, and persuasion." § 2000e-(b). Likewise, 42 U.S.C. § 2000e-5(f)(1) indicates that the EEOC may sue after it "has been unable to secure from the respondent a conciliation agreement *acceptable to the Commission*."

The court interpreted the aforementioned statutory language as providing substantial deference and discretion to the EEOC. The broad language of the statute merely instructs the EEOC to try to secure an agreement that the agency, in its sole discretion, finds acceptable. It does not place an explicit barrier to litigation. In fact, the only time limit on the EEOC's ability to sue prohibits the agency from doing so within the first 30 days after receiving the charge.

Moreover, the only other statutory terms in Title VII addressing the conciliation process make all details of the process strictly confidential. The Seventh Circuit found that the prohibition of using the contents of the conciliation as evidence in a later proceeding is broad. An implied affirmative defense for failure to conciliate directly

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conflicts with the confidentiality provision as it would allow discovery regarding the conciliation for a collateral purpose. Courts would be required to consider evidence that should be confidential.

The court found that the second major problem with an implied failure to conciliate defense is the lack of a meaningful standard for review. The statute provides no mandates as to the informal methods that the EEOC is required to use or "how hard the agency should 'endeavor' to pursue them." *Id*. at 175. The statute gives no description of what a negotiated settlement should look like beyond eliminating the discriminatory conduct. Moreover, the statute allots the agency broad discretion to accept or reject an employer's offer for any reason. Courts have not been provided with any method to analyze the parties' conduct in conciliation efforts. Congress' failure to provide even the outlines of such standards shows that it did not contemplate judicial review of the conciliation process.

Finally, the court found that judicial review of the conciliation process, by way of an affirmative defense, does not fit with the broader scheme of Title VII as it has the effect of undermining the EEOC's enforcement efforts. If an employer engaging in conciliation knows it can avoid liability down the road by arguing that the EEOC did not negotiate properly, its incentive to reach an agreement may be outweighed by the incentive to stockpile evidence to bolster its procedural defense. Moreover, the defense distracts from the underlying allegations of discrimination or retaliation allowing for "protracted and ultimately pointless litigation over whether the EEOC tried hard enough to settle." *Id*. at 172. The court noted that parties to the case spent nearly two years sparring over the affirmative defense, which created extensive discovery and slowed discovery on the merits of the underlying discriminatory hiring claim. Litigating the parties' "informal endeavors" during the conciliation stage does not serve the purpose of the statute well.

The court recognized that it is the only federal appellate court to reject the implied defense, effectively creating a split among the circuits. Noting that few federal appellate courts have directly addressed the issue, the court was not persuaded by the general reasoning that the other circuit courts provided to justify their holdings that the defense is applicable - that courts should give effect to Congress' intention that the EEOC address discrimination through voluntary settlement. The court found that the affirmative defense was too problematic when the statutory text was considered in its entirety, reiterating, again, the defense's inconsistency with the confidentiality provision. The court was skeptical that the judicial oversight which would logically follow from the application of the defense would encourage compliance rather than strategic evasion on the part of employers. Moreover, the court again noted that the standard of review was open-ended, pointing out that other circuits stood divided over the level of scrutiny to apply in reviewing conciliation. Finally, the court found that dismissal based on a procedural deficiency is far too drastic a remedy and would not serve the statute's purpose of deterring employment discrimination.

The EEOC has hailed the decision as landmark, arguing that it forces courts to focus on the merits of a dispute and not a collateral defensive posture designed to avoid addressing substantive allegations. For employers, the decision is a major blow. Not only does it strip employers of a valuable affirmative defense, but it also highlights the broad authority that the EEOC possesses in the conciliation process. Employers are left without any meaningful recourse to challenge whether the EEOC's conciliation efforts were made in good faith. The decision provides no limits to the scope of the EEOC's obligations in the conciliation process—obligations that remain ill-defined.

On February 25, 2014, Mach Mining filed a petition for writ of certiorari to the United States Supreme Court. The question presented for the High Court's review is: "Whether and to what extent may a court enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit?"

Medical Marijuana and Employment

by Jennifer A. Winking
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The Compassionate Use of Medical Cannabis Pilot Program Act became effective on January 1, 2014. 410 ILCS 130/5, *et. seq.* (hereafter "Medical Marijuana Act" or "Act"). The statute establishes the parameters in which individuals, defined as "qualified patients," are allowed to purchase and possess cannabis for medical use. The amount of medical marijuana which a person may possess is defined as "adequate supply." The statute further defines the contours for the cultivation, sale, and delivery of cannabis being used for medical purposes. A qualified patient who abides by the stringent requirements of the Act is not subject to arrest, prosecution, or penalty for the medical use of cannabis. Registered designated caregivers, who care for a qualified patient, are also given immunities from prosecution for possession of cannabis if such possession does not exceed the adequate supply for the patient as defined. Physicians who certify the debilitating medical conditions for qualified patients are subject to regulation and must maintain records as required by the Department of Public Health and Department of Financial and Professional Regulation. Cultivation centers must apply to the Department of Agriculture to receive a medical cannabis cultivation permit, of which there are only a limited number to be issued.

While there are specific requirements concerning the use, possession, and cultivation of cannabis defined in the Act, there are also many details which will be subject to further regulation. The Department of Public Health, the Department of Agriculture, and the Department of Financial and Professional Regulation have all been instructed to develop rules in accordance with their responsibilities under the Act not later than 120 days after the effective date.[1] The rules should provide some additional clarity for the use of medical marijuana.

Simply stated, the Medical Marijuana Act decriminalizes the use of marijuana for medical purposes in the state of Illinois. State marijuana laws do not change the fact that using marijuana continues to be an offense under Federal law as noted by the Office of National Drug Control Policy.

For Illinois employers, the difficulty with the Act lies in the implementation of employers' policies while remaining in compliance with both state and Federal law. Employers have long been able to rely upon zero tolerance policies to prohibit the use of marijuana in the workplace. With the passage of the Medical Marijuana Act, these policies may now be called into question. Unlike many other states' medical marijuana statutes, the Illinois statute makes specific reference to employers' responsibilities to qualified patients and their caregivers.

Discrimination Prohibited

The Medical Marijuana Act prohibits discrimination in employment on the basis that the employee is a registered medical marijuana patient or caregiver. The section prohibiting discrimination reads as follows:

Section 40. Discrimination Prohibited

*(a) No school, **employer**, or landlord may refuse to enroll or lease to, or otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the school,*

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[1] Since the writing of this article, the Illinois Department of Financial and Professional Regulation, the Department of Public Health, the Illinois Department of Revenue, and the Illinois Department of Agriculture have filed administrative rules, which rules are currently in their first notice public comment period, to be followed by a second notice period prior to adoption. The proposed rules can be found at http://www2.illinois.gov/gov/mcpp/Pages/update-04182014.aspx.

> ***employer**, or landlord in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal laws or rules. This does not prevent a landlord from prohibiting the smoking of cannabis on the premises. [emphasis added]*
>
> *410 ILCS 130/40(a)*
>
> *(c) No school, landlord, or **employer** may be penalized or denied any benefit under State law for enrolling, leasing to, or employing a cardholder. [emphasis added] 410 ILCS 130/40(c)*

Discrimination refers to the unfair treatment or denial of normal privileges to a person; the failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored. BLACK'S LAW DICTIONARY 467 (6th ed. 1990) (citing *Baker v. California Land Title Co.*, 349 F.Supp. 235, 238, 239 (D.C. Cal. 1972)). In the context of medical marijuana, discriminatory conduct would be to treat those who are registered medical marijuana patients or caregivers differently solely because they are medical marijuana patients or caregivers. In other words, an employer cannot penalize an employee/applicant merely because of the employee/applicant's status as a qualified patient or caregiver.

There is an exception to the prohibition on discrimination that applies in the event that the failure to discriminate would cause the employer to violate Federal law or lose benefits under Federal law. For example, an employer who is required to comply with United States Department of Transportation (DOT) guidelines can differentiate between medical marijuana qualified patients and non-medical marijuana qualified patients for jobs that involve transportation and require compliance with the DOT regulations on drug and alcohol testing, resulting in a disparate impact upon qualified patients. Jim Swart, Director with the Office of the Secretary of Transportation, issued a Notice specifically addressing this issue, which states that state medical marijuana laws will have no impact upon the DOT's regulation of drug testing program and that it remains unacceptable for any safety-sensitive employee to use marijuana. Jim L. Swart, *DOT Office of Drug and Alcohol Policy and Compliance Notice* (Oct. 22, 2009), http://www.dot.gov/sites/dot.dev/files/docs/ODAPC_medicalmarijuananotice_0.pdf. If an employer is relying upon the exception as the basis to treat a registered qualified patient differently, the employer should be able to demonstrate specifically where Federal law would be violated and/or which monetary or license related benefit would be lost as a result of compliance with the non-discrimination requirements.

Also notable is the fact that the prohibition against discrimination against a registered qualifying patient or registered designated caregiver is qualified by the word "solely." By including the word "solely," did the legislature intend for employers to be able to discriminate if there is more than one motivating factor in the decision? For example, if an employee fails a drug test and violates a zero tolerance policy, is the discipline for such conduct discriminatory based upon the status as a registered qualifying patient or is the employer's discipline based upon several reasons, one of which may be the employee's status? If the employee's status is a factor, is that discriminatory if it is not the only factor? The answer may lie in the additional provisions contained in the Act which are specifically addressed to employers.

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Employment and Employer Liability

The Medical Marijuana Act attempts to further instruct employers by identifying eight actions that an employer may take that do not constitute discrimination or would not be prohibited by the Act:

Section 50. Employment; employer liability

(a) Nothing in this Act shall prohibit an employer from adopting reasonable regulations concerning the consumption, storage, or timekeeping requirements for qualifying patients related to the use of medical cannabis.

(b) Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug-free workplace provided the policy is applied in a non-discriminatory manner.

(c) Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy.

(d) Nothing in this Act shall limit an employer's ability to discipline an employee for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding.

(e) Nothing in this Act shall be construed to create a defense for a third party who fails a drug test.

(f) An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others. If an employer elects to discipline a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination.

(g) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for: (1) actions based on the employer's good faith belief that a registered qualifying patient used or possessed cannabis while on the employer's premises or during the hours of employment; (2) actions based on the employer's good faith belief that a registered qualifying patient was impaired while working on the employer's premises during the hours of employment; (3) injury or loss to a third party if the employer neither knew nor had reason to know that the employee was impaired.

(h) Nothing in this Act shall be construed to interfere with any federal restrictions on employment including but not limited to the United States Department of Transportation regulation 49 CFR 40.151(e).

410 ILCS 130/50, *et. seq.*

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An employer may enact a drug free workplace or zero tolerance policies relating to drugs in the workplace. The Act allows employers to enforce those policies. However, the enforcement of such policies must be done in a non-discriminatory manner. An employer who is not otherwise enforcing a drug free workplace policy or who is doing so in an inconsistent manner risks violating the Act if it chooses to enforce such policy against a qualified patient or caregiver.

It is important for an employer to examine its policies to ensure that such policies are not in violation of the Act on their face. An employer should also re-examine how it enforces such policies and ensure that the enforcement is being done in a consistent, non-discriminatory manner. In other words, the policies should not be enforced more aggressively against a qualified patient or caregiver, especially because they are a qualified patient or caregiver.

The employee who fails a properly administered drug test has the burden of producing a valid registry identification card. The employee cannot rely upon their registration with another state. The registration must be with the Illinois Department of Public Health. If the employee who fails the drug test is a registered cardholder, then the employer must consider what employment action it can take, if any.

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If the test was administered pursuant to a random drug test and there is no indication that the employee was otherwise impaired or that the employee had exceeded the usage allowed under the Act, the plain meaning of the Act would suggest that no disciplinary action could be taken. If, however, the employee failed a test administered under reasonable suspicion due to identifiable impairments, the Act supports disciplinary action in accordance with the employer's policies. For the employer, the important aspect will be the identification of impairments. An employer should be able to articulate the symptoms that prompted the need for the test. As with any reasonable suspicion testing, whenever possible, those symptoms should be observed by more than one individual. The Act identifies the types of symptoms which constitute impairment, such as speech, dexterity, agility, and demeanor. 410 ILCS 130/50(f). The Act further provides some protection for employers from causes of action when the employer acts in good faith. 410 ILCS 130/50(g).

At this time, before the rules have been adopted or any cases have tested the boundaries of the law, the conclusions regarding the full impact and effect of the law remain conjecture. Certainly as situations arise and cases are decided, attorneys will become better able to advise clients regarding the proper interpretation of these allowances as understood in conjunction with the prohibition against discrimination. For now, employers will need to be cautious about taking adverse employment action against employees who are qualified patients for violation of workplace drug policies, at least until regulations and case law are available to provide additional guidance.

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