Bostock v. Clayton County - Supreme Court Casts New Theories of Employment Practices Liability Under Title VII Nationwide

The financial integrity of commercial entities depends heavily on their ability to anticipate risks and financial liabilities while working in conjunction with their partners and insurers to allocate these costs before they arise. This is a fluid and dynamic process as some companies' operations may span across numerous jurisdictions with varying approaches to the legal issues their business regularly faces. However, even companies whose operations are centralized in certain geographic areas should be aware of shifting legal landscapes, as new law can emerge, unexpectedly altering the nature and extent of a company's liability exposure overnight. The Supreme Court's recent decision in cases consolidated under Bostock v. Clayton County, 590 U.S. ___ (2020), is a prime example of the new law that could subject many companies and their insurers to risks they never anticipated.

The Supreme Court's opinion in Bostock makes it unlawful, under Title VII of the Civil Rights Act of 1964, to fire an individual merely for being gay or transgender. This is a momentous holding under federal law and its effect on employment practices litigation nationwide is likewise profound. Until the Supreme Court decided these cases, employers in almost half of the states in the country were operating under laws that did not address discrimination based on sexual orientation or gender identity at all. The Bostock decision means that people in those states can now seek recourse for employment discrimination based on sexual orientation and gender identity through the EEOC and federal courts, whereas no such remedy existed before. For employers in other states where a state law remedy was already available, this may not change the potential liability calculus. However, companies whose primary operations are in states where this type of exposure did not exist before could be faced with liabilities they had not anticipated.

Observers note that employment practices claims have been on the rise because of the new law as well as increasing awareness and advocacy on behalf of previously underrepresented groups of employees. The Bostock being a good example, as by some estimates over 7 million LGBT employees live in states where a remedy for this type of discrimination was not previously available. Partly because of this surge in litigation, Employment Practices Liability Insurance ("EPLI") has become more sought after in the insurance marketplace. Typically addressing potential third-party liability discrimination and sexual harassment, wrongful termination, demotion, and discipline, this line of insurance is likely to continue to develop along with the exposures it is intended to address. Critically, however, as EPLI insurance products and employment law develop it is imperative for companies to review and assess their coverage to ensure it is keeping pace with the times.

As EPLI is a developing market, and policies are often crafted differently to address the particular attributes of a business, the law and cases addressing these types of policies are also in flux. Consider the decision in Bostock, for example. Until the past couple of years, no court had interpreted Title VII's prohibition of discrimination in employment because of "sex" to reach discrimination based on sexual orientation or gender identity. Now, that is the interpretation that applies in every federal court in the country. It is possible that neither of the companies nor their insurers contemplated this new cause

of action when assessing their potential risks and coverage needs. Thus, even if a company procured EPLI insurance, their insurer may argue that coverage for "sexual harassment," for example, was not intended to cover disparate treatment because of sexual orientation or gender identity. Indeed, dozens of court opinions came to similar conclusions leading up to the decision in Bostock in holding that discrimination because of "sex" did not constitute discrimination because of sexual orientation or gender identity.

The other distinct feature of EPLI policies that may be implicated by sudden changes in the law like Bostock is that they are typically issued as claims-made coverage. Thus, a policy may only respond to claims for wrongful employment practices that occur and are reported to the insurance company within the policy period. Other types of liability policies will cover damages or loss that occurs during the policy period even if the resulting lawsuit arises years later. However, the claims-made nature of EPLI restricts coverage to claims within the window of the policy term and any extended reporting period. For this reason, it is important to procure adequate tail coverage to pick up the potential risk of delays in reporting of claims to an EPLI carrier. This is doubly so where commercial entities merge, and the surviving or successor entity inherits pending or potential claims of the acquired entity. Like tail coverage, runoff options are available to prevent a lapse in coverage for those outstanding claims. Given the potential changes in exposure that arise out of monumental shifts in the law like the Bostock decision, companies should be staying up to date and engaging in an ongoing evaluation of their potential liabilities and risk management strategies.

Uncertain times, especially stagnant or faltering economic conditions, tend to lead to an increase in litigation, and the Supreme Court's decision in Bostock is just one example of new platforms for employment litigation. The interaction of developing areas of law and insurance necessitates an informed and experienced assessment of these types of coverage issues.

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