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THE ETHICS OF TECHNOLOGY: LAWYER COMPETENCY AND CLIENT CONFIDENTIALITY IN THE DIGITAL AGE

By Dennis J. Quinn & Sarah W. Conkright

There's no way around it—technology is ubiquitous in the legal industry. It has impacted the practice of law in fundamental ways, from online firm advertising to internet-based legal research engines. Courts have rolled out electronic filing, and federal and local rules of procedure impose requirements for electronically-stored information and e-discovery.[1] Technological innovations have elevated the practice of law from pen and paper to e-signatures and emails. As a result, lawyers can access client files from virtually anywhere using smartphones, flash drives, VPNs, or third-party servers (i.e., clouds). This increased technological proficiency brings with it ethical concerns over the confidentiality and security of electronically-stored client information and a lawyer's ethical obligation to competently perform these technological endeavors.

Recognizing that technology has changed the way lawyers maintain client files and information, the American Bar Association amended its Model Rules of Professional Conduct in 2012 to remind attorneys that failing to obtain basic technological proficiency runs contrary to a lawyer's duty of competence.

The amendment to ABA Model Rule 1.1 (Competence) followed a three-year study and public hearings conducted by the Commission on the Impact of Technology and Globalization and the Practice of Law ("Ethics 20/20 Commission"). In its May 2012 Report, the Ethics 20/20 Commission stated that "in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology." As a result, Comment 8 to Model Rule 1.1 was amended to state: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject." (emphasis added). So far, twenty states have adopted this amendment.[2]

Carr Maloney P.C. is proud to announce the appointment of its Member Dennis Quinn to the Virginia State Bar's Standing Committee on Legal Ethics. As a member of the Standing Committee, Mr. Quinn will participate in issuing advisory opinions as well as interpreting and applying the Rules of Professional Conduct in Virginia. Mr. Quinn was previously appointed as a faculty member for the Virginia State Bar's Harry L. Carrico Professionalism Course by the Chief Justice of the Virginia Supreme Court. The program focuses on the Virginia Rules of Professional Conduct and a lawyer's ethical obligations to clients, society, and the judicial system. Currently an elected representative to the Virginia State Bar Council, Mr. Quinn is a former President of the Virginia Association of Defense Attorneys and worked in the White House Counsel's Office as Special Counsel to the President.

1) *See, e.g.,* Va. Sup. Ct. R. 4:9 (governing the discovery of electronically-stored information).
2) These states include Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Utah, Virginia, West Virginia, and Wyoming.

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ETHICS OF TECHNOLOGY (CONTINUED)

On December 17, 2015, the Supreme Court of Virginia adopted amendments to Rules 1.1 (Competence) and 1.6 (Confidentiality) of the Virginia Rules of Professional Conduct.[3]

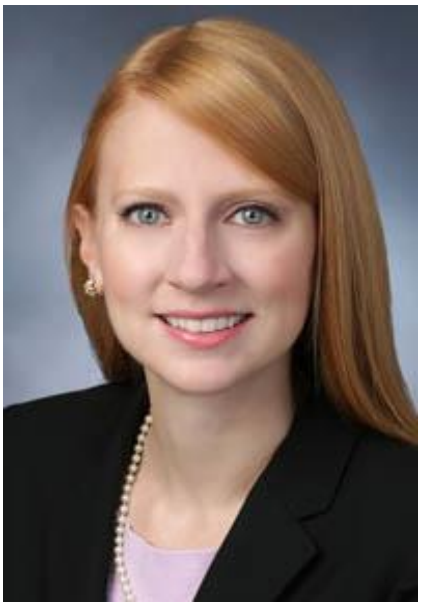
These Rule amendments acknowledge the importance of keeping abreast of changes in relevant technology in order to ensure that clients receive competent legal services from their attorneys. The Rule changes focus on lawyers' ethical responsibilities to clients; they do not require attorneys to become overnight technological experts.

What are the changes?

Comment 6 to Rule 1.1 (Competence) emphasizes the need for attorneys to monitor developments in technology and states: "To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. . ."

The changes to Rule 1.6 (Confidentiality) focus on the need for attorneys to take steps to prevent against disclosure of client information. A new paragraph has been added to the Rule that reads: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule." Va. R. Prof'l Conduct 1.6(d). To clarify what Rule 1.6's "reasonable efforts" entail, the Supreme Court approved Comments 19, 19a, 20, and 21 to Rule 1.6. These new comments highlight the fact that while attorneys must takes steps to safeguard client information, lawyers are not expected to become IT security experts and that there is no such thing as perfect online security.

Comment 19 addresses a lawyer's responsibilities under Rule 1.6(d) by requiring that a lawyer "act reasonably to safeguard information protected under [Rule 1.6] against unauthorized access by third parties and against inadvertent disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment 19 notes,



Sarah Conkright is a civil litigation attorney focusing her practice on employment law, commercial litigation, and Professional and Director's & Officer's Liability. After graduating from law school, Ms. Conkright served as a law clerk to the Honorable Marcus D. Williams and the Honorable John M. Tran in the 19th Judicial Circuit, Fairfax, Virginia. During her clerkship, she worked on a wide range of civil matters, from complex business litigation to personal injury cases. Given her experience, Ms. Conkright is mindful of her clients' litigation objectives. She understands the importance of clear client communication and the unique challenges of defense practice, counseling clients at every stage of the litigation process. In law school, Ms. Conkright was production editor of the Catholic University Law Review. She is licensed to practice law in Virginia and the District of Columbia.

3) These amendments went into effect on March 1, 2016.

ETHICS OF TECHNOLOGY (CONTINUED)

however, that "the unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information *does not constitute a violation of this Rule* if the lawyer has made reasonable efforts to prevent the access or disclosure." (emphasis added). The "reasonableness" of an attorney's efforts to protect against unauthorized access or inadvertent disclosure includes "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)." Va. R. Prof'l Conduct 1.6, cmt. 19.

Comment 19a notes that a lawyer's obligations to safeguard client information in order to comply with state or federal privacy laws are distinct from the requirements of Rule 1.6.

Comment 20 reiterates that a lawyer is not subject to discipline if he or she has taken reasonable efforts to safeguard client information from disclosure even in the event of a breach. What is "reasonable" depends, in part, on the size of the firm. The Comment stresses that lawyers "can and more likely must turn to the expertise of staff or an outside technology professional" and that periodic reviews of information safeguards are needed to avoid employing outdated security procedures.

Comment 21 emphasizes the need for law firms to routinely evaluate whether they are employing reasonable methods for protecting client confidential information. The Comment provides a list of practices for firms to use to ensure that they are aware of evolving technology practices as well as the evolving risks associated with protecting confidential information.

What Do These Amendments Mean?

Despite what those who opposed the amendments believed—that the Rule changes require attorneys to become IT gurus—the Rule changes do not even require that lawyers become personally proficient with technology.

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Carr Maloney Collaborates with Hispanic National Bar Association on Youth Outreach Program

On May 20, 2017, Carr Maloney Attorneys Samir Aguirre, Mariana Bravo, Suzanne Derr, Nick Hallenbeck, Diana Lockshin, and Tracy Scott collaborated with the Hispanic National Bar Association's Latina Commission Youth Group Program to present the case of "Big Bad Wolf v. Curly Piglet". A jury of Seaton Elementary School (DC) third graders serving as the jury found B.B. Wolf's "testimony" not credible. Presented in the Federal Court of Appeals for the Federal Circuit, the case "made it all the way" to Court of Appeals Judge Jimmy Reyna, who gave the students a heartfelt presentation prior to the trial encouraging them to learn about the justice system and pursue careers in the law.

ETHICS OF TECHNOLOGY (CONTINUED)

In fact, many lawyers do not understand how decryption, malware, or other aspects of cyber-security work. And that's okay. The Rule changes do not impose a higher standard of technological competence on any technology luddites. Instead, the amendments merely codify what many lawyers and law firms are already doing—enlisting specialists to assist with IT issues. IT specialists can help lawyers competently employ technological upgrades to their law practice, including installing internet security software that enable lawyers to safely store client information on a third-party site.[4] Some upgrades can even be done without the assistance of an IT specialist. In fact, many technology concerns can be mitigated by installing software updates and security patches on computers and smartphones.

Even after a lawyer has taken reasonable steps to safeguard client information, an inadvertent or unauthorized data breach may still occur. Comment 20 to Rule 1.6 acknowledges this unfortunate reality by noting that "[p]erfect online security and data protection is not attainable." The new Comments to Rule 1.6 provide a safe harbor for attorneys who take reasonable steps to safeguard confidential client information. In other words, an attorney is not subject to the heightened standard or technological competency of an IT specialist; mistakes can (and possibly will) happen. This safe harbor acknowledges that even the most competent, diligent, and tech-savvy lawyer may still fall victim to a data breach by a sophisticated cyber-criminal. Factors that the disciplinary committee will consider when determining if an attorney violated his or her ethical duties to reasonably safeguard client information include, but are not limited to, the cost and difficulty of employing additional safeguards. Large law firms typically maintain higher volumes of electronic information, but usually have the financial resources to employ IT departments or consultants. However, small firms or solo practitioners may be more financially limited, and the Rule change takes this into consideration.

In order to fulfill Rule 1.1's requirement to pay attention "to the benefits and risks associated with relevant technology," lawyers can enroll in CLE programs and take advantage of other online resources to educate themselves about technology issues affecting the practice of law. The Virginia Standing Committee on Legal Ethics publishes legal ethics opinions that provide guidance on technology considerations for attorneys.[5] The Virginia State Bar has formed both a Study Committee for the Future of Law Practice and a Standing Committee on Law and Technology aimed at studying the use of technology in the legal industry and educating bar members on the challenges facing their law practices.

As lawyers implement technology in order to competently represent clients and safeguard their information from cyber-security threats, the Virginia Rules of Professional Conduct will, and must, continue to evolve to reflect these technological advances and their impact on legal ethics. Lawyers can no longer ignore the pervasive impact of technology on the practice of law. Instead, attorneys must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve.

4) *See* Va. Legal Ethics Op. ("LEO") 1872 (lawyers may ethically use clouds to store client information).

5) *See, e.g.* LEO 1791 (addressing representation of clients using electronic communications); LEO 1818 (providing guidance on maintaining digital client files); LEO 1842 (using websites for marketing and communications with prospective clients); LEO 1850 (providing guidance on the ethical considerations of outsourcing support services).

BATHROOM BILLS AND WHAT THEY MEAN FOR EMPLOYERS: A LEGAL RESOURCE

By Tina L. Maiolo and Diana M. Lockshin

On March 23, 2016, GOP Governor Pat McCrory signed North Carolina House Bill 2 ("HB2"), also known as the Public Facilities Privacy and Security Act.[1] The result was a firestorm of opposition to what is viewed by many as a discriminatory "bathroom bill": people vowed to boycott North Carolina, celebrities canceled concerts, and companies said they would pull out of business deals in the state. This all begs the question: what exactly is the big deal with HB2, bathroom bills, and how do they affect you as an employer?

So called "Bathroom Bills," such as HB2, are bills that seek to allow or ban transgender individuals' (individuals whose internal gender identity is different from the sex they were assigned at birth) use of public facilities, particularly bathrooms, that correspond to their gender identity, as opposed to the sex they were assigned at birth.

Proponents of HB2 argue that the bill, and bathroom bills in general, are privacy and public safety bills that protect the rights and expectation of privacy in one of the most private areas of our personal lives—the bathroom.[2] They argue that the law is a compromised measure because it requires that individuals use bathrooms and changing facilities that match the sex on their birth certificate.[3] Thus, it is legal for transgender individuals who have changed the legal sex on their birth certificates to use the bathrooms that align with their gender identity.

Opponents of the law are critical because it prevents transgender people who do not, or cannot, alter their birth certificates from using the restroom consistent with their gender identity. This subjects those individuals to possible verbal harassment, physical assault, and medical complications that result from their inability to locate safe restrooms to use.[4] Moreover, altering ones' gender on a birth certificate is no easy task: in North Carolina, only people who undergo a time consuming and often cost prohibitive sex reassignment surgery can change the sex on their birth certificates, while other jurisdictions have different rules, some of which are even more restrictive.[5]

On May 4, 2015, the Department of Justice ("DOJ") clearly stated the Federal Government's position on the matter: HB2 violates Title VII of the 1964 Civil Rights Act, which prohibits employers from discriminating against individuals on the basis of sex.[6]

1) The official name of the bill is An Act to Provide for Single-sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations.
2) Specifically, proponents of bathroom bills claim that the laws protect women and children from potential sexual predators in public restrooms.
3) H.B. 2, Section 1.3, codified at N.C.G.S. 143-760(a)(1) & (B).
4) Public Restrooms, DC TRANS COALITION (May 17, 2016), https://dctranscoalition.wordpress.com/campaigns/our-bathroom-safety-campaign; David Kurz, *What Just Happened in North Carolina*, TPM (Mar. 24, 2016), http://talkingpointsmemo.com/edblog/north-carolina-anti-lgbt-bill. Opponents also point out that there are no known instances of a sexual predator dressing up as women to commit a crime and then using similar city ordinances as a defense. Avianne Tan, *North Carolina's Controversial "Anti-LGBT" Bill Explained*, ABCNEWS.COM (Mar. 24, 2016), http://abcnews.go.com/US/north-carolinas-controversial-anti-lgbt-bill-explained/story?id=37898153.
5) Catherine E. Schoichet, *North Carolina transgender law: Is it discriminatory?*, CNN.COM April 5, 2016), http://www.cnn.com/2016/04/03/us/north-carolina-gender-bathrooms-law-opposing-views
6) Letter from Vanita Gupta, Principal Deputy Assistant Attorney General for the U.S. Department of Justice to Governor Pat McCrory, Governor for the State of North Carolina (May 4, 2016)

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Tina Maiolo partners with clients to operate and grow their businesses. She focuses her legal practice in areas that help companies function, including employment and labor matters, business immigration, civil rights issues, contracts, and all types of commercial litigation. As part of her practice in employment and labor, civil rights, and directors and officers (D&O) liability, Ms. Maiolo successfully represents clients in claims brought under federal, state, and local laws governing fair-employment practices, including Title VII, the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), Title VII, the Americans with Disabilities Act (ADA), employment discrimination, sexual harassment, wrongful discharge, breach of contract, negligent hiring, and defamation. She advises her clients on preventing employment law and civil rights violations and minimizing damage once violations occur. The Embassy of Italy in the United States recently certified Ms. Maiolo as its official referral counsel.

BATHROOM BILLS AND WHAT THEY MEAN FOR EMPLOYERS: A LEGAL RESOURCE (CONTINUED)

Notably, the DOJ looked to the Supreme Court decision in Price Waterhouse v. Hopkins, which held that that discrimination on the basis of "sex" includes differential treatment based on any "sex-based consideration[s],"[7] and to a number of Federal and Administrative decisions that "have applied Title VII to discrimination against transgender individuals based on sex, including gender identity"[8] to back its position that the definition of "sex" under Title VII necessarily includes gender identity. The DOJ demanded compliance under Title VII, placing the state at risk of losing hundreds of millions of dollars in federal funding for schools, housing, and highways.

Instead of changing the law, Governor McCrory has filed suit against the DOJ, arguing that Title VII does not recognize "transgender status" as a "protected class."[9] He claims that the DOJ is incorrectly interpreting federal law "in an attempt to unilaterally rewrite long-established federal civil laws in a manner that is wholly inconsistent with the intent of Congress and disregards decades of statutory interpretation by the Courts."[10]

The DOJ in turn, has sued the State of North Carolina, Governor McCrory, the North Carolina Department of Public Safety, the University of North Carolina, and the Board of Governors of the University of North Carolina, urging compliance under its interpretation of the law.

What the Lawsuit Means

The outcome of the case is important because a legal decision may set precedent for future civil rights cases by determining the extent of influence of federal law. Over the last 15 years, federal appellate courts have increasingly recognized that discrimination against a transgender person is a form of sex discrimination prohibited by federal law under Title VII.[11] For example, federal court decisions paved the way for the Equal Employment Opportunity Commission (EEOC) decision in *Macy v. Holder,*[12] which held that such discrimination violates Title VII.[13]

"The EEOC's *Macy* ruling is binding on the federal government and establishes definitively that federal transgender workers have protections under Title VII. It also supports transgender employees, public and private, anywhere in the country who feel they have experienced employment discrimination. This is because they can now file complaints with the EEOC," which, if found valid, will allow for the pursuit of settlements, and filing of lawsuits.[14]

7) 490 U.S. 228, 242 (1989) (plurality).
8) *Id.*
9) Complaint for Declaratory Judgment at 1 *McCrory v. United States of America, et al*, 5:16-cv-00238-BO (May 5, 2016).
10) *Id.*
11) *See e.g., Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).
12) Appeal No. 0120120821 (EEOC Apr. 20, 2012).
13) *Know your rights: FAQ: Answers to Common Questions about Transgender Workplace Rights,* LAMBDA LEGAL (June 13, 2016), http://www.lamdalegal.org/know-your-rights/transgender/trans-workplace-faq.
14) *Id.*

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Diana Lockshin is an energetic and experienced litigator focused on health law, professional liability, and complex litigation matters. During law school, Ms. Lockshin worked as a Rule 16 Student Attorney for the National Association of the Deaf as part of her clinics. She also served as the Asper Fellow in the Office of the Attorney General's Department of Labor, Licensing, and Regulation. Ms. Lockshin was a University of Maryland School of Law Leadership Scholar from 2010 to 2013 and volunteered as a peer advisor and on the Joint Student-Faculty Administrative Committee. She joined Carr Maloney in 2015 after working at DermAssociates, PC as legal counsel and as a law clerk for the Honorable Paul A. Hackner in the Circuit Court for Anne Arundel County. Ms. Lockshin's professional experience includes negotiation, risk management, trial contracts, and regulatory compliance. A native of Columbia, Diana is proficient in Portuguese and offers English-Spanish translation and interpretation services.

BATHROOM BILLS AND WHAT THEY MEAN FOR EMPLOYERS: A LEGAL RESOURCE (CONTINUED)

Legal Requirements for Employers

Further strengthening the Federal government's support of a broad definition of sex under Title VII that includes discrimination based on gender identity, the Department of Labor's ("DOL") Occupational Safety and Health Administration ("OSHA") has released A Guide to Restroom Access for Transgender Workers, which guides employers on best practices regarding restroom access for transgender employees.[15]

The EEOC's holding in *Macy*, OSHA guidelines, and recent legal developments make it "clear that employers must treat transgender employees in exactly the same way as they treat other employees of the gender with which the transgender employee identifies".[16] These protections apply regardless of any contrary state or local laws if the employer is covered by federal laws.

Employers That Must Comply With Federal Laws

- Businesses and Private Employers with 15 or more employees who worked for the employer at least twenty calendar weeks this year or last
- State and Local Governments with 15 or more employees who worked for the agency at least twenty calendar weeks this year or last
- All Federal Agencies

Covered employers are legally required to provide workers reasonable access to restroom facilities. Specifically, OSHA requires that employers make toilet facilities available so that employees can use them when they need to, and does not allow employers to impose unreasonable restrictions on employee use of the facilities. While no federal, state, or municipal laws or regulations specifically pertaining to gender identity require employers to utilize one type of bathroom over another, or to construct new facilities to accommodate transgender individuals, there are best practices that are recommended to ensure employers compliance with the law.[17]

While no single solution will work for every employer, these new laws make it clear that employers need to find solutions that are safe, convenient, and respect transgender employees.

Best Practices to Avoid Discrimination Claims Related to Bathroom Access

In the wake of this new and rapidly changing legal landscape, there are some recommended strategies that employers can implement to avoid harassment and discrimination claims.

15) Available at https://www.dol.gov/asp/policy-development/TransgenderBathroomAccessBestPractices.pdf

16) Destyn D. Stallings, *The Employer's Legal Resource: OSHA Issued Guidance on Transgender Employees and Workplace Restrooms* (June 13, 2016), DSDA.com, http://www.dsda.com/News-Publications/Newsletters/34703/The-Employers-Legal-Resource-OSHA-Issues-Guidance-on-Transgender-Employees-and-Workplace-Restrooms.

17) Restroom Access for Transgender Employees, HUMAN RIGHTS CAMPAIGN (June 13, 2016), http://www.hrc.org/resources/restroom-access-for-transgender-employees.

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Paul Maloney, Jan Simonsen, and J. Peter Glaws present Product Liability Seminar to Everest National Insurance

On June 22, 2016, Carr Maloney Attorneys Paul Maloney, Jan Simonsen, and J. Peter Glaws presented a multi-media Product Liability Seminar to Everest National Insurance. Focusing on Negligence, Strict Tort Product Liability, and Breach of Warranty Recovery Theories, the seminar explains the common themes that run through these theories, the different burdens of proof for the plaintiff to sustain, and the different considerations for the defense. Addressing the differences between the laws in Maryland, Virginia, and the District of Columbia, the seminar concluded with an in-depth discussion on multi-national risks and practical tips for claims handling and management. Since 1984, Carr Maloney has counseled clients on all aspects of product liability matters, aggressively representing manufacturers and distributors faced with product liability litigation.

BATHROOM BILLS AND WHAT THEY MEAN FOR EMPLOYERS: A LEGAL RESOURCE (CONTINUED)

These best practices generally include:[18]

- Implementing policies and procedures that clearly state transgender employees will not be required to use any specific restroom.
- Training HR personnel and managers on such policies, in particular, making sure they know that the employee should determine the most appropriate and safest option for him or herself.
- Ensuring transgender employees are not required to provide medical or legal documentation of their gender identity.
- Ensuring transgender employees are not required to use a segregated facility apart from other employees.
- Providing all employees with access to single-occupancy, unisex restrooms (where available) to be used at each employee's discretion.
- Working with transgender employees to devise a practical and dignified solution to restroom access issues.
- Implementing policies and procedures that clearly state that co-workers uncomfortable with a transgender employee's use of the same restroom may use separate restroom facilities.
- Taking steps to increase the privacy of any common restrooms, as outlined below.
- Providing additional options, which employees may choose, but are not required to use, including:

Single-occupancy gender-neutral (unisex) facilities

These are one-room facilities equipped with a sink, toilet, and optional urinal, typically existing in the form of family access bathrooms and bathrooms accessible to people with disabilities. Single-occupancy restrooms should be designated as "gender neutral," as gender-restricted restrooms can cause confusion when individuals are perceived to be of a different gender from the restroom's designation.

Multiple-occupant, gender-neutral restroom facilities

These contain multiple stalls with lockable single occupant stalls and are generally modified versions of gender-segregated restroom facilities with enhanced privacy features. Employers can retrofit their current gender-segregated restrooms to enhance privacy by installing flaps on the outer edge of stall doors to cover the gap between the door and the stall wall, extending stall doors and walls from floor to ceiling, and in men's restrooms, extending privacy dividers between urinals further out from the wall and to a higher level.

While no single solution will work for every employer, these new laws make it clear that employers need to find solutions that are safe, convenient, and respect transgender employees.[19]

18) *Id.*

19) *Id.*

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Implementation of New Accounting Standards for all Financial Institutions

On June 17, 2016, the Board of Governors of the Federal Reserve Board System, FDIC, NCUA, and OCC issued a joint statement regarding the implementation of a new accounting standard issued by the Financial Accounting Standard Board for estimating allowances for credit losses. The new standard is applicable to all banks, savings associations, credit unions, and financial institution holding companies, regardless of asset size. It requires financial institutions to use a broader range of data than under existing U.S. Generally Accepted Accounting Principles. The effective date for the new standard ranges from March 2020 to December 2021, depending on the characteristics of the institution. However, early application of the new standard is permitted for fiscal years beginning after December 15, 2018. This change requires the attention of the financial institution's board of directors and management.

BATHROOM BILLS AND WHAT THEY MEAN FOR EMPLOYERS: A LEGAL RESOURCE (CONTINUED)

Bathroom Specific Laws in the District of Columbia

Rule 4-802 of the D.C. Municipal Regulations prohibits discriminatory practices in regard to restroom access. In the District, transgender individuals have the right to use public gender-segregated multi-occupancy bathrooms consistent with their gender identity, regardless of their assigned sex or gender expression. Additionally, the law specifies that all existing single-stall restrooms in any public space,[20] should be labeled "gender neutral." The District of Columbia Office of Human Rights ("OHR") enforces these regulations.

Bathroom Specific Laws in Maryland

Senate Bill 212, otherwise known as the Fairness for All Marylanders Act of 2014,[21] prohibits discrimination on the basis of gender identity in employment, housing, places of accommodation, credit and other licensed services which are narrowly defined as hotels, restaurants, entertainment and recreation establishments such as movie theaters and sports arenas, and retail stores.

The Fairness for All Marylanders Act is not a "bathroom bill" and does not change the Civil Rights Law of Maryland,[22] which contains an exception from the prohibition on sex discrimination for facilities of a place of public accommodation that are "distinctly personal and private" and are "designed to accommodate only a particular sex."[23] This means that establishments can have separate men's and women's restrooms, changing rooms, and locker rooms.[24] However, if an establishment is a place of public accommodation, all facilities in that place of public accommodation, including the restrooms, cannot be offered on a discriminatory basis.[25]

Thus, if an establishment that is a place of public accommodation has a private facility on its premises that they want to be exempt, the establishment is required to provide "equivalent space" for transgender patrons. This is defined as a space that is "functionally equivalent to the space made available to other users."[26]

Bathroom Specific Laws in Virginia

Virginia does not have any non-discrimination laws to protect gender identity. However, in February 2016, a Virginia House Committee took a cautious approach to bathroom bills and killed House Bill 781, which would have forced transgender students and citizens in Virginia to use the restrooms aligned with their birth gender in all public buildings.[27]

20) Public spaces include restaurants, bars, and cafes.
21) S.B. 212, 2014 Act. Gen. Assemb., Ch. 474 (Md. 2014).
22) Md. STATE GOVERNMENT Code Ann. § 20 et seq. (2016).
23) Md. STATE GOVERNMENT Code Ann. § 20-303 (2016).
24) *FAQs ON SENATE BILL 212: THE FAIRNESS FOR ALL MARYLANDERS ACT OF 2014*, EQUALITY MARYLAND (June 13, 2016), http://equalitymaryland.org/faqs-for-sb-212-the-fairness-for-all-marylanders-act/.
25) *Id*.
26) This is written so as not to unduly burden private facilities. For example, a private space could be a curtained off area within an existing locker room, or an existing private, single-user facility with equivalent amenities.
27) *Virginia House committee kills two anti-LGBT bills,* EQUALITY FEDERATION (June 13, 2016), http://equalityfederation.org/fairnessproject/virginia-house-committee-kills-two-anti-lgbt-bills/.

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Tom McCally and Jan Simonsen present at NRF Protect

On June 16, 2016, Carr Maloney Members Thomas McCally and Jan Simonsen presented "Smile…It's Facial Recognition Technology!" at the NRF PROTECT Conference in Philadelphia. NRF PROTECT is the largest, most important retail and restaurant loss prevention event in North America. In collaboration with FaceFirst, Inc. of California, Mr. McCally and Ms. Simonsen's presentation focused on the privacy, civil rights, and product liability issues involved with facial recognition technology. As featured speakers in NRF PROTECT's Technology and Innovation Breakout Session, they provided insight and guidance to the retail, food, and beverage industries on the practical uses of this new and cutting edge technology.

LABOR DEPARTMENT ANNOUNCES MASSIVE CHANGES TO OVERTIME REGULATIONS

By Edward J. Krill

On May 18, 2016, the Department of Labor, Wage and Hour Division promulgated new standards for the salaried employee exemption from overtime pay. This new rule modifies existing Fair Labor Standards Act requirements and is slated to be effective December 1, 2016. Congress may block these new rules.

The basic change is to increase the minimum salary from $23,600 per year to $47,476 per year. This is the lowest amount payable to an employee who is otherwise "exempt" from overtime pay. The definition of a "salary" remains a periodic payment of an equal amount without reduction for days off, late arrival, or early departure.

The other criteria for exemption have not changed. An employee must still be performing administrative, executive, professional, or certain information systems management functions to qualify for an exemption. The additional exemption for "highly compensated" employees, regardless of function, has been increased to $134,004 per year. Changing a binding employment contract prematurely may lead to a claim of breach of contract.

Employers have several options in adjusting to this new rule: increase salaries to the minimum, strictly control the overtime hours of workers, or convert salaried employees to hourly pay and non-exempt status regarding eligibility for overtime. The timing of these changes may need to correspond exactly with the date the new rules go into effect.

Implementation of these changes requires an evaluation of the employment relationship:

At Will Employment - Where the employee serves without a written contract on an indefinite basis and in the absence of employer commitments regarding compensation for a period of time or an Employee Handbook pledge regarding changes in pay, an employer is free to offer a salaried employee a new hourly pay status.

Offers of Employment and Appointment Letters - When an employer has offered a position to a prospective employee at a salary below the new minimum and that offer stipulates a period of time of employment, such as the following school year or during the term of a specific project, and that offer has been accepted, and employer is not as free to change the compensation amount or basis. This situation requires a careful assessment of whether the parties formed a true contract of employment and whether a modified agreement can be required by the employer.

Employment Contracts - If a formal written contract of employment has been signed by the employer and the employee, respect for the terms of that agreement are required. A review of the conditions for amendment and termination and the period of time that the agreement is intended to exist should be done. This change in the law was probably not anticipated by the parties and it would be most unusual for an employment agreement to include a provision on future changes in law. Nonetheless, an arbitration clause requiring the parties to submit disputes to that process may be applicable.

Employee benefits can be affected by changes in compensation and hours of work. For example, a salaried employee who has been able to accomplish the work required in 30 hours per week, and wants to stay with that schedule, may lose eligibility for health, disability, life, or retirement benefits under the terms of those plans. Each benefit plan typically contains its own criteria for eligibility and the scope of benefits and may be available only to "full time" employees based on a certain number of hours per week.

Employee morale is an important consideration in this process. Clear, thoughtful statements that address employee questions are essential so that employees see changes in their employment situation as fair and considerate.

COMPLIANCE STRATEGIES FOR FEDERAL GOVERNMENT CONTRACTORS UNDER OFCCP SEX BIAS RULES

By Thomas L. McCally and Diana M. Lockshin

On June 14, 2016, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced a Final Rule setting forth requirements that contractors and subcontractors must follow in order to comply with federal laws providing protections against discrimination in employment on the basis of sex.[1]

The Final Rule goes into effect on August 15, 2016 and addresses "a variety of sex–based barriers to equal opportunity and fair pay in the workplace today, including compensation discrimination; sexual harassment; failure to provide workplace accommodations for, or other kinds of discrimination because of, pregnancy, childbirth, or related medical conditions; discrimination on the basis of gender identity and transgender status; family caregiving discrimination; and stereotypes based on gender norms like dress and appearance."[2]

Why does this matter?

While most federal government contractors already have personnel manuals in place with various workplace policies, those policies should be reviewed in light of new obligations for employers under the Rule. This is because the previous guidelines were adopted in 1970 and have not been substantively changed since that time; the guidelines are outdated and therefore inaccurate.[3] OFCCP requires that contractors "come into compliance immediately with already existing law and legal interpretations."[4]

Review of existing policies is essential for ensuring contractor's obligations are aligned with current laws, and contractors should review their policies to ensure compliance prior to the August 15, 2016 effective date.[5]

Are you covered by the Final Rule?

The Final Rule generally applies to:[6]

- Any business or organization that:

1) holds a single federal contract, subcontract, or federally assisted construction contract or subcontract in excess of $10,000;
2) holds federal contracts or subcontracts that have a combined total in excess of $10,000 in any 12-month period; or
3) holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

1) The Final Rule, 41 CFR Part 60-20, is available on the OFCCP Web site at http://www.dol.gov/ofccp/sexdiscrimination.html. The term "sex discrimination" includes, but is not limited to, discrimination on the basis of sex; pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping. U.S. Department of Labor – Office of Federal Contract Compliance Programs (OFCCP) – FAQ: SD NPRM Final Rule (June 22, 2016), https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination_faqs.htm (hereinafter "SD NPRM Final Rule").
1) SD NPRM Final Rule, *supra.*
2) *Id.* 4) *Id.* 6) *Id.*
3) *Id.* 5) *Id.*

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On May 18, 2016, Carr Maloney Members Thomas McCally and Tina Maiolo were invited by ARCH Insurance to present *'Whistleblower Claims are Being Heard Loud and Clear'*. The presentation focused on the protected status of Whistleblower Anti-Retaliation Claims under the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010. Mr. McCally, a member of the American Board of Trial Advocates (ABOTA) who heads the Employment and Labor Law Practice at Carr Maloney, and Ms. Maiolo, the National Association of Professional Women's (NAPW) 2011-2012 "Woman of the Year", are both subject matter experts on whistleblower retaliation. The nuanced and in-depth presentation included a discussion of how decisions by the 2nd Circuit Court in *Berman v. Neo@Ogilvy, LLC* and the 5th Circuit Court in *Asadi v. GE Energy (USA)* have split the United States Court of Appeals on the Anti-Retaliation Provisions of the Dodd-Frank Act.

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COMPLIANCE STRATEGIES FOR FEDERAL GOVERNMENT CONTRACTORS UNDER OFCCP SEX BIAS RULES (CONTINUED)

- Millions of employees and applicants, both male and female, who work or seek to work for federal contractors. Generally, it is not necessary that employees work on a federal contract to be covered; they need only work for a company that holds a covered federal contract or subcontract.

How does the Rule affect other laws, such as state laws?

- The Final Rule does not overrule state and local prohibitions of discrimination on the basis of sex. Instead, it sets a minimal standard in terms of protections. If a state or local law provides greater protections to applicants or employees, the Final Rule does not generally relieve a contractor from its obligations under that law.[7]

- The Final Rule applies to the employment practices of educational institutions that are covered. However, the Rule does not address discrimination against current or prospective students in education programs or activities.[8] It "also applies to certain students who are employed by covered educational institutions" and "follows Title VII principles in determining whether an allegation of discrimination … relates to a student's status as an employee."[9]

Notable Rules

- ***Compensation Discrimination***: The Final Rule prohibits discriminatory wages. However, the new Rule does not require contractors to pay equal wages to similarly-situated employees. Instead, it requires fair pay for comparable work.[10] Therefore, compensation differences stemming from neutral factors, such as tenure, are likely permitted.[11] The OFCCP will use a case-by-case approach in evaluating the pay practices during an audit.

- ***Sex Stereotypes***: The Final Rule also prohibits limiting roles to a specific sex. However, it includes a narrow exception where sex is a bona fide occupational qualification because it is "reasonably necessary to the normal operation" of a "particular business or enterprise."[12]

7) *Id.* See for example, local and state laws pertaining to bathroom use in DC, MD, and VA. [Tina Maiolo and Diana Lockshin, *Bathroom Bills and What They Mean for Employers: A Legal Resource*, Legally Speaking, Volume XXXII]
8) *Id.* The OFCCP notes that "[s]chools, colleges, and universities that have questions about their obligations under Title IX of the Education Amendments of 1972 should contact the Department of Education's Office for Civil Rights (http://www2.ed.gov/about/offices/list/ocr/index.html)." *Id.*
9) *Id.*
10) Mshreiner, *OFCCP Publishes Final Rule Prohibiting Numerous Forms of Sex Bias*, FEDERAL CONTRACTOR COMPLIANCE WATCH (June 18, 2016), https://federalcontractorcompliancewatch.com/2016/06/18/ofccp-publishes-final-rule-prohibiting-numerous-forms-of-sex-bias/.
11) *Id.*
12) *Id.*

COMPLIANCE STRATEGIES FOR FEDERAL GOVERNMENT CONTRACTORS UNDER OFCCP SEX BIAS RULES (CONTINUED)

Strategies and Best Practices to Ensure Compliance with the Final Rule

- Review health care plans: Federal contractors that extend any type of health insurance coverage to workers should review their plans for so-called categorical exclusions, which could be deemed facially discriminatory under the new regulations.[14]
- Avoid the use of gender-specific job titles such as "foreman" or "lineman" where gender-neutral alternatives are available.
- Design single-user restrooms, changing rooms, showers, or similar single-user facilities as sex-neutral.[15]
- Provide, as part of your broader accommodations policies, light duty, modified job duties or assignments, or other reasonable accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions.
- Provide appropriate time off and flexible workplace policies for men and women.
- Encourage men and women equally to engage in caregiving-related activities.
- Foster a climate in which women are not assumed to be more likely to provide family care than men.[16]
- Foster an environment in which all employees feel safe, welcome, and treated fairly by developing and implementing procedures to ensure that employees are not harassed because of sex. Examples of such procedures include:

  (a) Communicating to all personnel that harassing conduct will not be tolerated;
  (b) Providing anti-harassment training to all personnel; and
  (c) Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on sex.

14) Vin Gurrieri, *3 Tips For Dealing With New OFCCP Sex Bias Regs*, LAW 360 (June 14, 2016), http://www.law360.com/articles/806899/3-tips-for-dealing-with-new-ofccp-sex-bias-regs. For example, "employers offering plans that categorically exclude health services related to gender transition for all employees could be subject to sex discrimination claims." *Id*. (citing Mickey Silberman). The OFCCP notes that "some contractors may recognize a need to update their benefit plans in light of the guidance provided in this final rule, but some plan changes may be difficult to implement immediately. While the specific facts of each case will vary, OFCCP will consider, for example, good faith progress to take steps to change benefits policies and practices in this area in analyzing whether enforcement action is appropriate – particularly in the period immediately following the Rule's effective date." SD NPRM Final Rule, *supra*.

15) Please note that local and state laws may already require compliance in this respect. For DC, MD, and VA laws with respect to bathroom use, see [Tina Maiolo and Diana Lockshin, *Bathroom Bills and What They Mean for Employers: A Legal Resource*, Legally Speaking, Volume XXXII]

16) One example of this is paternalism, or "adopting too much of a protective attitude toward some employees." Gurrieri, supra (citing Connie N. Bertram). To illustrate, "an employer may choose to place a late-night call to a 29-year old single male if something unexpectedly arises instead of a woman with children, thinking it might inconvenience the parent." Id. However, "[e]mployers can't think about someone's [personal] circumstances unless they are seeking an [American with Disabilities Act] accommodation when deciding on assignments or allocating work." Id. (quoting Connie N. Bertram). In this scenario, "the employer might think they're doing the right thing, but the employee may think they were deprived of an opportunity" and therefore believe they were discriminated against. Id.