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4 Discrimination Law Questions Looming As Biden Era Begins

By **Vin Gurrieri**

Law360 (February 5, 2021, 10:09 PM EST) -- President Joe Biden is expected to usher in a decidedly more worker-friendly environment than his predecessor, but whether Congress or the courts embrace similar pro-employee leanings over the next four years is anyone's guess.

Here, experts home in on four top-of-mind questions about bias law that may soon be addressed.

How Far Is the RFRA's Reach?

As the Biden team settles into the Oval Office, one of the biggest outstanding questions from a bias law standpoint is how courts will approach the growing tension undergirding many recent bias cases — how to square anti-discrimination law with protections for religious liberty.

Among those religious protections is the Religious Freedom Restoration Act, a Clinton-era statute that blocks the government from infringing on a person's religious rights unless it has a good reason and does so in the "least restrictive" way.

In a 2014 case called Burwell v. Hobby Lobby, the best-known RFRA case, the U.S. Supreme Court said the closely held corporation that was a party to the case could wield the law to protect its "sincerely held religious beliefs" against providing female workers birth control.

In last year's landmark Bostock v. Clayton County, Georgia, ruling, a six-justice majority led by Justice Neil Gorsuch held that Title VII's ban on discrimination based on sex covers both sexual orientation and gender identity, but the majority expressly declined in that case to delve into the interplay between the RFRA and Title VII of the Civil Rights Act.

However, Justice Gorsuch did offer a glimpse about where he might land on the issue, writing in the opinion that the RFRA "operates as a kind of super statute" that "might supersede Title VII's commands in appropriate cases."

Daniel J. Doron of McDermott Will & Emery LLP said there has been a "really interesting shift in the battle lines" when it comes to the RFRA since its inception, noting that the law was introduced by then-House Rep. Chuck Schumer and signed by former President Bill Clinton in response to a 1990 Supreme Court decision called Employment Division v. Smith, which was authored by iconic conservative Justice Antonin Scalia.

The high court held in Smith that litigants cannot challenge "neutral" and "generally applicable" laws under the First Amendment's guarantee of free exercise of religion. The precedent, which has more recently become the target of conservatives and religious groups that say it undermines the Constitution's guarantee of religious liberty, is currently under review by the high court.

While Doron said it's "unclear" what Justice Gorsuch meant when he called the RFRA a "super statute," he speculated that it "would require some real gymnastics" by the high court to reconcile Bostock with the RFRA as the law was interpreted in Hobby Lobby.

"Either the court would have to put some kind of fence around its holding in Hobby Lobby or it blows a pretty significant hole through Title VII," Doron said. "And I think the court will have to be very careful about opening [the] door that says that a private employer's religion can be used as a basis to discriminate, not just on the basis of LGBTQ status or sex but on the basis of race, religion or national origin."

"I do think this confluence of cases and events is very much one of the hot, open questions that we're going to have to wait and see what Justice Gorsuch really meant by his comments about RFRA," Doron added.

Do Harassment Claims Fall Under the 'Ministerial Exception' Umbrella?

Another area of legal uncertainty in which religion and anti-bias statutes are intertwined involves the so-called ministerial exception, a decades-old legal doctrine rooted in the First Amendment that gives religious employers cover against certain workers' bias claims.

The Supreme Court, which has addressed this issue multiple times in recent years, endorsed a broad application of the ministerial exception last year in a ruling known as Our Lady of Guadalupe School v. Morrissey-Berru. That decision built upon a 2012 ruling called Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC in which the justices first recognized the legal doctrine and set out a loose framework for how courts should apply it.

But while the high court in Guadalupe said the ministerial exception blocked two discrimination suits lodged by fired elementary school teachers against the Catholic schools where they worked, the Seventh Circuit recently said it will review whether the exception similarly blocks ministerial employees from pursuing suits under a hostile work environment legal theory.

Doron, citing language from the Guadalupe and Hosanna-Tabor rulings, said they both were both "primarily focused" on the autonomy of religious institutions to make internal management decisions that are essential to their mission, including picking people to hold key roles. But harassment claims could present a different scenario.

"The tension here is that subjecting an employee to a sexually hostile environment is hard to justify on the basis of autonomy in selecting an individual to play an ecclesiastical or quasi-ecclesiastical role in a religious institution," Doron said.

Doron noted that sexual harassment law on a federal level is derived from Title VII's ban on sex discrimination, and that the composition of the high court could go a long way in analyzing how the issue might ultimately shake out if a case lands on the justices' doorstep.

"The court is one generally that I think is going to be inclined — even more so inclined given its composition — to keep the scope of the ministerial exception fairly broad," Doron said. "But in an environment where #MeToo and the church sex scandals are very much top of mind, it makes it more difficult for the court to say that employees subject to a sexually hostile environment don't have federal recourse."

Who Qualifies For Title VII's 'Religious Exemptions'?

Under Title VII, a carveout exists that shields religious organizations from the law's ban on religious bias and allows them to give job preferences to members of their own religion.

Those so-called religious exemptions were recently addressed by the U.S. Equal Employment Opportunity Commission as part of a lengthy guidance on religious bias that was finalized last month. The anti-discrimination watchdog laid out various factors that courts can look to when trying to determine if an organization has a "purpose and character [that is] primarily religious such that it qualifies for the exemption.

However, Crowell & Moring LLP partner Ira Saxe said that none of those factors are "dispositive," and that a key question going forward is which employers are covered by the carveout.

"One issue is who are those religious organizations?" Saxe said.

The broad list of factors listed by the EEOC in its guidance include whether the organization seeks to generate a profit, whether it produces a secular product, and whether it holds itself out publicly to be secular or sectarian.

The agency noted in its guidance that courts have ruled that an organization that engages in secular activities isn't barred from qualifying for the exemption, while adding that "Title VII case law has not definitively addressed" whether for-profit businesses that check off other factors on the list can qualify as a religious corporation.

In speaking about the potential secular nature of a religious organization as it relates to the Title VII exemptions, Saxe said it's a key issue because of how broadly it extends.

"One of these factors is engaging in secular activity … [which] according to the guidance is not enough to disqualify organizations from being covered by the religious organization exemption," Saxe said. "It's significant because unlike the ministerial exception, this exception is not limited to jobs involving vital religious activities. It's broader than that."

Will Congress Carve Sexual Harassment From Arbitration Pacts?

Another controversial area of law that could be in for major changes under the Biden administration and a Democratic Congress is the extent to which employers can keep using arbitration agreements to push employment suits out of court and insert class action waivers into those pacts to limit workers' ability to pursue claims collectively.

The Supreme Court has recently addressed this issue as well, giving employers the go-ahead in its landmark 2018 Epic Systems Corp. v. Lewis decision to use mandatory arbitration pacts that contain

class waivers, which companies have increasingly used to limit their legal exposure and avoid publicity.

But in response, some states, including New York and California, attempted to ban mandatory arbitration agreements for sexual harassment claims as well as in other contexts, although some of those efforts ran into some legal roadblocks.

Democrats during the Trump administration also showed an appetite for pursuing legislation at the federal level aimed at curtailing the use of arbitration, with the U.S. House of Representatives passing the Forced Arbitration Injustice Repeal Act, or FAIR Act. The bill would've barred the enforcement of contract clauses requiring that disputes go to arbitration rather than the courts, but efforts to address arbitration in Congress stalled. Democrats have also **included provisions** addressing mandatory arbitration in other bills, such as the sweeping Protecting the Right to Organize Act.

With the Biden administration and a new Democratic majority in Congress now in place, Democrats might look to take another shot at reform.

Steven Suflas, senior counsel at Ballard Spahr LLP, said that even if the Democrats can't muster enough momentum to push a sweeping block on mandatory arbitration agreements through Congress, pursuing a bill that focuses just on arbitration agreements in the context of sexual harassment claims might be an easier hill to climb.

"Based on what we've seen at the states, I think the first line of attack is sexual harassment because it's a hot-button issue [and] it's an issue that has broad-based support," Suflas said.

"If you're doing it at the state level, there's a real question as to whether or not the Federal Arbitration Act would preempt it, and frankly I think it would," Suflas added. "But … what we've already seen in the first two weeks of this administration is tremendous activity to support organized labor and support employee groups. I would think that would be on the agenda."

--Additional reporting by Braden Campbell, Anne Cullen and Andrew Kragie. Editing by Abbie Sarfo.