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Developing Issues in Labor and Employment Law

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DEVELOPING ISSUES IN EMPLOYMENT LAW

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DEVELOPING ISSUES IN EMPLOYMENT LAW

by
Eric J. Johnson

I. UNITED STATES SUPREME COURT CASES

A. **Arbitration and Alternative Dispute Resolution – *Rent-A-Center, West, Inc. v. Jackson*, --- U.S. ---, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010)**

1. Introduction

The United States Supreme Court, in *Rent-A-Center, West, Inc. v. Jackson*, recently addressed whether a court can decide that an arbitration agreement as a whole is unconscionable when the agreement explicitly assigns that decision to an arbitrator. The Court held that, under the Federal Arbitration Act (“FAA”), where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement (the “delegation provision”), if a party specifically challenges the delegation provision, the court will determine the challenge. However, if a party challenges the enforceability of the agreement as a whole, the challenge will be left to the arbitrator.

2. “Severability” of Delegation Provision

The Court reasoned that because the delegation provision is “severable”, a challenge of the arbitration agreement as a whole does not render invalid the particular provision delegating to an arbitrator the right to determine whether the remaining portions of the agreement are enforceable. Thus, unless a party challenges the delegation provision specifically (claiming, for example, unconscionability or fraud in the inducement of the delegation provision itself), any challenge to the validity of the agreement as a whole is left to the arbitrator.

3. Practical Implications

- a. *Rent-A-Center* provides several practical implications. First, employers may want to incorporate delegation provisions similar to the one found in *Rent-A-Center* to ensure that any disputes regarding the enforceability of the arbitration agreement as a whole would be settled by an arbitrator and not the courts.
- b. Secondly, employers should ensure that delegation provisions are clear and conspicuous in the arbitration agreement. For example, the delegation provision should be in bold font and capital letters and should perhaps include language stating that the employee

waives the right to have a court determine the enforceability of the delegation provision.

- c. Finally, clear language providing the employee adequate notice will help to ensure that employers avoid claims of unconscionability or fraud in the inducement in the future.

**D. Personal Use of Company-Owned Electronic Devices –
City of Ontario v. Quon, --- U.S. ---, 130 S.Ct. 2619, 177 L.Ed.2d 216
(2010)**

1. Introduction

The United States Supreme Court, in *City of Ontario v. Quon*, recently addressed whether the Fourth Amendment prohibited a municipal police department from searching a police officer's text messages maintained on an employer-owned device. The Court held that the City's search of a police officer's text messages on the City-issued device did not violate the police officer's rights under the Fourth Amendment, which guarantees freedom from unreasonable searches and seizures.

The Police Department performed an audit of the police officer's text messages to determine whether police officers were exceeding their monthly usage of text messages for work-related or personal reasons. The Police Department's audit revealed that one police officer, Quon, was sending and receiving sexually explicit text messages while on duty and concluded that Quon violated the City's "Computer Usage, Internet and E-Mail Policy."

2. "Reasonable Under the Circumstances" Standard

In reaching its conclusion, the Court assumed that Quon had a reasonable expectation of privacy in his text messages and reasoned that because the City's search was "justified at its inception" and was not "excessively intrusive" the search was "reasonable under the circumstances" in both the government-employer and private-employer context. The Court was careful to draw a distinction between text messages and e-mails, seemingly inferring that employees may have a greater expectation of privacy in text messages than e-mails (i.e. e-mails, unlike text messages, are sent and received on an employer's server).

3. Practical Implications

Employers should consider revising any current policies regulating computer, internet and e-mail usage to include language notifying an employee that text messages sent and received on company-issued

devices (e.g., Blackberrys) are also included in the company's usage policy and are subject to work-related audits.

E. National Labor Relations Board (“NLRB”) Lacked Authority to Issue 600+ Decisions –

***New Process Steel, L.P. v. National Labor Relations Board*, --- U.S. ---, 130 S.Ct. 2635, 177 L.Ed.2d 162 (2010)**

1. Introduction

The United States Supreme Court, in *New Process Steel, L.P. v. National Labor Relations Board*, recently held that the NLRB did not have a statutory quorum when it decided over 600 cases during a two-year period. Under the National Labor Relations Act, the Board should consist of five members, with a quorum of no less than three.

2. Practical Implications

The fact that the Board decided cases which are currently pending before the Supreme Court or federal courts of appeals means that the Board will likely have to re-decide these cases and could also mean that other employers and unions will reopen cases not appealed on the basis that the Board lacked jurisdiction to originally decide their cases. However, employers who have pending cases at the NLRB will not be directly affected by the decision, except that their cases will likely not be decided anytime soon.

II. SIXTH CIRCUIT COURT OF APPEALS CASES

A. Waiver of Right to Sue on Employment Application –

***Alonso v. Huron Valley Ambulance, Inc.*, 2010 WL 1644233 (6th Cir., Apr. 26, 2010)**

1. Introduction

The Sixth Circuit, in *Alonso v. Huron Valley Ambulance Inc.*, recently addressed the issue of whether an employee can waive his right to sue in court on an employment application by agreeing to an internal dispute resolution procedure without having complete knowledge and disclosure of the dispute resolution process, alternatives available to the employee, and the employee's right to revoke the waiver. The Court held that an employee does not waive his right to sue in court on an employment application by merely agreeing to an internal dispute resolution procedure unless he knowingly and voluntarily executes the waiver.

2. “Knowingly and Voluntarily” Executed Waivers

In concluding that the waivers were not knowingly and voluntarily executed, the Court reasoned that the plaintiffs were not aware of what the internal dispute resolution process entailed, were never informed of their right to revoke their waiver, and were not given any documentation regarding the internal dispute resolution process until one month after their employment began. The Court articulated several factors that should be used to determine whether a waiver was knowingly and voluntarily executed:

- a) Plaintiff’s experience, background, and education;
- b) The amount of time the plaintiff had to consider whether to sign the waiver, including whether the plaintiff had an opportunity to consult with a lawyer;
- c) The clarity of the language;
- d) The consideration provided to the plaintiff for the waiver; and
- e) The totality of the circumstances.

3. Practical Implications

While employers may continue to include right to sue waivers on employment applications, *Alonso* provides several practical guidelines employers should consider going forward which will assist in preparing right to sue waivers that are significantly more difficult to attack by future plaintiffs. Employers should ensure that:

- a) *The right to sue waiver is clear and conspicuous.* Bold font and capital letters, for example, will provide assurance that the employee is aware that he is waiving his right to sue in court.
- b) *The employee has had ample time to review and possibly even consult with an attorney.* Employers should encourage employees to not immediately sign the right to sue waiver and should incorporate language encouraging employees to consult with an attorney.
- c) *The employee understands his right to revoke the waiver.* Clear and inconspicuous language stating that the employee is aware that he has the right to revoke the waiver and is under no

obligation to waive his right to sue should be included in the waiver clause.

- d) *The employee is fully aware of the alternative dispute resolution process by which he is to bring employment-related claims.* Employers should create pamphlets and other reading materials that outline what the company's internal dispute resolution process is at the same time the employee is provided with the waiver. Similar to a handbook, the employee should be required to sign the documentation acknowledging receipt of the material and attesting to the employee's understanding of the internal dispute resolution process.

B. Waiver of Uniformed Services Employment and Re-Employments Rights Act (USERRA) Claims –
***Wysocki v. International Business Machine Corp.*, 607 F.3d 1102 (6th Cir., 2010)**

1. Introduction

The Uniformed Services Employment and Re-Employment Rights Act of 1994 (“USERRA”) prohibits discrimination in employment based upon the military service of employees. USERRA provides that an employee must be given leave from work for active military service or in order to attend initial or subsequent regular military training, such as National Guard and Reserve training, provided that the employee notifies his employer in advance, either orally or in writing, unless military necessity dictates otherwise. Upon return from military leave, USERRA provides that an employee must be “promptly re-employed” by the employer.

2. The Effects of 38 U.S.C. § 4302 on General Release Waivers

Recently, the Sixth Circuit Court of Appeals, in *Wysocki v. IBM*, decided a case of first impression in which the issue was whether a specific provision of USERRA, 38 U.S.C. § 4302, prohibited Wysocki, an employee of IBM and military veteran, from waiving all USERRA claims against his employer through a general release waiver that he both voluntarily and knowingly signed. 38 U.S.C. § 4302(a) provides that a general release waiver, among other things, supersedes § 4302(a) when the general release waiver “establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided [the employee under USERRA]” (emphasis added). On the other hand, 38 U.S.C. § 4302(b) provides that a general release waiver, among other things, is superseded by § 4302(b) when the general release waiver “reduces, limits, or eliminates in any manner any right or benefit provided [the employee under USERRA]...”

In analyzing 38 U.S.C. § 4302 and its application to Wysocki's case, the Court concluded that "the critical inquiry is whether the [general release] is exempted from the operation of § 4302(b) by § 4302(a), because the rights it provided to Wysocki were more beneficial than the rights that he waived." The Court found that Wysocki believed that the rights provided in the general release were more beneficial than his USERRA rights and based its reasoning on the fact that the general release was "clear and unambiguous" with respect to informing Wysocki that he was waiving his USERRA rights and because he did not bring forth evidence challenging whether the general release resulted in a situation more beneficial than his USERRA rights. Accordingly, the court held that Wysocki's general release waiver was "exempted from the operation of § 4302(b) by § 4302(a)."

3. Practical Implications

It is important to note that the Court's holding is narrow and limited to the facts of *Wysocki*. Because Wysocki did not bring forth evidence challenging whether the general release waiver resulted in a situation more beneficial than his USERRA rights, the Court did not address the issue of "what it means for one thing to be 'more beneficial' than something else." Thus, employers should be aware that, in the wake of *Wysocki*, future USERRA plaintiffs are likely to more efficiently challenge similar general release waivers on the grounds that the waiver is superseded by § 4302(b) in that it resulted in a situation that was not more beneficial to the veteran than if the veteran had asserted his USERRA rights. Thus, a well-written general release waiver should include language that clearly and unambiguously indicates that the veteran recognizes that signing the release and waiving all USERRA claims against his employer will result in a situation that is "more beneficial" to the veteran.

III. SEVENTH CIRCUIT COURT OF APPEALS CASES

A. **Abstaining From Race-Based Work Assignments Trumps a Patient's Preference for White Aides –** ***Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir., 2010)**

1. Introduction

The Seventh Circuit, in *Chaney v. Plainfield Healthcare Center*, recently addressed whether a health care provider's policy of complying with patients' wishes to be treated only by white health care workers trumped its duty of abstaining from race-based work assignments and a subsequent racially hostile work environment. The Court held that the

employer's written policy of not allowing black nursing assistants to provide care for residents who did not want care from black assistants violated Title VII and created a racially hostile or abusive work environment.

Chaney was employed as a certified nursing assistant and was reminded daily through Plainfield's written policy that she, and other black nursing assistants, were banned from providing care to a certain patient who preferred only white nursing assistants. The Court concluded that the long-term care facility's policy of meeting the patients' preference for white aides was not a legitimate criterion (as is gender, for example) for accommodating any privacy interests of the patient.

2. Practical Implications

The *Plainfield* court offered several practical suggestions that similar long-term care facilities could undertake in order to avoid Title VII liability: "[i]t can warn residents before admitting them of the facility's nondiscrimination policy, securing the resident's consent in writing; it can attempt to reform the resident's behavior after admission; and it can assign staff based on race-neutral criteria that minimize the risk of conflict." Additionally, the court noted that where an employer is uncertain as to whether its policies may conflict with state or federal laws, an attempt to seek guidance through an appropriate administrative agency (i.e., the Department of Health) would also demonstrate reasonable measures taken by the employer to ensure that its policies were consistent with state and federal laws.

IV. OTHER FEDERAL CASES

A. **U.S. District Court for the Southern District of New York: Gender/Family Discrimination -**

Velez v. Novartis Pharmaceuticals Corp., Case No. 04-CV-09194, (S.D.N.Y. 2010)

1. Introduction

In 2004, Amy Velez and four other female employees of Novartis Corp. filed a class action lawsuit alleging gender discrimination over pay and promotion and for pregnancy. The class was certified in July 2007 and the trial began on April 8, 2010. On May 19, 2010, the jury returned a verdict finding Novartis Corp. liable for gender discrimination and awarded \$250 million in punitive damages to a group of 5,600 employees. On July 14, 2010, Novartis agreed to settle for \$152.5 million.

2. Practical Implications

Throughout the trial, “anecdotal evidence” was presented by a number of female witnesses who recounted experiences of allegedly being treated unfairly and denied promotions and salary increases because they became pregnant or took maternity leave. The female witnesses also testified about various managerial behavior and comments which appeared consistent with a workplace environment reflective of gender discrimination. *Novartis* provides a constant reminder of the importance of managerial training and development in areas ranging from sex discrimination to the “do’s and don’ts” with respect to various laws such as FMLA. Additionally, employers should consistently review and update policies currently in force (e.g., leave policies) so as to ensure that certain employees, particularly women who take maternity leave, are not adversely affected when it comes to promotions and pay increases. Managers must constantly be reminded of FMLA’s very purpose – which is to protect employees from adverse treatment in the workplace for taking care of and raising families.

B. Second Circuit and U.S. District Court for the District of Illinois: EEOC’s Power to Subpoena Nationwide Records – *E.E.O.C. v. United Parcel Service, Inc.*, 587 F.3d 136 (2nd Cir. 2009) and *E.E.O.C. v. Yellow Transportation*, 2010 WL 2891673 (N.D. Ill. 2010)

1. Introduction

In 2006, the EEOC launched its systematic discrimination initiative, in which the focus was on patterns and practices of unlawful bias throughout a company’s operations, rather than on individual complaints of discrimination. To date, at least two courts have reinforced the agency’s initiative by boosting its power to subpoena an employer’s nationwide employment records.

2. UPS and Yellow Transportation: Cases Supporting EEOC’s Nationwide Subpoena Power

In *EEOC v. UPS*, the Second Circuit forced a company to produce company-wide employment records in response to two individual charges of discrimination (Muslims who applied for driver positions, but refused to shave their beards for religious reasons). Instead of simply requesting records about the two individuals, or even for co-workers at the same site, the EEOC requested information about how UPS’s appearance guidelines had impacted its entire workforce.

In *EEOC v. Yellow Transportation*, the U.S. District Court for the District of Illinois ordered Yellow Transportation to produce a list of all African-American employees from 2004-2009. The EEOC brought suit against Yellow Transportation on behalf of a class of black employees who alleged that they were subject to different terms and conditions of employment and subject to a hostile work environment because of their race from 2004-2009.

3. Practical Implications: Allegations of Pattern and Practice Unnecessary

The significance of both *UPS* and *Yellow Transportation* is that neither plaintiff alleged a pattern and practice of discrimination against their respective employers, but, nonetheless, the EEOC was able to obtain subpoenas for nationwide company records. In both cases, the courts rejected the argument that the requests were too broad and irrelevant to the specific charges being investigated. Thus, employers should be aware that courts are supporting the EEOC's tactic of expanding individual discrimination cases to nationwide investigations.

V. STATE CASES

A. **New Jersey Supreme Court: Employer's Search of Employee's Attorney-Client Privilege Communications Sent and Received Using Employer-Issued Laptop – *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (N.J., 2010)**

1. Introduction

The New Jersey Supreme Court, in *Stengart v. Loving Care Agency, Inc.*, recently addressed whether e-mail messages exchanged between an employee and her attorney via an employer-issued laptop from the employee's personal, password-protected, web-based e-mail account are exempt from attorney-client privilege notwithstanding the employer's electronic communication policy. The Court held that by exchanging messages with an attorney through a personal, password-protected, web-based e-mail account, an employee could reasonably expect that e-mail communications with the attorney would remain private and that sending and receiving such e-mails via an employer-issued laptop did not eliminate the attorney-client privilege that would otherwise attach to the messages.

2. Public Policy Rationale Supporting Attorney-Client Privilege Doctrine

In reaching its conclusion, the Court looked to the overall purpose of the attorney-client privilege, which is to encourage free and full disclosure of information from the client to the attorney. The Court recognized that the employer's electronic communication policy did not discuss the use of

personal, password-protected, web-based e-mail accounts accessed via an employer-issued laptop or provide a warning to employees that communications through such e-mail accounts could be retrieved by the employer. Nonetheless, the Court concluded that even if an employer were to adopt a policy allowing the employer to retrieve attorney-client privilege communications of an employee, the policy would be unenforceable on public policy grounds as the policy would circumvent the very purpose of the attorney-client privilege.

3. Practical Implications

Employers should note that *Stengart* may have a significant impact on employers across the country in that other courts may rely upon *Stengart* if confronted with similar issues. Further, employers should be aware that *Stengart* was limited to its particular facts. Thus, it is unclear whether a similar issue involving e-mails sent and received using an employee's company issued e-mail address would result in a similar outcome as the expectation of privacy would presumably differ.

B. Circuit Court of Macomb County, Michigan: Weight Discrimination – *Smith v. Hooters of Roseville, Inc.*, Case No. 10-2213-CD, Macomb County, Michigan

While Ohio law does not recognize a cause of action for weight discrimination, employers should be aware that Michigan's civil rights statute prohibits discrimination on the basis of weight. Recently, Cassandra Smith, a Michigan resident, filed a lawsuit in the Circuit Court for Macomb County alleging that Ms. Smith was wrongfully discharged by her employer, Hooters, because of her weight. The complaint asserts that Ms. Smith was put on "weight probation" as a condition of her employment. Additionally, during a performance evaluation, Ms. Smith was counseled about the fit of her uniform and told to join a gym in order to better fit the size small uniform. Ms. Smith claims that she was constructively discharged because she was unable to meet Hooters' discriminatory weight requirements. Ms. Smith was 5'8" and 132.5 pounds at the time she alleges that she was constructively discharged.

VI. DEVELOPMENTS IN FEDERAL LEGISLATION / REGULATORY AUTHORITY PERTAINING TO EMPLOYMENT ISSUES

A. Genetic Information Nondiscrimination Act (GINA)

1. Introduction

The Genetic Information Nondiscrimination Act ("GINA") became effective on November 21, 2009 and applies to employers with 15 or more employees. The purpose of GINA is to prohibit discrimination against

employees based upon genetic information indicating a predisposition to chronic diseases. Additionally, GINA prohibits retaliation against employees who claim discrimination based upon genetic information. The remedies under GINA are the same as those under Title VII of the Civil Rights Act, except that “disparate impact” claims are not allowed.

2. Steps to Avoid GINA Liability

GINA should not have a significant impact on employers so long as the following steps are taken:

- a. Separate your confidential medical and health records from all other records and limit access to these records as required by the Americans With Disabilities Act;
- b. Ask health care providers to provide only non-genetic health information (pre-employment physicals, return to work exams, etc.) about your employees;
- c. Remember that workers’ compensation records may have genetic data and treat them appropriately; and
- d. Take steps to make sure you do not inadvertently receive genetic information about your job applicants or employees

3. First Wave of GINA Cases

To date, the EEOC has received over 80 charges filed under GINA and the lawsuits stemming from GINA-related allegations are soon to follow.

B. The Dodd-Frank Wall Street Reform and Consumer Protection Act

1. Introduction

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law. Many of the provisions of the Act will require the U.S. Securities and Exchange Commission to implement rules that will align with the intent of Congress. Thus, while many specific details of the Act remain undetermined, employers should be aware that the act will have significant effects, particularly in the area of executive compensation.

2. Practical Implications: Significant Impact on Employers

The Act will require registered public companies to have an advisory vote on senior executive compensation (also known as a “say on pay”). The Act includes a provision which will require public companies to include a non-binding resolution in their proxy statements to approve executive compensation for named officers, at least once every three years, including “golden parachute” compensation. Additionally, at least once every six years, companies will be provided to have a separate vote indicating how frequently say on pay votes are to occur. The Act also requires stock exchanges to revise their listing requirements to provide that each member of the compensation committee be “independent” under a new definition formulated by the SEC.

C. Updates to the FMLA – Department of Labor Administrator’s Interpretation No. 2010-3

1. “In Loco Parentis” Clarified

On June 22, 2010, the Department of Labor issued its third Administrator’s Interpretation, which clarifies the definition of “son or daughter” under the FMLA as it applies to an employee standing “in loco parentis” to a child. Currently, the FMLA regulations define “in loco parentis” as including those with day-to-day responsibilities to care for and financially support a child. The Interpretation does not require an employee who assumes the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand “in loco parentis” to a child.

2. Practical Implications: Increasing FMLA Coverage

The Interpretation has significant practical impacts as it sets forth a broad scope of employees who qualify for FMLA leave. For example, the Interpretation makes clear that an employee does not have to have a legal or biological relationship with a child to stand “in loco parentis.” Rather, the employee need only show that he or she either provides day-to-day care for the child or financial support. According to the Interpretation, “[a] simple statement asserting that the requisite family relationship exists” is sufficient “reasonable documentation” of the family relationship.

Thus, where a non-biological parent will share equally in the raising of a child with the child’s biological parent, the non-biological parent would be entitled to leave for the child’s birth “because he or she will stand ‘in loco parentis’ to the child.” The Interpretation also provides FMLA leave to gay workers: “an employee who will share equally in the raising of an adopted

child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands ‘in loco parentis’ to the child.” Hence, an employee who neither has a biological nor legal relationship with a child can still consider the child his or her “son or daughter” for purposes of FMLA leave.

VII. DEVELOPMENTS IN OHIO LEGISLATION PERTAINING TO EMPLOYMENT ISSUES

A. Ohio Maternity Leave

1. Introduction

The Ohio Supreme Court, in *McFee v. Nursing Care Mgt. of Am., Inc.*, recently held an employer is not required to grant maternity leave to a pregnant employee who does not meet the minimum length of service requirement under the employer’s leave policy. In its June 22, 2010 decision, the Court made clear that Ohio’s discrimination statute only requires that an employer grant leave to a pregnant employee under the same leave of absence rules that apply to all of its employees.

McFee sought to take leave due to a medical condition related to her pregnancy after working for Pataskala Oaks for only eight months. Her request was denied but she took the leave anyway and was terminated. McFee then filed a claim challenging her termination with the Ohio Civil Rights Commission (“OCRC”). The OCRC took the position that Ohio law required that Pataskala Oaks provide Ms. McFee with maternity leave and that its failure to do so constituted sex discrimination. To support its decision, the OCRC primarily relied upon a regulation that the agency had issued in 2007 providing that the termination of a pregnant employee under a leave policy offering “insufficient or no maternity leave” constituted unlawful sex discrimination.

2. Summary of Ohio’s Maternity Leave Law

The Court held that, although Ohio law prohibits discrimination based upon pregnancy or pregnancy related illnesses, the statute’s plain language only requires that pregnant women “be treated the same for all employment-related purposes as other [non-pregnant employees who are] similar in their ability or inability to work”. The Court concluded that Pataskala Oaks leave policy did, in fact, treat all employees the same. As the Court noted, to hold otherwise would require Pataskala Oaks to treat Ms. McFee more favorably than other employees – which the statute does not require.

The *McFee* decision is an important victory for all employers for two reasons. First, it affirms that employers have the ability to implement and enforce minimum-length-of-service leave policies so long as those policies are consistently applied to all employees. Second, the Court sent a clear message to the OCRC that it cannot legislate by regulation and that any extension of employee rights in Ohio must come from the General Assembly.

B. Ohio Law Requires Military Leave

The Ohio Military Leave Act, which became effective July 2, 2010, applies to Ohio employers with 50 or more employees. The Act requires employers to provide two weeks of unpaid leave for an employee who is the spouse, parent, or a person who has or had custody of a member of the uniformed services when that member is deployed or injured. Under the Act, the employee may take up to 10 days or 80 hours (whichever is less) once per calendar year. Further, the employee must exhaust all available forms of leave, except sick leave or disability leave. Thus, the Act supplements FMLA military leave and provides an additional form of leave when FMLA has been exhausted.

VIII. PENDING FEDERAL LEGISLATION PERTAINING TO EMPLOYMENT ISSUES

A. Protecting Older Workers Against Discrimination Act

1. Introduction

In 2009, the United States Supreme Court, in *Gross v. FBL Financial Services, Inc.*, ruled that plaintiffs in age discrimination claims must prove that their age was the “but for” cause of the adverse employment action to establish an age discrimination claim under the ADEA. Prior to *Gross*, plaintiffs could satisfy their burdens under the ADEA by proving that age was a “motivating factor” in the adverse employment action. Thus, *Gross* essentially eliminated the use of the “mixed motive theory” to prove age discrimination in ADEA claims.

2. Effect of the Act

After *Gross*, there was a general consensus among critics that the decision would make it nearly impossible for plaintiffs to win age discrimination claims. Democrats introduced the Act in the fall of 2009 with hopes of restoring employees’ rights under the ADEA using “pre-*Gross*” standards, thereby overturning the Supreme Court’s decision in *Gross*. In particular, the language of the legislation makes clear that the standard of proof for claims under the ADEA is “no different” from the mixed motive theory used in Title VII claims.

B. The Public Safety Employer-Employee Cooperation Act (“PSECCA”)

1. Introduction

The PSECCA was introduced in Congress on January 29, 2010. The purpose of the Act is to extend collective bargaining rights to public safety officers who do not currently have them. The Act would require that each state provide minimum collective bargaining rights to their public safety officers, but allows the state to decide the manner in which they are conferred. While more than half of the states have enacted legislation providing for collective bargaining rights of public safety officers, those states that do not currently have such legislation will be required to include certain provisions that would have to be a part of a collective bargaining bill in that state, while also leaving certain decisions to the state legislature.

2. Minimum Standards Necessary for Collective Bargaining Per PSECCA

While the Act does not impose a single federal labor relations law that all states would have to follow, the Act will allow each state to tailor collective bargaining laws to the meet the specific needs of that state. Certain minimum standards would be required for collective bargaining laws, including:

- a. The right of workers to form a union and bargain over hours, wages, and terms and conditions of employment;
- b. An impasse resolution mechanism, such as mediation, fact finding or arbitration; and
- c. The ability to have these basic rights enforced, including the right of the parties to sign legally enforceable contracts.

C. Employment Non-Discrimination Act (“ENDA”)

1. Introduction

Introduced in Congress on June 24, 2009, ENDA would prohibit discrimination on the basis of actual or perceived sexual orientation or gender identity. The Act would apply to employers with 15 or more employees. The Act exempts small businesses, religious organizations, and the military, and does not require that domestic partner benefits be provided to same-sex partners of employees.

Currently, 12 states and the District of Columbia have policies that protect against both sexual orientation and gender identity discrimination in

employment, while another 9 states have laws that protect against discrimination based on sexual orientation only.

2. Practical Implications

While many corporations already provide equal rights and benefits to their lesbian, gay, bisexual and transgender employees, as measured by the Human Rights Campaign's Corporate Equality Index, there are still many corporations that do not provide for these rights. While ENDA does not necessarily require an employer to provide certain benefits to its LGBT population, ENDA will ensure that employees are not discriminated against or retaliated against because of their sexual orientation.

D. Paycheck Fairness Act ("PFA")

1. Introduction

The Paycheck Fairness Act was introduced in both the House and the Senate and passed by the House on January 9, 2009. A final vote from the Senate is still pending. The PFA makes it clear that, with respect to wage discrimination claims, the limitations period begins again each time an employee receives a paycheck affected by a discriminatory decision. Additionally, under the PFA, there is no effective statute of limitations for wage discrimination so long as an employee continues to receive arguably discriminatory paychecks.

2. Practical Implications: Impact on Employers

The PFA would update and strengthen the Equal Pay Act, which focuses on pay disparities between men and women, in at least four significant ways:

- a. The PFA would curtail the ability of employers to defend differences in pay.
 - 1) Currently, employers may defend differences in pay by showing that disparities result from any "factor other than sex."
 - 2) Under the new law, employers will have to show that the disparity:
 - i. Is the result of a "bona fide factor other than sex, such as education, training or experience,"

- ii. Is “job-related with respect to the position in question,” and
 - iii. Is “consistent with business necessity.”
 - b. The PFA would enhance the remedies available under the Equal Pay Act.
 - 1) Currently, plaintiffs can only sue for back pay and liquidated damages.
 - 2) Under the new law, plaintiffs would essentially be able to recover extensive compensatory and punitive damages.
 - c. The PFA would facilitate class actions.
 - 1) Currently, class members must affirmatively opt in to the case.
 - 2) Under the new law, class membership would be made automatic unless members specifically opt out.
 - d. The PFA would prohibit employers from retaliating against workers who discuss their pay.

3. What Can Employers Do To Protect Themselves

Employers should conduct an audit of compensation practices with the assistance of an attorney knowledgeable in federal and state compensation laws, so as to ensure that the audit is privileged. The audit should address how wages/salaries are set at the time of hire, especially among similarly situated employees, and should focus on analyzing current decision-making concerning initial wages/salaries, raises, bonuses, and stock options. Employers should realize that rectifying questionable pay disparities now may start the clock running on the statute of limitations. In order to demonstrate that disparate treatment has to do with the worker’s performance and business needs, and not discrimination, employers must write good employee handbooks, honest evaluations, and create records of actions that are the reason for treating employees differently.

XIX. PENDING OHIO LEGISLATION PERTAINING TO EMPLOYMENT ISSUES

A. H.B. 523 to Redefine “Employee”

1. Purpose

The Ohio General Assembly recently introduced legislation that seeks to create a generally uniform definition of “employee” for purposes of cracking down on the misclassification of workers as independent contractors.

2. New “Employee” Definition

If passed, the legislation would require a seven-point test to determine whether a worker is an employee. Under the legislation, independent contractor status is established by meeting **all** of the following factors:

- a. The individual has been and continues to be free from control and direction in connection with the performance of the service.
- b. The individual customarily is engaged in an independently established trade, occupation, profession, or business of the same nature as the trade, occupation, profession, or business involved in the service performed.
- c. The individual is a separate and distinct business entity from the entity for which the service is being performed or, if the individual is providing construction services and is a sole proprietorship or partnership, the individual is a legitimate sole proprietorship or a partner in a legitimate partnership.
- d. The individual incurs the primary expenses and has continuing or recurring business liabilities related to the service performed.
- e. The individual is liable for breach of contract for failure to complete the service in the time and manner prescribed.
- f. An agreement, written or oral, express or implied, exists describing the service to be performed, the payment the individual will receive for performance of the service, and the time frame of completion of the service.
- g. The service performed by the individual is outside of the usual course of the business of the employer.

Thus, the legislation would require employers to take more aggressive steps in ensuring that employees receiving “independent contractor” status are, in fact, meeting each of the above criteria.

3. Current Status

The Ohio General Assembly is currently in summer recess, but as of May 25, 2010, the legislation was referred to the Commerce and Labor Committee.

The information in this presentation and handout is a summary of often complex legal issues and may not cover all of the "fine points" of a specific situation or court jurisdiction. Accordingly, it is not intended to be legal advice, which should always be obtained in consultation with an attorney. The lawyers in Walter & Haverfield's Labor and Employment Group will be pleased to assist with any questions about this new development in the law.

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