TROUTMAN SANDERS

Employment & The Law

LABOR & EMPLOYMENT PRACTICE | SPRING 2010 NEWSLETTER

IN THIS ISSUE

Time to Get the Message: How Employers Can Address the Influx of Text Messaging in the Workplace

By Kristina N. Klein

We've all seen the headlines: relief organizations in Haiti raise millions of dollars by asking people to send small donations via text message; the Tiger Woods scandal ensues when his wife allegedly discovers inappropriate text messages on his cell phone; and Oprah Winfrey's newest mission, "Don't Tempt F8, That Text Can W8," leads the effort to ban texting while driving.

Whether for good or bad, and whether we like it or not, texting has become commonplace. In fact, studies show that since 2008, American cell phone users are sending more text messages than they are making phone calls. Thus, it should come as no surprise that texting is also having a major impact in the workplace. Because of the increased use of texting in the workplace, employers can no longer turn a blind eye to this common practice and, instead, must become "textperts" in ways to protect themselves from potential liabilities created by employee texting. Below are some problems involving texting that are already popping up in the workplace, and some possible solutions your company may consider implementing:

1. Privacy Expectations of Employee Texting on Employer Devices

The Problem: The U.S. Supreme Court has recently agreed to review its first case (*City of Ontario v. Quon*) involving the privacy rights of an employee's personal text messages and will essentially address the following question: What are the legal boundaries of an employee's privacy in this interconnected, electronic–communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text messages to friends and family via hand-held computer-assisted electronic devices?

The *Quon* case arose after the City's police department inspected personal, sexually explicit text messages that one of its sergeants (Sgt. Quon) sent using a city-issued pager. Sgt. Quon challenged the City's actions claiming that it violated his privacy rights. The Ninth Circuit ruled that, because the City's general internet and e-mail policy did not specifically address text messages, and because the Lieutenant in charge of issuing the pagers stated that no one would review the text messages, Sgt. Quon had a reasonable expectation of privacy and that the City had violated those rights by inspecting his text messages. The City appealed, arguing that its well-established no-privacy policy could not be disregarded simply because a Lieutenant verbally announced otherwise and that it is not objectively reasonable to expect privacy in a message sent to or from someone's workplace pager. So, as the *Quon* case

Continued on page 2

Time to Get the Message *Continued*

illustrates, one problem for employers who wish to investigate an employee's allegedly improper use of text messages is the fact that the employee may claim such actions violate his or her reasonable expectations of privacy and, therefore, are unlawful.

Possible Solutions: Until the Supreme Court provides further guidance on this issue, employers who issue cell phones, pagers or other devices with text messaging capabilities to employees should take two important steps to ensure that employees have no expectation of privacy when sending text messages using company-issued equipment. First, employers should revamp their policies to clearly and unambiguously inform employees that all employee communications, including e-mail and text messages, that are made using corporate resources, like pagers or cell phones, are not private and will be monitored by the employer. Second, employers need to instruct their managers and information technology personnel to not contradict written policy by representing to employees that certain communications are not and will not be reviewed. At a minimum, employers should revise their electronic use policy to include a simple statement that the formal policy cannot be modified absent a revised written policy.

2. Employee's Personal Texting During the Work Day

The Problem: The *Quon* case underscores a common drain on employee productivity: texting during the workday. In the *Quon* case, the investigation revealed that Sgt. Quon was sending an average of thirty texts a day while on duty, only three of which were work-related. In another illustrative case, a female County Magistrate Judge in Indiana was recently disciplined for sending numerous personal text messages to a married male co-worker. In fact, she even texted photos of herself to the co-worker while conducting hearings in Juvenile Court.

Possible Solutions: While most employers have policies stating that employees should limit personal phone calls or personal e-mails during the workday, these policies are often silent about employees sending personal text messages during company time. With the increased use of text messages, employers should consider updating their policies to reflect that it is unacceptable for an employee to engage in personal text messaging during working hours.

3. "Textual Harassment"

The Problem: As discussed in the article that appears later in this newsletter, *Sticks and Stones: Practical Suggestions for Preventing a Hostile Work Environment Based on Profane or Offensive Words*, employers should be cognizant of the new phenomenon of "textual harassment" in the workplace and the possible liabilities an employer could face as a result.

Possible Solutions: Because of the increase of lawsuits involving offensive text messages, employers should revise harassment policies to inform employees that sending harassing text messages to coworkers is a violation of the policy. The concept of textual harassment, as well as real-life examples of such harassment, should also be specifically incorporated into any current training program that deals with harassment in the workplace.

4. Employee Texting While Driving

The Problem: Another area where texting can cause employers headaches (and litigation) pertains to texting while driving. More and more case law is suggesting that an employer may be liable to a third party for an accident that occurs when one of its employees is texting while driving in the course of performing his or her job duties. For example, a young girl in Florida was killed by a driver who was using her cell phone. When phone records showed that the driver was communicating with a client when the accident occurred, the jury determined that the *employer* was liable to the victim's family under a theory of vicarious liability for 2 million dollars!

Possible Solutions: Currently, 19 states and the District of Columbia ban text messaging while driving. Employers in these states must incorporate and enforce similar bans into their policies. Because other states have similar legislation pending (and because it is good risk management advice), employers operating in the other 31 states should also consider implementing and enforcing a written policy banning all texting and e-mailing, and possibly even cell phone use, while driving a company vehicle or otherwise conducting company business while driving. If an absolute ban is impracticable, employers should advise employees to limit their communications to only emergencies and/or pull over before accepting the call or reading the text. These tips should be incorporated into a written policy that employees review and acknowledge by signature before being permitted to operate a company vehicle. ■

Is Your Company's Maternity Leave Policy Legal? The EEOC May Not Think So

By Theresa Y. McDaniel

Picture this. Your company is contemplating providing women with two months of paid leave with an option to take two more months of unpaid leave for the birth of a child and it is contemplating providing men with two weeks of paid leave for the birth of a child. Legal? Perhaps not. In fact, such a policy might be considered unlawfully discriminatory against men.

The EEOC's Interpretation of Title VII of the Civil Rights Act of 1964

Under Title VII of the Civil Rights Act of 1964, employers are permitted to provide women with leave specifically for the period that they are incapacitated because of pregnancy, childbirth, and related medical conditions. Employers, however, may not treat females more favorably than males with respect to other kinds of leave, *including leave for childcare purposes*, under Title VII. Indeed, according to the Equal Employment Opportunity Commission (EEOC), employers who grant more liberal leave to new mothers than to new fathers without tying that leave to a pregnancy-related disability may be guilty of sex discrimination.

The EEOC has cited an example of potential sex discrimination that is similar to our example above. In the EEOC's example, the company allowed female employees to take up to 16 weeks of unpaid leave after childbirth, while male employees were limited to two weeks of "paternity leave" to care for a newborn. The EEOC stated that a portion of the disparity in leave may be justified because the female may require disability leave associated with her pregnancy or the childbirth. The EEOC, however, opined that it may be difficult for the company to justify the entire 14-week disparity between men and women. The EEOC stated that "[i]n short, the employer must justify any disparity in parental leave by proving that it is attributable to the woman's disability." The EEOC's example may also run afoul of the Family and Medical Leave Act (FMLA) because the FMLA allows 12 weeks of unpaid leave to an eligible employee regardless of gender to care for a newborn.

Making Your Parental Leave Policy Compliant with the Law

To avoid a potential Title VII or FMLA violation, employers should consider developing a safe harbor policy which would establish a single standard for parental leave applicable to men and women and then create a separate pregnancy disability policy that is limited to a period that women are incapacitated by pregnancy and childbirth. For example, the EEOC has opined that an employer could provide both males and females with a certain amount of paid parental leave following the birth of a child and then allow additional leave for females who verify that they need additional time based on a disability related to her pregnancy or the childbirth.

Avoid Stereotypes When Implementing Your Parental Leave Policy

Once your company has implemented a gender-neutral parental leave policy, it is important to apply the policy fairly. For example, managers and HR personnel should avoid acting on stereotypes about which gender is usually the caregiver for a newborn child. The EEOC has provided the following example of such a stereotype, which would likely cause a company legal trouble:

Eric, an elementary school teacher, requests unpaid leave for the upcoming school year for the purpose of caring for his newborn son. Although the school has a collective bargaining agreement that allows for up to one year of unpaid leave for various personal reasons, including to care for a newborn, the Personnel Director denies the request. When Eric points out that women have been granted childcare leave, the Director says, "That's different. We have to give childcare leave to women." He suggests that Eric instead request unpaid emergency leave, though that is limited to 90 days. This is a violation of Title VII because the employer is denying male employees a type of leave, unrelated to pregnancy, that it is granting to female employees.

There are many options for drafting parental leave policies available to employers. Of course, the easiest way to avoid these potential legal pitfalls is to provide men and women the same amount and type of leave for childbirth. But, understandably, that is not always the best option from a business standpoint. At the very least, an employer should review its current parental leave policies to ensure that they are not facially discriminatory towards one gender. Employers should then strive to implement their parental policies in a gender-neutral manner.

If you have any questions about your Parental Leave Policy, please do not hesitate to contact any member of Troutman Sanders LLP's Labor & Employment Practice Group. ■

Sticks and Stones: Practical Suggestions for Preventing a Hostile Work Environment Based on Profane or Offensive Words

By Caroline K. Anderson and Matthew R. Almand

The United States Court of Appeals for the Eleventh Circuit (which includes Alabama, Florida, and Georgia) recently issued a landmark decision under which an employer could be liable for profane messages or statements that are not specifically directed towards the plaintiff-employee. In Reeves v. C.H. Robinson Worldwide, the plaintiff was subjected to hearing words such as "bitch" and "whore" in conversations between her co-workers, but no evidence established that her co-workers had called her those names. Nevertheless, the Eleventh Circuit concluded that certain gender-specific words could support a sexual harassment lawsuit, even if they weren't used explicitly with reference to the plaintiff-employee. The Reeves case is important because it emphasized that words alone can be sufficient to establish a sexual harassment claim – even without evidence of inappropriate touching. This decision will likely mean that employers can more easily be subject to viable claims of a hostile work environment.

The Reeves case primarily involved the verbal exchange of words by employees in the office; however, the Eleventh Circuit's decision is likely applicable to situations where harassing words are communicated by other means in the workplace or among co-workers. Most notably, employers are currently dealing with the relatively new phenomenon of "textual harassment." What is that? Well, textual harassment commonly refers to the sending of offensive or inappropriate text messages. A recent survey shows that fifteen percent of teens who own cell phones had received nude or nearly nude images via text message from someone they know. The phenomenon doesn't stop there: several employers (including a public university and a well-known entertainment company) have faced sexual harassment cases involving sexually explicit text messages. In addition, employers cannot ignore the increase in popularity of social networking sites (like Facebook or Twitter), blogging, and instant messaging, which means that employers should be aware of the increase in potentially harassing or inappropriate content that may be contained in these communications.

Employers may not be able to monitor or control all communications or workplace conduct. However, this article provides some practical suggestions for preventing hostile work environment claims.

Step 1: Protect Employees from a Hostile Work Environment

- **Implement an effective anti-harassment policy.** The first and most important step employers can and should take is to establish, disseminate, and enforce an anti-harassment policy to provide a means to address alleged misconduct. Many employers have policies prohibiting only sexual harassment, but this approach is much too narrow because harassment based on a number of other protected characteristics is also unlawful. Therefore, any policy should emphasize that the employer will not tolerate harassment based on sex, race, color, religion, national origin, age, disability, and other protected characteristics. In addition, be sure to expressly state that abusive or profane language and harassing e-mails, text messages, Facebook or Twitter posts, blogs, or other electronic communications will also be considered violations of the anti-harassment policy.
- **Adequately train all employees on harassment.** A very simple way for an employer to protect the company from liability is to provide training on the various forms of harassment. The training should be very detailed and complete with role-playing and other ways to provide real life examples of situations that may be considered harassment to employees. In this training, make sure that employees understand that textual harassment and other harassment based solely on words are just as serious as any other form of alleged harassment. Employers should also provide special training to managers and supervisors on how to recognize and address harassment in the workplace. As human resources personnel cannot monitor all employees at all times, managers and supervisors are relied upon to be the "eyes and ears" of the company in case inappropriate conduct is taking place. This is why training managers on these issues is so important.

- **Nip inappropriate joking and comments in the bud.** The Reeves decision is a perfect example of how a joke or comment here and there can quickly get out of hand if not properly controlled by an employer. The work environment should be a professional environment designed to conduct a business. Not a comedy house. Because it is inevitable that some of your employees

Continued on page 5

Sticks and Stones *Continued*

will develop friendships with each other, it is important for employers to set ground rules for the type of conduct that is permitted in the workplace. Employers may consider prohibiting the use of any profane language in the workplace. Managers should also promptly stop any use of inappropriate language or jokes. As Reeves illustrates, employers need to recognize that individuals who do not participate in the social banter, but can overhear the jokes and comments, may be offended and may be able to establish a hostile work environment based on words – even if those words are not directed at them. The safest rule, of course, is to maintain a professional atmosphere in the workplace and stop the jokes and comments before they become inappropriate.

- **Instruct managers and supervisors to not participate in the banter.** While it seems obvious to most employers, we still continue to see lawsuits involving situations where managers or supervisors are active participants in the banter claimed to be profane or offensive in those cases. Thus, managers and supervisors need to be reminded that this is inappropriate. In addition, understanding that e-mails can be monitored by their employer and that inappropriate discussions may be overheard, many employees now turn to text messaging as a way to send inappropriate jokes, flirt with the new employee, or ridicule co-workers. It is imperative that managers and supervisors do not participate in text messaging of this nature with employees.

- **Consider prohibiting management from "friending" other employees.** For similar reasons, employers may consider telling managers and supervisors that they cannot be "friends" with their employees on social networking sites, or at least encourage them to limit these connections to business networking sites, like LinkedIn, as opposed to networking sites that are primarily social in nature, like MySpace or Facebook.

- **Update your electronic communications policy to reflect new technological trends.** Just as an employer should update its anti-harassment policies to prohibit textual and other modern forms of harassment, employers should also update any electronic communications policy in a way that helps employers prevent harassment based on words. Many employers already filter the types of internet websites employees can access. Similarly, employers may consider expanding their filter to prevent the transmission of certain types of words through e-mails, posts to blogs and social networking sites, and even texts using company-owned equipment. Employers who already monitor e-mail and internet use may consider monitoring text-messaging, provided the employer has placed employees on sufficient notice that they do not have a reasonable expectation of privacy when text messaging using a company-issued telephone. Employers may even contemplate banning text messaging or personal use of social networking sites, e-mails, or other internet sites during working hours.

Step 2: Establish Accessible Reporting Mechanisms for Employee Complaints

An employer's anti-harassment policy should encourage employees to come forward with complaints of harassment by detailing the complaint process. These complaints are a valuable source of information that enable the employer to promptly stop and correct any harassing conduct. If employees see that the employer takes all allegations of harassment seriously, future victims will be more comfortable coming forward with their complaints and potential harassers will be less likely to engage in harassment. Therefore, it is important for an employer to implement a reporting process that provides accessible avenues of complaint and a prompt, thorough and impartial investigation. For example, an employee who receives suggestive texts from her supervisor should be able to find the method for reporting in the anti-harassment policy and feel comfortable that he or she can report the complaint in confidence and without any risk of retaliation. One way to protect employee confidentiality is to set up an informational helpline for employees to discuss questions or concerns about harassment on an anonymous basis. If the helpline is not staffed 24/7, consider expanding its hours of operation to cover calls made after work. Reminders of how to report misconduct should be displayed on posters, pay stubs, and sign-in windows. Also, since a supervisor may very well be the harasser, do not require employees to complain first to their supervisors. Instead, provide contact information for at least one manager or official outside of an employee's chain of command (an HR official, for example) to take complaints of harassment.

Step 3: Take Prompt Remedial Action to Address Concerns of Harassment

Finally, be sure to set up a mechanism for prompt, thorough and impartial investigations into alleged harassment. Determine if a fact-finding investigation is necessary, and if so, launch one promptly. Even if both the complainant and the alleged harasser have since left the company, employers should still consider conducting investigations into allegations of harassment. Conducting an investigation in this scenario still helps demonstrate to a judge or jury that you do not tolerate harassment and, where the alleged harassment was by a former supervisor, such investigation could still play a key role in defending a hostile work environment claim brought by the former employee.

To ensure the impartiality of any investigation, the alleged harasser should not have any supervisory authority over the person conducting it. Ideally, the person performing the investigation should be outside of the chain of command. It also may make sense to review the text messages, blogs, and posts to social networking sites to obtain an unbiased view of the nature of their communications. However, keep in mind that it is unlawful to obtain access to password protected electronic communications without the voluntary consent of the user. In other words, ask the employee if he or she is willing

Continued on page 6

Sticks and Stones *Continued*

to voluntarily share the content with the investigator, but also make it clear that the disclosure would be voluntary and that the employee will not suffer in any way if he or she declines to share the content with the investigator.

Upon completion of the investigation, it is important to discipline and, in some egregious cases, terminate the employee as warranted. Be sure that any disciplinary measures are proportional to the severity of the offense and that they do not adversely affect the complainant. Also, keep in mind that it is important to enforce the terms of the anti-harassment policy equally among all employees, regardless of position or rank. For instance, it is difficult to send a message to employees that inappropriate language will not be tolerated when the CEO or other officer of the company is free to use such language without any repercussions.

Ultimately, while having an anti-harassment policy may be evidence of reasonable care in the event that an employer is faced with a harassment lawsuit, simply having a policy in place is not enough. Employers should use all possible means to widely distribute the policy, follow the policy closely, and consistently enforce it. This means taking those extra steps to keep a work environment professional and avoid the type of work environment that was created in the Reeves case.

If you have questions about how to revise your anti-harassment policies, how to conduct an effective investigation into allegations of harassment, or how to address potential concerns with textual harassment or other misuse of electronic communications mediums, please contact a member of Troutman Sanders LLP's Labor & Employment Practice Group for assistance. ■

Easy Come, Easy Go: State Rules on Post-Termination Forfeitures of Bonuses and Commissions

By Rebecca E. Ivey and Rebecca Shanlever

Many employers have a compensation plan in which an employee may qualify for commissions or a bonus as of December 31 to be paid in the following year. These plans often provide that if the employee is no longer employed by the date on which the bonus is scheduled to be paid, the bonus is not earned, and consequently the employer need not pay it. Are there any problems with this?

The answer is: yes and no. In many states, an employer may legally require an employee to forfeit a bonus or commission if the employee is no longer employed on the date the bonus or commission is to be paid. In other states, these types of forfeiture provisions are expressly prohibited. Whether a forfeiture provision is legally permissible will vary based upon many factors, including: (i) the state in which the employee is employed; (ii) whether the compensation being forfeited is a commission (based on sales made) or a bonus (based upon company or individual performance); (iii) how and when the commission or bonus is calculated, earned, and paid; and (iv) when, why, and how the employee's employment terminates. This article addresses just some of these factors, but not all state laws regarding bonus or commission forfeiture provisions. Because the rules vary widely from state to state, one-size-fits-all plans may not be enforceable everywhere an employer has employees. Employers should consult with counsel to confirm that a specific forfeiture provision is lawful in a particular state. Below is a snapshot of some state rules applicable to post-termination forfeitures of bonuses and commissions.

Georgia

Generally, absent a contract that provides otherwise, at-will employees in Georgia are entitled to bonuses and commissions "earned" while they were employed. Forfeiture provisions are disfavored in Georgia, but they are not unlawful. Where a bonus or commission plan in unmistakable terms provides that the compensation will not be paid if the employee is no longer employed on a certain date (and has no other legal problems), Georgia courts will uphold the forfeiture provision. Georgia law does not distinguish between bonuses and commissions in the forfeiture context, and have enforced forfeiture of both.

Forfeiture provisions must be carefully worded, because any confusion in the language will be resolved in favor of paying the bonus or

Continued on page 7

Easy Come, Easy Go *Continued*

commission. Employers also should be careful to comply with all other terms in the bonus or commission plan. A carefully worded forfeiture provision that is clear and unmistakable in its terms is likely to be enforceable in Georgia.

Virginia

In Virginia, courts treat forfeiture provisions in much the same way as they are treated in Georgia: they are disfavored but not unlawful. Virginia treats a provision stating that an employee must be employed when the bonus or commission is to be paid as a requirement for vesting of the bonus or commission and generally essential to the right to compensation. Virginia, like Georgia, requires clear, unambiguous language setting forth the terms of the compensation plan.

New York

New York courts treat bonuses, incentive plans, and commissions differently in the forfeiture context. Bonuses or incentive payments may be forfeited under the terms of the compensation plan, but commissions are considered earned wages, which cannot be forfeited. Thus, the key determination is whether the compensation to be forfeited is properly characterized as a bonus, incentive payment, or commission.

Under New York law, earned wages – which are defined to include commissions – are not subject to forfeiture. Bonuses, however, may be forfeited because they are paid at the discretion of the employer. New York law states that an employee's entitlement to a bonus is governed by the terms of the employer's bonus plan, and courts in New York have regularly upheld forfeiture where employees left or were discharged from their jobs before a bonus became payable under the employer's bonus plan. Similarly, compensation owed under incentive compensation plans may be forfeited. Compensation is part of an incentive compensation plan where it is supplemental income based on the employee's individual achievement as well as overall business performance or other factors outside of the employee's control.

Whether a particular type of compensation is an earned commission or a forfeitable bonus or incentive compensation turns on various factors. A bonus or incentive compensation must supplement the employee's base salary. If the compensation plan has ambiguous or contradictory language, or there is conflicting evidence as to the nature of the payments, a question of fact may arise regarding whether the compensation is a bonus or a commission, potentially rendering the forfeiture clause unenforceable.

California

California also draws a critical distinction between a bonus and a commission, and different rules apply depending on the nature of the payment. Forfeiture of a bonus generally is permissible where the employee resigns or is terminated with good cause. Where an employer terminates an employee without good cause, however, forfeiture is unlawful, and the employer must pay the bonus. The forfeiture clause should carefully define what grounds will constitute good cause, such as poor performance or misconduct. Commissions are seen as earned, vested wages and generally may not be forfeited.

What Should Employers Do?

- There are certain steps an employer can take to increase the likelihood that forfeiture provisions in its compensation plans will be enforced:

- The language providing for forfeiture must be completely clear and unambiguous.

- The provision should state not only that the employee will not receive the compensation if he or she is not employed on a certain date, but also whether the employee will receive compensation if he or she resigns, is terminated for cause, or is terminated without good cause.

- For commission payments, the employer should state that the commission is not earned or vested until certain specific conditions are met, including that the employer has received payment from the customer and that the employee must be employed on the date of payout (specifying what the date is).

- All employees should sign an acknowledgment that they have read the compensation plan and agree to its terms. Consider having employees initial the forfeiture provision.

- Where a compensation plan includes both bonuses and commissions, distinguish between the bonus portion of the compensation and the commission portion of the compensation, with different forfeiture rules for each.

Taking the steps listed above will increase the likelihood that post-termination forfeiture provisions will be enforced, but even with these precautions, some states will not permit the forfeiture of earned commissions. As an employer grows and expands its ranks to new states, it is crucial to review compensation plans with counsel for compliance. ■

Expect Inspections: More Resources for OSHA Equals Increased Scrutiny for Employers

By Brandon Dhande and Robert H. Buckler

Employers in safety-sensitive industries beware: the Occupational Safety and Health Administration (OSHA), which increased workplace inspections in 2009, is expected to continue aggressive enforcement policies in 2010. In anticipation of new funding, OSHA has stepped-up investigations to enhance awareness of workplace safety standards. The Obama administration is currently seeking $50 million dollars to increase OSHA's budget and allow the agency to hire 130 additional compliance officers. Additionally, Congress is reviewing proposed legislation that would significantly increase civil and criminal penalties for serious workplace safety violations. Across the country, and especially in the Southeast, recent OSHA inspections have cost employers thousands of dollars in fines:

- OSHA inspectors at a metal hose manufacturer in Stone Mountain, Georgia, found 44 health and safety violations, including the use of forklifts without adequate training and improper use of respirators. The inspections came in response to a complaint filed with OSHA. OSHA proposed nearly $60,000 in penalties.

- At a poultry additive manufacturer in Ball Ground, Georgia, OSHA inspectors discovered several serious violations including broken stairs and ladders, an unguarded floor hole, and amputation risks. The inspection followed citations in 2008 related to the company's procedures for handling formaldehyde. OSHA proposed $69,500 in penalties.

- An inspection at an animal feed manufacturer in Upper Sandusky, Ohio led to citations for 30 violations. OSHA investigated after receiving a complaint about fires in the facility. Inspectors found the company failed to protect workers from exposure to combustible dust. The proposed health and safety fines total $472,900. Four of the health violations were deemed "willful," meaning OSHA determined the company acted knowingly or with intentional disregard for workplace safety standards.
- OSHA cited a retail store in Commack, New York for 16 violations when OSHA inspectors found blocked exits and other fire hazards. The company had previously received repeat citations due to similar conditions at other retail stores. OSHA proposed $233,500 in fines.

- A printing company in Huntington, West Virginia was recently cited for 18 health and safety violations, including six willful violations. The OSHA inspection revealed sound hazards, unguarded machines, and lack of protective equipment for workers. OSHA recommended $158,000 in penalties.

- OSHA inspectors at three corporate subsidiaries in Fulton, Mississippi issued 120 citations for heath and safety violations and proposed a total of $680,000 in penalties. Some of the citations included willful and repeat violations for unsafe electrical conditions and failure to guard machinery. The inspection followed a worker fatality in 2009.

As the above-listed citations indicate, OSHA's interest in workplace safety is expansive. OSHA is not limiting its investigative powers to investigating workplace fatalities. Nor is OSHA leaving employers with past violations alone on the assumption that those employers have fixed previously-cited problems. Instead, OSHA is recommending penalties for more common-place occurrences such as lack of adequate safety training, blocked fire exits, and broken stairs, and the agency is conducting follow-up inspections to ensure compliance with the applicable safety standards.

Faced with the threat of increased inspections, employers should ensure that the appropriate workplace safety standards are well-known and consistently maintained in their workforce. OSHA has indicated it will be less willing in 2010 to downgrade violations, even for employers who cooperate with investigations. Accordingly, employers should regard OSHA compliance as a "must" for 2010.

Additionally, employers who are notified of a pending OSHA investigation should be aware of their rights and responsibilities before an OSHA inspector arrives at their doorsteps. For example, employers have the following rights during an inspection:

- To request a copy of the complaint filed with OSHA,

- To request proper identification from the inspector,

- To limit the scope of the investigation to the area of the workplace at issue,

- To delay the inspection without prejudice while legal counsel is contacted,

- To provide a company representative who will escort the inspector at all times,

- To request the results of any tests conducted during the inspection,

- To prevent the inspector from interviewing supervisory employees in private, and

- To limit the production of documents to those required by OSHA regulations and standards.

Understanding your rights and responsibilities will be key to a successful workplace inspection, especially as OSHA takes a tougher stance on enforcement issues. If you have questions about OSHA compliance or how to prepare for an OSHA inspection, contact Troutman Sanders LLP's Labor and Employment Practice Group for assistance. ■

The Americans with Disabilities Amendments Act of 2008: A Year in Review

By Brandon Dhande and Tevis Marshall

Employers across the country have been living with the Americans With Disabilities Amendments Act of 2008 (ADAAA) for over one year now. In fact, January 1, 2010, marked the one-year anniversary of the effective date of the ADAAA.

The ADAAA, which altered the very definition of what it means to be disabled under the ADA, has been a source of confusion and frustration for employers. Undoubtedly, the ADAAA will result in more individuals being covered by the ADA. In passing the ADAAA, Congress expressed its general discontent with how the ADA had been applied since 1990 and stated that the new definition of disability "shall be construed in favor of broad coverage... to the maximum extent permitted by the terms of the ADA." As a result, employers can expect an increase in requests for accommodations due to alleged disabilities and, unfortunately, lawsuits.

So, are employers entirely defenseless to a new wave of ADA claims? Not necessarily. Employers have voiced pessimism over the recent changes; however, some may have forgotten that the ADA has always contained provisions designed to protect employers, even if an individual is disabled under the Act. This article explains some of the important ways that the ADAAA changed disability law and gives a brief overview of defenses that remain available to employers.

ADAAA Not Applicable to Claims Pre-2009

So far, the circuit courts have agreed that the ADAAA does not apply to claims of discrimination that accrued before the effective date of the ADAAA. In other words, the ADAAA does not apply retroactively and cannot be relied upon by plaintiffs for claims arising after January 1, 2009.

What Has Changed as a Result of the ADAAA?

The ADAAA makes it easier for employees to establish that they have a disability under the Act. Some major changes to the ADA include the following:

1. Individuals no longer need to be severely restricted in order to be "substantially limited" – Before the ADAAA, the U.S. Supreme Court set a high standard when it announced that an individual had to be "severely restricted" from performing major life activities to qualify as disabled. The ADAAA lowers this standard and requires individuals to show that they are merely limited in performing activities when compared to most people in the general population. This comparison can be made using a "common-sense standard, without resorting to scientific or medical evidence."

2. Mitigating measures are no longer considered – Mitigating factors, such as the use of medication or assistive devices, can no longer be considered when determining whether an individual is disabled. The only exception to this new rule is the use of ordinary eyeglasses and contact lenses.

3. An impairment that is episodic or in remission is still a disability if it would impair an individual when active – The ADAAA covers an individual with an impairment that would normally limit a major life activity if it were active – even if it is currently inactive or in remission.

In addition, the EEOC has provided a proposed list of impairments that, in its view, would consistently meet the definition of disability, including the following: blindness, deafness, intellectual disabilities, missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, major depression, bipolar disorder, post-traumatic stress disorder, and schizophrenia.

What Defenses Have Employers Retained Under the ADAAA?

The short answer to this question is: all of them. The ADAAA has radically changed how the term "disability" is to be construed and interpreted, but the remainder of the Act has been left virtually untouched. Thus, employers may avail themselves of the same protections afforded under the ADA as they have in the past – the difference now being that employers may need to invoke the following defenses much more frequently:

1. An employee must still be able to perform the essential functions of the job – An employee with a qualifying disability must be able to perform the essential functions of the job, with or without a reasonable accommodation. Otherwise, the ADA generally does not limit an employer's ability to discharge or otherwise discipline an employee. The ADA still provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential." So, be sure to review your company's written job descriptions and make sure that these are current and an accurate reflection of the employee's day-to-day responsibilities. You may need to use these job descriptions in your defense of claims of discrimination or failure to accommodate under the ADA. It's also a good practice to print the job expectations in a formal document (like a performance review or annual goals) and have employees acknowledge their receipt by signature.

Continued on page 10

ADAAA *Continued*

2. Reasonable accommodations are not required if they create an undue hardship for the employer – In general, employers must reasonably accommodate employees with disabilities. This could include making existing facilities more accessible, job restructuring, acquisition of equipment or devices and interpreters, to name only a few. However, if accommodating an employee's disability creates an "undue hardship" – meaning that it requires significant difficulty or expense – an employer does not have to provide the accommodation.

3. Qualification standards and tests are generally appropriate if they are job-related and consistent with business necessity – Employers may still ask general questions to employees which might, directly or indirectly, solicit information concerning a disability if the criteria are job-related and consistent with business necessity. For example, an employer hiring an individual for a position that requires heavy lifting may ask that individual if he or she has any restrictions that might prohibit heavy lifting. If the same question was asked to an applicant for a sedentary position (e.g., a computer programmer), this question may violate the ADA because it would not be job-related. Similarly, employers may continue to rely upon fitness-for-duty evaluations and other qualification tests that are job-related and consistent with business necessity provided such tests are administered after a conditional offer has been made.

4. Employers may design qualification standards to ensure that applicants and employees do not pose a "direct threat" to the health or safety of other employees – Employers may still design qualification standards to determine if an applicant or existing employee poses a "direct threat" to its workforce. A direct threat is a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. If an applicant or employee poses a direct threat, the employer may refuse to hire that applicant or may terminate an existing employee without violating the ADA.

Conclusion

The law is still unfolding under the ADAAA and employers will continue to face challenges and additional changes under the ADAAA moving forward. For instance, the EEOC is currently reviewing public comments on its proposed regulations to the ADAAA. The final regulations are not expected until later this year. One thing is certain – the ADAAA has changed how employers handle requests for accommodation and disability claims in general. More individuals have been and will continue to be covered by the Act and, as a result, employers will be expected to engage in a heightened interactive process with their employees, as Congress had originally intended especially with respect to requests for accommodations. Notwithstanding the recent concerns, employers may still avail themselves of the defenses set forth above. ■

Legislative Update

By Chad C. Almy

It has been an eventful last few months on Capitol Hill with the election of Scott Brown to the Massachusetts Senate seat vacated by the passing of Ted Kennedy and the passage of the health care bill (The Patient Protection and Affordable Care Act), which President Obama signed into law on March 23, 2010. The lost seat for Democrats means their filibuster-proof supermajority of 60 Senators is now gone. As this will likely have far-reaching ramifications on several of the bills we have discussed previously, we will revisit some of them in addition to reporting on new developments since our last Newsletter.

Employee Free Choice Act (EFCA)

EFCA proponents had been pointing to early 2010 as a likely time to revitalize the efforts to draft a new bill. However, those hopes were contingent on the health care reform situation being resolved, as well as the Democrats maintaining a supermajority in the Senate. As neither prerequisite has materialized, the EFCA is in real danger of not ever becoming law. That said, union advocates are not likely to give up the fight just yet. In fact, many analysts are predicting a shift in such advocates' focus from legislative action to overturning precedent from National Labor Relations Board decisions with a newly appointed pro-union Board. Some of the issues being targeted include:

- Narrowing the definition of "supervisor" under the National Labor Relations Act (NLRA) so that more employees will be eligible for union representation.
- Extending co-worker representation to non-union employees in any employer investigatory interview that could lead to discipline.

Continued on page 11

Legislative Update *Continued*

- Barring a decertification petition within 45 days of an employer's voluntary recognition of a union.

- Foreclosing an employer from designating "at-will" employees as permanent replacements for striking employees.

Arbitration Fairness Act of 2009 (AFA)

The AFA (S. 931, H.R. 1020) would make all predispute arbitration agreements unenforceable as they pertain to employment and civil rights causes of action. Similar to the EFCA, momentum for the AFA has been slowed significantly by Scott Brown's victory in Massachusetts. Not only has the bill received staunch criticism from many Republican members of Congress, it will now continue to idle in place as Democratic members of Congress scramble to repair the health care reform situation while still addressing the ever-dormant economy. Although the AFA remains a potential threat to an employer's ability to utilize alternative dispute resolution in employment discrimination matters, its chances of passage have been greatly diminished.

Lifetime Income Disclosure Act (LIDA)

While it may seem that no employment legislation will ever be passed again, there is optimism surrounding the LIDA. A bipartisan effort, LIDA (S. 2832) was recently introduced to the Senate by Senators Jeff Bingaman, D-N.M., Johnny Isakson, R-Ga., and Herb Kohl, D-Wis. This non-controversial bill would require all defined contribution plan sponsors to provide workers with an annual statement detailing that individual's projected monthly income during retirement. The bill is designed to encourage greater participation in defined contribution plans, such as 401(k)s, by increasing information about individuals' future retirement situations.

Under the proposed law, all defined contribution plans subject to ERISA would be required to provide the annual statement. Although plan sponsors would face penalties for failing to provide the statements, the U.S. Department of Labor would provide model disclosures and issue tables for employers to use to calculate annuity equivalents. Employers using the model disclosures and prescribed assumptions would be immune from any penalties.

Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 (CIR ASAP)

On December 15, 2009, Representative Luis Gutierrez, D-Ill., introduced H.R. 4321. The bill seeks to create a legalization program for qualified undocumented immigrants and their spouses and children. To be qualified, undocumented immigrants must establish that they immigrated prior to December 15, 2009, and that they have either worked, volunteered, attended school, or performed military service since such immigration. Any criminal record will automatically disqualify an applicant. Approved applicants will then be granted a six-year visa, allowing them to travel and work without fear of deportation. At the end of the six-year visa, the immigrants may apply for permanent resident status and eventual citizenship.

In addition to reforming the visa program, the bill calls for increased border security and a new employment verification system to better ensure that only authorized workers are hired by employers. The employment verification system is highlighted by the following features:

- Establishes serious criminal penalties for knowingly hiring unauthorized aliens.

- Bars employers who repeatedly violate these provisions from government contracts, grants, and agreements.

- Forbids employers from using the new system to discriminate against applicants or employees on the basis of nationality.

- Prohibits employers from terminating employment due to a tentative non-confirmation of the authorized status of an employee by the system.

- Allows an individual to register with the Social Security Administration and acquire a PIN and access its online resources.

- Creates significant civil penalties for employers who do not comply with the requirements of the new system. ■

In support of the Troutman Sanders Sustainability Program, this edition of *Employment and The Law* was printed on recycled paper using eco-friendly supplies.

TROUTMAN SANDERS

650 lawyers | 50 practice areas | troutmansanders.com

ATLANTA CHICAGO HONG KONG LONDON NEW YORK NEWARK NORFOLK ORANGE COUNTY
RALEIGH RICHMOND SAN DEIGO SHANGHAI TYSONS CORNERS VIRGINIA BEACH WASHINGTON, DC