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Employment & The Law

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Meet the "New EEOC"

By Kristina N. Klein

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with the enforcement of the federal employment discrimination statutes – like Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act – through investigation, conciliation, mediation and litigation. During his campaign for the presidency, then-Senator Barack Obama made known his dissatisfaction with the reduced role the EEOC had taken in enforcing anti-discrimination laws. Thus, it should come as no surprise that the EEOC has launched efforts to revamp its role as the leading civil rights agency for employees. This article will discuss the "EEOC of Old," the efforts that have been made toward creating a "New EEOC," and what this new EEOC means to today's employers.

The Role of the EEOC

The EEOC's core function is to investigate allegations of employment discrimination and retaliation. Before filing a discrimination lawsuit, a person must first file a charge of discrimination with the EEOC. The agency is then obligated to investigate the Charging Party's charge thoroughly and determine whether reasonable cause exists (meaning there is reason to believe that discrimination occurred). The EEOC or Charging Party may dismiss the investigation charge or the EEOC may administratively close the charge, which still entitles the Charging Party to file suit. On occasion, a Charging Party's attorney may file the charge and request a notice of right to sue 24 hours later.

The EEOC of Old

Over the last 10 years, the EEOC has battled constant criticism over its ability to effectively carry out its role. While some of these criticisms have focused on circumstances beyond the EEOC's control, others appear (at least to its critics) to be the direct result of the EEOC's actions or inactions.

1. Workforce Attrition

From 2001 through 2009, the EEOC saw its resources substantially curtailed, particularly with respect to the number of investigators. The EEOC declined from 2,850 employees in 2000 to under 2,200 in February 2009 – a loss of 23% of the entire workforce in less than a decade. This attrition was blamed in large part on a 2002 hiring freeze and low morale. A January 2009 survey of EEOC employees found that 59% considered morale within the agency to be at the lowest possible level. In addition, the union representing EEOC workers awarded the agency an "F" rating in 2008, stating that "[r]ock bottom staffing and record high charges of discrimination add up to another failing grade for the beleaguered civil rights agency." Neglect of the agency culminated in a March 2009 finding by an arbitrator that the agency had been violating the Fair Labor Standards Act by requiring its employees to work in excess of 40 hours in a workweek without paying those employees additional overtime compensation.

2. Reduced Enforcement

The reduction in resources had a noticeable effect on the EEOC's enforcement ability in terms of pursuing litigation and conducting investigations. First, a key weapon in the arsenal of

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the agency is its ability to bring suits on behalf of aggrieved individuals. By bringing such an action, the EEOC is able to throw the full resources of the government behind a single individual and save the individual the time and expense of retaining private counsel. Use of this weapon was on the rise from 1997 through 1999 – in 1997, the EEOC brought 332 private enforcement actions and by 1999 that number rose to 465. However, beginning in 2003, the number of suits filed by the EEOC began to fall precipitously, reaching a low of just 314 in 2009. This was despite the fact that the number of charges filed with the EEOC increased annually between 2005 and 2009, with a new high of 95,402 filed in 2008.

3. Case Backlog Increases

With a smaller staff during this time period, the EEOC also had a difficult time investigating claims in a timely manner. The EEOC has operated under a goal of completing investigations within 180 days of a charge being filed. In 2007, 72% of charges were investigated in that 180-day period. However, in 2008 and 2009, that number dropped to just 48%. As a result, the EEOC's case backlog grew substantially with the EEOC concluding 2007 with 41,171 pending charges and 2009 with 75,743 pending charges. When the EEOC takes too long to conduct investigations and issue determinations, the result is often that crucial witnesses and other evidence necessary to prove or defend a case of discrimination are harder to track down.

4. Unfocused Investigations

Another critique of the old EEOC was that the quality of EEOC investigations had been relatively poor. Indeed, some attorneys suggested that because EEOC investigators lacked time to gain a full appreciation for the facts of a charge, investigations were frequently unfocused, and on-site visits often devolved into "fishing expeditions," with an investigator trying to weed out any discrimination that may be lurking in an office. Whether overly passive or overzealous, these investigations were likely doing little to actually further the enforcement of employment discrimination statutes.

The EEOC is Penalized

The recent decision issued in *EEOC v. CRST Van Expedited, Inc.* provides some insight into the old EEOC. There, a federal judge in Iowa dismissed a case brought by the EEOC on behalf of a class of female workers claiming sexual harassment. The court had previously found that when the EEOC filed suit, it was not certain how many aggrieved individuals existed, and had used the discovery process to try to identify potential complaining parties. As a result, the judge found that the EEOC had not conducted any reasonable investigation of the specific claims of the aggrieved class before filing suit, depriving the parties of their opportunity to settle the claim. As a result, the EEOC paid the opposing party's (CRST) attorney's fees. The case had the potential to strike a huge blow against the defendant corporation, with the EEOC alleging that 270 employees were the victims of discrimination. The EEOC was considered to have acted hastily in filing this case before fully investigating the various claims involved.

"The New EEOC"

In April 2009, the *New York Times* editorialized that the EEOC needed to be "repair[ed], replenish[ed], and [receive] a major attitude change forthwith." More than a year later, the EEOC and federal government in general appear to be responding to this charge. For the fiscal year 2010, the EEOC requested and received from Congress a budget increase of $23.4 million – the largest increase in the EEOC's budget since 1999. In February, the EEOC announced its request for an $18 million increase for fiscal year 2011. If granted, the increase between 2009 and 2011 will be greater than the total increase in the agency's budget between 2001 and 2009.

With this infusion of funds, the EEOC has set out to markedly improve its enforcement capabilities. In 2009, the agency had a net new hiring of 155 new employees, and it has plans to continue this trend into the next year, seeking to hire 100 new investigators in fiscal year 2011. In the materials the EEOC published in support of its 2011 request, the EEOC stated that with these new hires, it hoped to be able to decrease the backlog in investigating individual cases, while also taking on an increased role in combating systematic discrimination throughout the workforce. In the same report, the EEOC identified new ways to conduct more efficient investigations, including: scheduling fact-finding conferences with both parties to a charge, providing education for employers on how to respond to a charge, and educating its own employees on its internal procedures for prioritizing charges that appear ready for a determination. The EEOC has articulated a goal of having at least 54% of all private sector charges resolved within 180 days. In its February report, the EEOC stated that it could meet this goal through the hiring of new investigators who could conduct quicker, higher quality investigations. The EEOC has also made the encouragement of private settlement or the use of mediation or alternative dispute resolution (methods in which the parties present their case to a neutral arbitrator for a binding resolution) key components of its efforts to increase efficiency. Finally, the EEOC plans to enhance its litigation efforts to combat systemic discrimination. While the EEOC does not expect an increase in the total number of cases that it will file on behalf of individuals in the next three years, it does expect to undertake larger-scale litigation.

What This New, Refocused EEOC Means to Employers

With the EEOC's increased funding and renewed mission, the EEOC has the potential to dramatically affect the way that private employers respond to claims of discrimination and retaliation. Employers and their attorneys are already experiencing differences in their dealings with this new EEOC.

1. More Investigations. As a result of increased funding, the EEOC may be completing more investigations in a given year. This could lead to the issuing of more "cause determinations" than the EEOC has done in years past when investigations took longer and the backlog built up. More cause determinations could ultimately result in more lawsuits because individuals with a cause determination are more likely to find a plaintiff's attorney willing to take the case.

2. Aggressive Requests for Documents and Information. There has been a marked increase in the EEOC's requests for additional

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information from employers in connection with most charges of discrimination. The EEOC also appears more willing to make use of its subpoena power in order to secure documents it contends are relevant to an investigation.

3. Changes to On-Site Investigations. Employers have also recently experienced a rise in the number of on-site visits by EEOC investigators and changes to how these on-site visits are conducted. Notably, employers have found that on-site investigations are now lasting longer than in years past. The reasons cited for these lengthy investigations have been that the EEOC investigators are interviewing more witnesses than usual and are now requesting that witnesses provide written affidavits summarizing their interviews with the investigator. Indeed, in one recent on-site visit handled by this law firm, the investigator requested that witnesses write down the answer to each of the investigator's questions, which resulted in an on-site visit lasting the entire work day. Other firms are reporting that investigators are insisting on affidavits being prepared on site by management and non-supervisory personnel. On several occasions recently, the on-site visits have resulted in efforts by investigators to examine personnel files for job applications, W-2 forms and periodic performance evaluations. In light of this renewed vigor, we recommend establishing an exhaustive list of individuals the investigator plans to interview, a list of documents to be reviewed, and a description of parts of a facility the investigator plans to visit *before* the on-site investigation takes place so that any disputes over the EEOC's intended scope of the investigation can be worked out beforehand. ■

Special thanks to Jonathan Ross, who assisted with drafting this article.

Caution: Kids at Work – The DOL Amends its Child Labor Regulations

By Ashley Z. Hager

If you currently employ minor children, you likely already know that the U.S. Department of Labor (DOL) restricts the hours and manner in which minors work. By the same token, you also probably know that the DOL's so-called "guidance" on these issues is really just confusing regulations and unofficial enforcement positions that employers have struggled with for years. Well, employers have finally gotten some relief. On May 20, 2010, the DOL amended its regulations concerning the hours that minors can work and the tasks that they can perform. Many of the DOL's changes are not really changes at all though – rather, the DOL has simply formalized its previously unofficial enforcement positions on various topics. But there are a few rules that have changed, and employers who use workers under the age of 18 should be aware of the changes that affect their industry.

Some of the activities that certain minors could not previously perform, but now can perform, include the following:

- Minors age 14 or 15 can now ride in the enclosed passenger compartments of motor vehicles, except when a significant reason for the minors being passengers is for the purpose of performing work in connection with the transporting (or assisting in the transporting) of other persons or property.
- Minors age 16 or 17 may now use lightweight countertop mixers that meet certain specifications (i.e., they cannot be hardwired into the power source, the motor cannot be more than ½ horsepower, and the bowl's capacity cannot exceed 5 quarts).
- Minors age 14 or 15 who are employed in and pursuant to certain work-study programs may now work during school hours and more than 3 hours on a school day.

Some of the more important points that the DOL clarified in its new child labor regulations include the following:

- The prohibitions on minors working during the hours when "school is in session" or working more than 3 hours on a day when school is in session or more than 18 hours in a week when school is in session refer to the local public school where the minor resides – even if the minor attends a private school or is home-schooled.
- The rules concerning the times of day a minor can work and the number of hours a minor can work do not apply to minors who have graduated, been permanently expelled, are under a court order instructing them not to attend school or received a waiver or have been excused from school attendance.
- While minors age 14 or 15 cannot load or unload motor vehicles, they can load and unload light, non-power-driven personal hand tools that they will be using (such as brooms or rakes) and personal items (such as backpacks or coats).
- The DOL has formalized its longstanding interpretation that the prohibition on minors age 14 or 15 from working in walk-in freezers or meat coolers does not restrict these minors from briefly entering freezers momentarily to retrieve items.
- Minors age 14 or 15 can perform work of a mental or artistically creative nature, such as computer programming, teaching, singing or drawing. ■

The Not So Obvious Truth About Managing Employees With Obvious Disabilities

By Laura Windsor and Tevis Marshall

Under the Americans with Disabilities Act (ADA), employers are required to provide reasonable accommodations to disabled employees unless doing so would impose an undue hardship on the employer. Reasonable accommodations, depending on the nature of the disability, may include a wide range of options, from providing special equipment, to modifying an employee's work schedule, to providing a leave of absence. Generally, it is the responsibility of the *employee* with a disability to inform the employer that he or she needs an accommodation, which then triggers the employer's obligation to participate in the "interactive process" of identifying and providing a reasonable accommodation to the employee. However, when indeed a disability and need for accommodation are obvious, the *employer's* obligation to provide an employee with a reasonable accommodation is triggered even when the employee never mentions his or her disability and never requests an accommodation.

Courts have held that employers must offer the employee an accommodation, in the absence of the employee's request for one when a disability and need for accommodation are obvious. The courts' rationale is fairly straightforward. The ADA requires employers to reasonably accommodate their employees' "known" disabilities. A disability is considered to be *"known"* by the employer when the employee (or a third party) informs the employer of the disability and need for accommodation. In addition, an employer is deemed to have knowledge of an employee's disability if that disability is obvious. Courts have found that if the employee's disability and need for accommodation are obvious, and the employer fails to offer a reasonable accommodation, the employer violates the ADA.

Consider, for instance, a recent decision from the Second Circuit, in which an employee with cerebral palsy worked as a sales associate with a major retailer. The evidence showed that his disability manifested itself in noticeably slower walking, walking with a limp, recognizably slower and quieter speech, and the inability to look directly at people when speaking with them. Indeed, one witness testified that "just by looking at him, you could tell he had a disability." The employee never requested an accommodation and, furthermore, testified that he did not think that he needed an accommodation. Nonetheless, the court found that the employer should have initiated the interactive process to identify a reasonable accommodation for the employee's "known" disability. The court commented that in such situations "the employee, because he does not consider himself to be disabled, is in no position to ask for an accommodation." Thus, the court concluded that an employer has a duty to offer a reasonable accommodation if it knows, or reasonably should know, that an employee is disabled and needs an accommodation.

Similarly, a federal court in Oklahoma found that an employee's failure to request a reasonable accommodation was not fatal to her ADA claim where it was undisputed that her employer was aware that she was deaf and legally blind. The employee claimed that she was unable to comprehend policies or communicate with her co-workers and that her employer discriminated against her by failing to provide her with a translator or interpreter. The court agreed and held that, because the employee was "virtually unable to communicate such a request to [her employer] based upon her impairments," her employer knew the employee was disabled and should have initiated the interactive process to identify a reasonable accommodation.

An employer's obligation to offer an accommodation before an employee's formal request also applies to obvious *mental* disabilities. As one court has stated: "[P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want a reasonable accommodation' particularly when the employee has a mental illness." Instead, that court reasoned, the employer has to "meet the employee half-way" and, if it appears that the employee may need an accommodation but doesn't know how to ask for it, the "employer should do what it can to help." Thus, in a case where the plaintiff had an IQ score that placed her in the "borderline mentally retarded range" and it was "common knowledge" among other employees that she had a significant learning disability, the employer was obligated to initiate the interactive process despite the absence of an express request for accommodation.

In sum, the law is clear that employers should not wait for an employee to request an accommodation when a disability is obvious. For example, if the employee is hearing impaired, the employer should ask the employee whether he needs an accommodation, such as a TTD (a telecommunication device for the deaf or hearing-impaired), in order to assist in the performance of the employee's job.

This does not mean that every potential manifestation of a disability should be met with an offer for accommodation. For instance, courts have found that stress and unexcused absences are not considered obvious manifestations of a disability. In addition, the perception that an employee has poor judgment and impulse control and "behaved irresponsibly" were not sufficient to place employers on notice of the need for an accommodation. Moreover, employers

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Immigration Audits Now Focused on I-9s – Are You Ready?

By Aimee Clark Todd

The United States Department of Homeland Security has changed its focus from conducting raids to auditing employer records, specifically focusing on I-9 records as a starting point in its quest to eliminate the hiring or retention of undocumented workers. These I-9 audits have been highly publicized in the media, including the issuance of 652 notices in July 2009 and another 1,000 in November 2009.

These government audits are focusing not only on the employment of unauthorized workers, but also on proper completion of the I-9 form. For example, most employers know that they are required to complete their portion of the I-9 forms within 3 business days after an employee is hired. But did you know that the deadline for *the employee* to complete his or her portion of the 1-9 form (Section 1) is the first day of employment or earlier? Well, it is. The government is planning to treat violations such as this one as substantive violations (rather than technical ones) meaning that such violations cannot be cured and fine levels will be increased greatly! So, be sure to have your employees complete their portion of the 1-9 form on or before the first day of their employment. But be careful: an employer must not have an employee complete an I-9 form before an *offer* of employment is given.

Fines imposed for applicable substantive violations can range from $110 to $1,100 per I-9 violation. For this reason, all companies should be vigilant about I-9 compliance and should not be under the mistaken impression that audits only penalize those with undocumented workers.

What can you do to ensure your company is in compliance? We recommend the following as a basis for your I-9 compliance program:

- Develop written I-9 policies
- Provide regular training for the company representatives responsible for I-9 completion
- Conduct regular, independent audits of your I-9 records.

WANT SOMETHING FOR FREE?

With the above-referenced information in mind, we are offering a free service to review 10 of your randomly selected I-9s (and supporting documentation if you follow the policy of copying I-9 documentation). We will then provide you with our review of those I-9s and suggestions going forward. To take advantage of this service, please contact:

Aimee Clark Todd:
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(404) 885-3194.

The Not So Obvious Truth *Continued*

need not be concerned that by approaching an employee who has an obvious disability, and asking that employee if he needs an accommodation, the employer would be "regarding" the employee as disabled. The Equal Employment Opportunity Commission (EEOC) has found that an offer to provide a reasonable accommodation in light of a perceived disability does not violate the ADA. Furthermore, several courts have recognized that "an offer of accommodation does not, by itself, establish that an individual was regarded as disabled." However, an offer of accommodation with reference to an employee's "disability" and resulting restrictions, if significant, could support a finding that the employer "regarded" an employee as disabled. When in doubt about approaching an obviously disabled employee with an offer of a reasonable accommodation, employers should consult with legal counsel. ■

Speaking of Disabled: The ADA's Limitations On Disability-Related Inquiries of Current Employees

By Christina H. Bost-Seaton and Brandon Dhande

The Americans with Disabilities Act (ADA) limits an employer's ability to ask an employee questions about his or her medical condition. The ADA imposes different obligations on employers at three different stages of the hiring and employment process: (1) pre-offer, (2) post-offer, but pre-employment, and (3) during employment. But the rules are different at each stage, and employers are often perplexed as to what questions can be asked of applicants and employees. This article focuses specifically on medical inquires made during the course of an employee's employment.

Employers are allowed to conduct disability-related inquiries of current employees if they are job-related and consistent with business necessity. Of course, the job-relatedness and business necessity of a given question will depend on the type of job at issue. For example, it may be appropriate to ask whether an employee in a physically demanding position has a heart condition. In that case, the employer may have a reasonable belief that the employee is putting himself or herself in danger. In contrast, because the sedentary nature of administrative work is unlikely to put an administrative assistant at risk if he or she has a heart condition, questions about an administrative assistant's heart condition probably would not be job-related and, therefore, would exceed the ADA's limitations on permissible medical inquiries.

These types of questions can be tricky and employers may sometimes feel like they do not know what they can and cannot ask about an employee's medical condition. Indeed, some questions are acceptable to ask an employee (regardless of the job involved), while others are clearly unacceptable, and still others may depend on the circumstances. The following guidelines will help keep supervisors out of trouble and in the good graces of their legal department.

Questions Employers May Ask

Most employers recognize that it is acceptable to ask general questions that may unintentionally provoke medically-related responses, such as "How are you today?" or "Is everything okay?" But, there are also several others scenarios that permit employers to lawfully navigate into more specific questioning about an employee's health condition:

- After an unexcused absence, a supervisor may ask questions such as "Why were you absent from work yesterday?" While the answer to this question may identify a disability, the question serves a business purpose and is not aimed at uncovering a medical condition since there are a wide variety of reasons an employee may miss work.

- A supervisor may ask questions such as "Are you feeling better today?" or "Do you have a doctor's note?" once an employee returns from sick leave. These types of questions are not directed at identifying a particular disability and the answers may reflect the employee's fitness for duty, which is a legitimate business concern.

- It is typically acceptable to ask an employee how he broke his arm, sprained his ankle, or suffered from some other obvious condition that is not a "disability" covered by the ADA.

- After an employee's drug test comes back positive, an employer may ask "What medications have you taken that might have resulted in this positive test result?" and "Are you taking this medication under a lawful prescription?"

- If an employee requests an accommodation for her medical condition, an employer can ask for details and medical support in order to explore whether the requested accommodation is reasonable and available.

- If the employee suddenly stops performing the job well, the employer can ask "Why is your performance suffering?"

Questions Employers Should Never Ask

Just as some things are better left unsaid, there are certain disability-related questions that should not be asked at any time. Regardless of the job at issue, the following questions will likely find employers in hot water, legally speaking:

- "What are all of the prescription medications you currently take?"

- "How much alcohol do you drink?" or "Have you ever been treated for alcoholism?"

- "Why are you in a wheelchair?"

- "Do you have any medical conditions or are you taking any medications that are affecting your job performance?" (see below for how such questions should be asked).

- Upon learning that an employee is gay, asking him "Are you HIV positive?"

- While the focus of this article is the ADA, another statute – the Genetic Information Nondiscrimination Act of 2008 (GINA) – prohibits medical inquiries by an employer into an employee's or family member's genetic history, such as "Is there a history of heart disease, prostate cancer, or other diseases or disorders in your family?"

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Speaking of Disabled *Continued*

As you can see, these broad-based questions do not focus on an individual's ability to perform the job. Instead, they relate to a history of disability or go beyond the scope of information that might be needed to evaluate job performance. Because there are few, if any, situations in which employers need to know the answers to these questions, they should be avoided in favor of more directed, job-related inquiries.

Questions That May Depend on the Job at Issue

The majority of medical questions that employers actually want to ask will fall into the "it depends" category. The following examples illustrate the need for disability-related questions to be closely tailored to job functions:

- An employer can ask an employee in a safety-sensitive job (such as a bus driver, power plant operator, pilot) questions about whether she takes prescription medication that may cause drowsiness or otherwise impair her ability to safely perform her job.
- A police officer who appears anxious or depressed may be asked about his mental state if there is evidence to suggest his performance is being affected.
- A firefighter may be asked about behavior that appears consistent with post-traumatic stress disorder if there is reason to believe her safety is at risk or if her job performance has declined.
- If an employee volunteers information about his health condition, the employer may ask follow-up questions to determine the employee's ability to perform the essential functions of the job.

The ADA's rule on the scope of permissible medical inquiries an employer may make of its employees is clear – it must be job-related and consistent with business necessity. But, this rule is often difficult to apply. While the illustrations above are helpful to use as examples, it is important to reiterate that ADA–compliance issues are frequently fact-specific and the best approach may depend on the particular issues of a situation. Another question you should ask yourself is, "Do I really want to know more about an employee's medical condition?" especially given that a lack of knowledge about a disability is a defense in an ADA lawsuit.

The good news practically speaking is that it is rare for an impermissible medical inquiry to serve as the sole basis of a lawsuit. Nevertheless, evidence of an impermissible medical inquiry can support an independent claim under the ADA, and is often presented to support a termination, failure to promote or other disability discrimination claim brought under the ADA. For these reasons, employers should try to avoid these types of questions in the first place. If you have questions about whether a specific inquiry is permissible under the ADA, please contact the Labor and Employment Practice Group at Troutman Sanders LLP for assistance. ■

The DOL Clarifies that Non-Traditional Parents Have FMLA Rights, Too

The Family and Medical Leave Act (FMLA) permits otherwise qualifying employees who stand "in loco parentis" to a child to take FMLA-protected leave for the birth or placement of a child, to bond with a newborn or newly placed child, or to care for a child with a serious health condition. But, employers have wrestled for years with the issue of how the FMLA applies to employees who request leave for the birth or care of a child on the grounds that they stand "in loco parentis" to the child when there is no legal or biological parent-child relationship present. So what does "in loco parentis" mean?

Well, the U.S. Department of Labor Wage and Hour Division (DOL) has finally issued a formal interpretation opinion letter that attempts to clarify the definition of "in loco parentis." Specifically, the DOL has stated that "in loco parentis" includes individuals who care for a child by providing either day-to-day care or financial support for a child, regardless of the legal or biological relationship to the child. Thus, according to the DOL, non-traditional parents like unmarried or same-sex partners who have no legal or biological relationship to the child may be afforded FMLA protections if they otherwise meet the DOL test. By comparison, the DOL clarifies that an individual who cares for a child while the child's parents are on vacation does not stand "in loco parentis" to the child. The DOL further notes that there is no limitation on the number of parents a child may have under the FMLA, and the fact that a child has a biological parent in the home or both a biological mother and father does not prevent an individual from standing "in loco parentis" to a child for purposes of FMLA leave. The DOL states that an employee needs to provide only a "simple statement asserting that the requisite family relationship exists" in these situations.

For assistance in reviewing and revising FMLA-leave policies and practices to ensure that they are consistent with this interpretation, please contact a member of the Troutman Sanders LLP Labor & Employment Practice Group. The DOL's June 22, 2010 interpretation letter can be accessed and read in its entirety at ***http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm***

Title VII Class Actions: Has The Ninth Circuit Opened The Floodgates?

By Christina Lucio and Laura Windsor

In a sharply divided, and likely to be hotly debated, 6-5 ruling, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") upheld, in large part, a federal district court's decision to certify a broad and diverse nationwide class of female employees who alleged that Wal-Mart discriminated against them and similarly-situated employees because of their sex in its pay and promotional practices in violation of Title VII of the Civil Rights Act of 1964. The class of plaintiffs includes both salaried and hourly female employees in a wide range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country since December 26, 1998. Despite the indisputable differences among the class members, including different geographic locations, management structures, job titles, pay levels, and tenure with the company, the Ninth Circuit generally affirmed the district court's certification of the class and only excluded employees who were no longer employed by Wal-Mart when the lawsuit was filed in 2001. Now that the Ninth Circuit has upheld class certification, the path has been cleared for potentially one million female employees to join the class, unless Wal-Mart successfully appeals the Ninth Circuit's ruling to the U.S. Supreme Court. The case is *Dukes v. Wal-Mart Stores, Inc.*

Summary of Decision

The *Dukes* case arose as follows: in 2001, Betty Dukes and six other female employees of Wal-Mart filed a class action lawsuit alleging that women employed in Wal-Mart stores are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and that women receive fewer, and wait longer for, promotions to in-store management positions than men. They claimed that the strong, centralized structure at Wal-Mart facilitates gender stereotyping and discrimination throughout Wal-Mart stores.

Wal-Mart vehemently denied these allegations and further argued that class certification is inappropriate because the employees' claims are highly individualized, as the allegedly discriminatory decisions were made by thousands of different managers working in thousands of different stores throughout the country. Wal-Mart further maintained that the employees' claims for monetary relief are unique to each individual and such claims will dominate the proceedings.

The district court rejected Wal-Mart's arguments and certified the class. On appeal, the Ninth Circuit agreed with the district court and likewise concluded that the Plaintiffs offered sufficient evidence to raise a common question for further review by the court of whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII. The Court further concluded that evidence of Wal-Mart's subjective decision-making practices could present a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory.

Practical Implications for Employers

Undoubtedly, the *Dukes* decision will be scrutinized because of the tremendous size and diversity of the potential class. However, the decision also provides some insight on class certification law in the Ninth Circuit (unless and until Wal-Mart successfully appeals the ruling to the U.S. Supreme Court), including the following:

- **More Title VII lawsuits:** Employers should be aware of a potential increase in the kind, number, and size of discrimination suits. In fact, one dissenting judge who reviewed the case on appeal (and ruled in favor of Wal-Mart) cautioned against a flood of Title VII lawsuits, and stated "[p]ut simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions." As the dissenting judge's opinion alluded, before the Ninth Circuit's ruling, federal courts generally required a showing of a uniform practice of actual discrimination perpetrated in a manner common to the class. However, here, the anecdotal evidence and controversial expert and statistical testimony were sufficient to obtain class certification.

- **Decentralized Decision-Making Is Not a Shield Against Class Certification:** Employers must note that decentralized, subjective decision-making does not necessarily protect an employer from a class certification ruling. Indeed, the Ninth Circuit ruled that such a decision-making scheme can provide a "ready mechanism for discrimination" and that courts should scrutinize the scheme carefully. While such organization is insufficient on its own to establish a finding of commonality, where such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination, courts will often find that the required element of commonality of claims is satisfied.

- **Increased Use of Social Science Experts:** Given the outcome in *Dukes*, it is likely that plaintiff classes will increase their use of social scientists to establish commonality in the class certification stage. Here, the class evidence of corporate practices and policies was largely based on the testimony of one sociologist who employed a "social framework analysis" to examine the distinctive features of Wal-Mart's policies and practices and evaluate them against factors that create and sustain bias and those that minimize bias. The sociologist's opinion was based solely on subjective and anecdotal evidence, and it was heavily relied on in the Court's analysis. An employer facing such testimony should be sure to challenge such testimony. ■

Legislative Update

By Chad C. Almy

Employers Not Out of the Woods Yet: A Reinvigorated Congress Takes Aim at Strengthening Employee Rights

Following President Obama's election, many pundits predicted that Congress would transform employment law by granting employees unprecedented rights and saddling employers with an ever-increasing burden of regulations and potential liability. Now that the economy appears to be on the mend, healthcare reform is finally settled, and the related gridlock is starting to loosen, it seems Congress is poised to launch this predicted push toward reforming employment law. Although only a few of the following bills are likely to ultimately become law, all are the result of this revived push by Congress and highlight the key issues that are currently on Congress's radar screen. Note: All predictions are subject to change with the upcoming mid-term elections, when the respective majorities in the House and Senate will likely change. Specifically, 36 seats in the Senate and all seats in the House are up for grabs in the November 2, 2010 election.

Employment Non-Discrimination Act (ENDA) (H.R. 3017, S. 1584)

Current status of law: While there are some state statutes and local ordinances providing such protection (including in California, Oregon, New Jersey, and Colorado), there is currently no federal law prohibiting discrimination in the context of employment decisions on the basis of an individual's sexual orientation or gender identity.

What will change: Under the ENDA, employers would no longer be able to make employment decisions based on an individual's perceived or actual sexual orientation or gender identity. The bill is designed to add protections for this class of individuals identical to those currently granted under Title VII (which prohibits discrimination in employment decisions on the basis of gender, race, color, national origin, or religion). As with other forms of discrimination prohibited by the federal government, the EEOC would have the power to issue regulations and enforce the ENDA.

Why you care: The ENDA would add another protected class that employers must be aware of when making employment decisions. Consequently, it would increase employers' exposure to additional regulation by the EEOC and potential liability from private civil actions. Employers would also need to update their EEO and anti-harassment policies and training materials to include sexual orientation and gender identity as protected classes.

Likelihood of becoming law: The bill passed in the House in 2007, and is likely to pass again in the near future. In fact, House Speaker Nancy Pelosi has said she believes the bill will come to the House floor "pretty soon." President Obama has indicated that he will sign the bill if it makes it to his desk. That leaves the Senate as the final hurdle for the ENDA to clear. It is hard to predict exactly what will happen here, as partisan disputes seem to have reached unprecedented heights. The ENDA will likely follow healthcare and immigration as a highly contested and hotly debated topic on the Senate floor.

Equal Access to COBRA Act (S. 3182)

Current status of the law: The Consolidated Omnibus Budget Reconciliation Act (COBRA) allows qualifying employees to extend coverage under their employer's group health insurance plan for up to 36 months after their termination. These benefits are currently only available to the affected employee and the employee's spouse and dependent children.

What will change: COBRA benefits would be extended to same-sex domestic partners who are covered under the employer's group health insurance plan.

Why you care: The bill would potentially add individuals to employers' group health plans and result in increased costs, including employer-paid premiums.

Likelihood of becoming law: The bill has been introduced to committee, but there is no indication that it will be fast tracked as a priority in the Senate. Despite not being considered very controversial, it is too early to predict the bill's chances of becoming law.

Paycheck Fairness Act (H.R. 12, S. 182)

Current status of the law: The Equal Pay Act (EPA) became law in 1963, prohibiting discrimination on account of sex in the payment of wages by employers. Class members must affirmatively opt-in to any action through written consent. Employers are not liable under the EPA if a discrepancy in pay is due to "any factor other than sex."

What will change: The Paycheck Fairness Act would amend the EPA by narrowing an employer's affirmative defense for a pay discrepancy between men and women from "any factor other than sex" to being job related and consistent with business necessity. The bill would also allow for previously unattainable compensatory and punitive damages, as well as opt-out class actions.

Why you care: If passed, the Paycheck Fairness Act would make gender-based pay discrimination claims both more prevalent and more difficult to defend. Thus, employers should carefully review their pay practices, making sure that all pay decisions are job related and consistent with business necessity. And as always, employers should ensure that no glaring discrepancies in pay based on gender exist within their workforce.

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Likelihood of becoming law: The Paycheck Fairness Act has been "on deck" since breezing through the House alongside the Lilly Ledbetter Fair Pay Act (which became law in January of 2009). Now that things on the economic and healthcare fronts have calmed, the Paycheck Fairness Act is expected to get a strong push for Senate consideration later this year. If it is passed in the Senate, President Obama has indicated he will waste little time in signing it into law.

Healthy Families Act (H.R. 2460, S. 1152)

Current status of the law: There is currently no federal or state law that requires employers to provide paid sick leave to employees.

What will change: The Healthy Families Act would mandate that employers give their employees at least one hour of paid sick leave for every 30 hours on the job. The leave would be capped at seven paid sick days a year per employee. Employees would be entitled to use the paid sick leave to care for themselves or certain family members.

Why you care: This bill will make paid sick leave mandatory and could increase the amount of paid sick time an employer offers its employees. Depending on the size and current sick leave policy of the employer, the costs and logistical changes resulting from this legislation could be significant.

Likelihood of becoming law: This bill was introduced in both the House and Senate in March of 2009 and has not made its way out of committee in either forum. Due to a relative lack of support, stemming in no small part from the perceived oppressive nature of the bill to many employers, the bill is one of the least likely to be passed on this list.

Emergency Influenza Containment Act (H.R. 3991)

Current status of the law: There is currently no law governing this area.

What will change: Employers would be required to give employees up to five paid sick leave days a year if an employer "directs" or "advises" them to stay or go home due to contagious illness. If employers already provide at least five paid sick days to full-time employees (and part-time employees on a pro rata basis), they would be exempt from the law. The employer can end the paid sick leave at any time by informing the employee that they may return to work. Employees cannot be fired, disciplined, or retaliated against for following the employer's directive to stay or go home.

Why you care: Similar to the Healthy Families Act, the bill could increase the amount of paid sick time employers offer employees. The impact of the Emergency Influenza Containment Act appears to be less significant, however, as the employer retains discretion as to when employees can use the paid sick leave.

Likelihood of becoming law: Although this bill is more likely to pass than its companion Healthy Families Act, it is still considered a relative long shot due to more pressing congressional agenda items.

Pandemic Protection for Workers, Families, and Business Act (H.R. 4092, S. 2790)

Current status of the law: See the Healthy Families Act and Emergency Influenza Containment Act above.

What will change: This bill is very similar to the Healthy Families Act. It would require employers to give full-time employees seven paid sick days a year (and part-time employees an equivalent, pro-rated amount). The paid sick days could be used by the employee to obtain medical diagnosis or care for a contagious illness for the employee or employee's child, or at the direction of a health care provider, to avoid spreading the illness to co-workers (or to care for a child directed to stay home to avoid contaminating classmates). The bill also allows an employee to use paid sick leave to obtain preventive care for the employee or employee's child.

Why you care: For identical reasons to the Healthy Families Act and Emergency Influenza Containment Act – an increase in the amount of paid sick time employers are required to offer employees.

Likelihood of becoming law: Not very likely for the same reasons discussed above regarding the Healthy Families Act.

Protecting America's Workers Act (H.R. 2067, S. 1580)

Current status of the law: The Occupational Safety and Health Act (OSH Act) mandates safe and healthful working conditions by authorizing enforcement of workplace standards developed under the Act.

What will change: Penalties for violations of the OSH Act will increase dramatically. On the top end, fines for repeat violations that lead to a fatality will nearly quadruple, going from $70,000 to $250,000 per incident. Additionally, the criminal burden of proof for serious violations would be lowered from "willful" to "knowing" and employers and top management could find themselves individually liable for workplace death, facing jail time up to 10 years. Protections for whistleblowers under the OSH Act would also be increased.

Why you care: With significantly increased penalties and individual management employees potentially facing extensive jail time, this would be a huge paradigm shift in the OSHA world.

Likelihood of becoming law: Although, in the wake of the West Virginia mine tragedy, there is a lot of momentum generally behind the workplace safety movement, this bill has been introduced several times previously and has never made it to a vote. A similar result is expected this time around.

Equal Employment for All Act (H.R. 3149)

Current status of the law: The Fair Credit Reporting Act (FCRA) regulates the collections, dissemination, and use of consumer information. Currently, employers can obtain and rely upon information obtained in consumer reports – including consumer credit information – to make employment decisions.

What will change: The bill amends the FCRA to prohibit a non-governmental or financial employer from obtaining or using a consumer report or an investigative consumer report to make employment decisions, if the report contains information that bears upon the consumer's creditworthiness, credit standing, or credit capacity.

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Are You Taking Advantage of the HIRE Act?

The Hiring Incentives to Restore Employment Act (HIRE Act) creates two different tax incentives for private-sector employers who hire certain previously unemployed workers:

1. Social Security Tax "Holiday"
Employers are exempt from paying the 6.2% employer share of FICA (Social Security) taxes on wages paid to "qualified individuals" (see below for definition) during the time period from March 19, 2010 through December 31, 2010. Employees are still expected to pay their share of these taxes, and both employers and employees are still required to pay their share of Medicare taxes.

2. Bonus for Retaining Employees
Employers are also eligible for a separate business tax credit of up to $1,000 if a qualified individual remains employed for at least 52 consecutive weeks and is paid wages for the last 26 weeks of the 52-week period in an amount that is at least 80% of the wages paid during the first 26 weeks of the 52-week period.

Under the HIRE Act, a "qualified individual" is a newly hired employee that meets all of the following conditions:

- Begins employment after February 3, 2010 and before January 1, 2011.
- Is not hired to replace another employee (unless that former employee voluntarily quit or was fired for cause (including "downsizing")).
- Is not a relative of the qualified employer or anyone owning 50% or more of the stock or other capital of the employer.
- Certifies, by signed affidavit, under penalty of perjury, that he or she was not employed for more than 40 hours during the 60-day period prior to the beginning of employment. The IRS Form W-11 Employee Affidavit is available at http://www.irs.gov/pub/irs-pdf/fw11.pdf, but employers can use a substantially similar form if they prefer.

According to the IRS, some classifications of employees that may meet these eligibility requirements are (1) recent college and high school graduates, (2) paid summer interns, and (3) individuals previously laid off due to lack of work who are rehired when work resumes.

As the tax advantages under the HIRE Act can be significant for employers (and are only available to employers for a limited period of time), it is recommended that employers analyze their recent and future hires to determine if they qualify for any tax incentives under the HIRE Act.

Legislative Update *Continued*

Why you care: If the bill becomes law, consumer reporting agencies will likely take steps on their own to remove information regarding an applicant's credit history from the reports they provide to employers. Nevertheless, employers still need to be careful not to rely impermissibly on any consumer report that contains credit history information. If the bill becomes law, employers who currently procure consumer reports to screen applicants before making hiring decisions will have to change the manner in which they conduct background checks, as it will no longer be permissible to rely upon information regarding an applicant's credit history in making hiring decisions.

Likelihood of becoming law: Although several similarly-minded bills were recently introduced on the state level, it appears unlikely that there will be much movement with the federal version any time soon.

Democratic Senator Robert C. Byrd of West Virginia died on June 28, 2010. A special vote will be held in conjunction with November's mid-term elections to select Byrd's replacement for the remaining two years of his term. An interim replacement, Democrat Carte Goodwin, was sworn into office on July 20, 2010. Goodwin will serve until the winner of the special election is sworn into office in January of 2011. The special vote takes the number of available Senate seats in the mid-term elections to 37. ■

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November 11, 2010
Atlanta, Georgia

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