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Perspectives on the Final Regulations to the ADA Amendments Act

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By **Evan H. Pontz** and **Brandon V. Dhande**

The wait is over. The new regulations interpreting the Americans with Disabilities Act (ADA) Amendments Act are now effective, and with them comes a new world of disability claims for employers. The ADA Amendments Act expanded what it means to be disabled, and favors coverage of individuals to the "maximum extent" permitted by the ADA. Earlier this year, the Equal Employment Opportunity Commission (EEOC) issued final regulations interpreting the ADA Amendments Act. As explained below, these new rules undoubtedly pose new challenges and many questions for employers.

Key Changes in the Final Regulations to the ADA Amendments Act

The new regulations offer the EEOC's guidance on what the ADA Amendments Act means for employees and employers. In a nutshell, they clarify that employers should focus less on whether an employee is "disabled," and more on what employers can do to reasonably accommodate an employee's requests for assistance in performing the job. For instance:

- **Employees no longer need to show that they are "severely restricted to establish that they are disabled.** Before the ADA's amendment, courts found that employees must demonstrate that they were "severely restricted" in performing a major life activity to be disabled under the ADA. With the ADA Amendments Act, Congress explicitly rejected that standard. Now, an employee is considered disabled if he or she has difficulty performing major life activities that the rest of us can do with little or no problem.

- **More individuals will be covered because the amendments have expanded the list of major life activities.** The ADA Amendments Act provides a non-exhaustive list of examples of major life activities. The regulations add to this list activities such as "sitting," "reaching," and "interacting with others"—activities that were not considered major life activities before the enactment of the ADA Amendments Act.

- **Employees are now considered disabled even if they use medication or other devices that virtually eliminate all signs of their impairment.** Before the ADA Amendments Act, individuals were not considered disabled if the effects of their impairments were controlled by medication or other assistive devices. For instance, someone whose epileptic seizures were well-controlled by medicine was not disabled. Those days are over. Now, even if a condition is controlled by certain "mitigating measures," like medication, prosthetic devices, etc., the employee with that condition is still deemed "disabled" for purposes of the ADA Amendments Act.

- **Impairments that are episodic or in remission must be considered.** The ADA Amendments

Act provides that an impairment that is episodic or in remission still meets the definition of disability if it would substantially limit a major life activity when active. The regulations state that conditions such as epilepsy, post-traumatic stress disorder, hypertension, diabetes, major depression, bipolar disorder, and asthma may qualify for protection as impairments that are episodic or in remission.

We Asked…And Here's What HR Professionals Had to Say About the Final Regulations

To get a sense for how the ADA Amendments Act and the regulations are impacting employers, we spoke with human resources (HR) professionals who are responsible for disability and wellness management. These professionals view the ADA Amendments Act as an important and substantive change in the law. There is a clear sense that an employer's efforts to engage in the interactive process will be more important under the ADA Amendments Act and the regulations. Specifically, the HR professionals we interviewed believe that the new rules will result in more requests for accommodation and, consequently, more headaches for employers who believe they must choose between the expense and burden of granting requests and potential legal liability for denying requests.

The HR experts we spoke with also expressed concern that the ADA Amendments Act and regulations could force changes to their workplaces. For instance, in many industrial workplaces, disability issues are closely related to safety concerns. Employers may have a legitimate need to prevent employees from working while under the influence of certain prescription drugs that affect employee alertness or behaviors. But since the ADA Amendments Act is expected to increase the percentage of employees who qualify as "disabled," the HR professionals we interviewed wondered if employers will struggle to enforce workplace safety rules and other policies that may conflict with providing accommodations to a significant number of their employees.

Of course all is not lost under the ADA Amendments Act. For all of the new changes, employers still have the same rights and remedies as before. Most importantly, they do not need to maintain someone's employment if that person cannot perform the essential functions of the job. Thus, it is now especially important that employers have clear, correct, updated and fully-defensible job descriptions and that they ensure that their employees understand the expectations of the job. The HR professionals we interviewed plan to educate themselves further on the ADA Amendments Act and the regulations. Their goal, as it was explained to us, is to avoid becoming a "test case" for the EEOC or courts that are still learning and interpreting these new rules.

In a Recent Case Decided Under the ADA Amendments Act, the Court Held…

Among other things, the HR professionals we interviewed were troubled by changes in the ADA Amendments Act and the regulations stating that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. "How will this new rule affect requests for accommodation?" they asked. Fortunately, a recent case offers an illustration of how this new rule may be applied in real life.

In *Hoffman v. Carefirst,* Steven Hoffman worked as a service technician for a medical supply company. Hoffman suffered from advanced renal cancer, which ultimately required surgery to remove one of his kidneys. After his company signed a new contract that would require all service technicians to work extensive overtime, Hoffman asked for an accommodation and produced a doctor's note stating that he should be limited to working forty hours per week because of his condition. Previously, Hoffman had no work restrictions. His company initially refused this accommodation and terminated Hoffman. Perhaps realizing its mistake, the company offered to rescind the termination and limit Hoffman's work week, but only if Hoffman agreed to a new work location (that would require an additional two-hour commute). Hoffman refused this offer and sued, claiming that the company's actions violated the ADA Amendments Act.

In deciding the case, the Illinois federal court noted that the ADA Amendments Act has shifted the focus of the ADA to the interactive process and away from questions related to whether an employee has a disability. While the company argued that Hoffman's cancer was in remission and therefore did not constitute a disability, the court disagreed, citing what it termed the "clear language" of the ADA Amendments Act to the contrary. The court further held that the company's efforts to accommodate Hoffman were inadequate because no evidence established why Hoffman's proposed accommodation

(of not working overtime) would have created an undue hardship. The lesson from *Hoffman* is clear: when faced with evidence that an accommodation is medically necessary, employers need to grant the accommodation or point to evidence of a hardship that the requested accommodation is too problematic to allow. In many cases, employers' defenses will fail if they rely exclusively on attempting to prove that a given condition is not a disability that falls within the protections of the ADA, as amended.

Final Thoughts on the Final Regulations

The ADA Amendments Act and the regulations represent an important and substantive shift in the way employers are interacting with the large number of employees in their workforce who have medical conditions or limitations covered under the law. Dealing with requests for accommodation through the interactive process remains a key function of HR professionals and management employees who receive such requests. These new rules are still being developed and interpreted in the courts in decisions like *Hoffman*. The Troutman Sanders Labor & Employment group will keep you informed as the case law develops in this important area of law and is here to help manage situations that may arise in your workplace.

Could the Unemployed be the New Protected Class?

By **Katherine Birmingham** and **Seth T. Ford**

Denying employment opportunities to individuals because of their unemployed status may someday become unlawful discrimination. On September 12, 2011, President Obama introduced to the United States Congress the American Jobs Act of 2011 (the Jobs Act), which includes a provision entitled the "Fair Employment Opportunity Act of 2011" (the Proposed Act). Generally, the Proposed Act seeks to prohibit employers and employment agencies from disqualifying the unemployed from employment opportunities, either by failing to consider or hire them on the basis of their unemployed status or by publishing announcements for employment opportunities that indicate unemployed persons will not be considered.

In the context of private employers, the Proposed Act would be administered and enforced by the Equal Employment Opportunity Commission (EEOC), and claims would be subject to the procedural requirements of Title VII of the Civil Rights Act of 1964 (Title VII). Remedies for violations would also parallel Title VII for claims asserted by individuals who were not considered or hired because of their unemployed status, and would include potential liability for injunctive relief, back pay and attorneys' fees. Employers who violate the Proposed Act through ads or job postings indicating that the unemployed will not be considered may be subject to a court order enjoining them from further violations, as well as adverse awards requiring payment of attorneys' fees, costs and liquidated damages of up to $1000.00 for each day of the violation.

While the Proposed Act generally seeks to prohibit discrimination against the unemployed, it would permit employers to consider the reasons for a candidate's unemployed status in assessing an individual's ability to perform a job. Employers would also be allowed to consider an individual's unemployment if preference for a candidate with recent employment in a similar or related job is consistent with the legitimate needs of the business.

While the Proposed Act is new, the interest in prohibiting potential discrimination against the unemployed is not. Indeed, the issue has received a lot of attention this year. Also known as the Fair Employment Opportunity Act of 2011, House Bill 2501 and Senate Bill 1471 were introduced in July and August of 2011, respectively. These bills also seek to prohibit discrimination against the unemployed. The pending House and Senate bills are notably broader than the Proposed Act in the scope of individuals protected. The Proposed Act would protect those individuals who do not have a job, are available for work and are searching for work when the action alleged to violate the Proposed Act occurred. The more expansive House and Senate bills, however, propose protection for a broader range of individuals by defining "status as employed" to include an individual's present *or past unemployment, regardless of the length of that period of unemployment*.

In February 2011, the EEOC held a hearing on the issue of whether employers and employment agencies are excluding unemployed individuals from applicant pools. The Proposed Act and House and Senate Bills are primarily concerned with job creation and the economic impact of such alleged

exclusions. In contrast, the EEOC hearing focused on the degree to which such unemployed individuals are being excluded from applicant pools, possible reasons employers and employment agencies may make such exclusions, and the impact of such exclusions on protected groups, such as women and racial minorities. Additionally, the commissioners and panel members examined whether existing equal employment laws might already protect unemployed persons from discrimination. While the Commission drew no conclusions during the hearing regarding the legality or scope of the practice of excluding the unemployed from candidate pools, it expressed concern for the potential disparate impact on multiple protected classes if the practice is used to screen candidates.

In addition to potential federal legislation, several states have also addressed discrimination against the unemployed. New Jersey enacted legislation in June that penalizes employers for job postings that show bias against the unemployed. This new statute does not create a private cause of action. It does, however, allow the New Jersey Department of Labor to impose civil penalties against employers who violate the statute. Other states, including New York, Michigan and Illinois, are considering similar or more expansive legislation.

In the current economy, the response to job postings can be tremendous, and excluding the unemployed from an applicant pool may be a tempting expedient. Given the current political climate, however, employers may want to review their screening practices and job postings, as well as the practices and postings of any employment agencies upon which they rely, and confer with their employment counsel to determine if these potential changes in the law, if passed, would impact their practices.

E-Verify and Enforcement Efforts Continue to Expand

By **Aimee Clark Todd** and **Mark J. Newman**

During the past year, numerous new state laws have been enacted requiring employers to use E-Verify (the electronic system to verify the eligibility of newly hired employees to work in the United States). At the federal level, the administration continues to expand audits of Form I-9s ("I-9 forms") and has increased its level of I-9 discrimination-related enforcement as well. Amid this government activity, several members of Congress have introduced legislation that would require all U.S. employers to use E-Verify. This continued trend focusing on employer compliance shows that employers must remain vigilant about their employment eligibility verification procedures.

New State E-Verify Laws

The following is a summary of the new state E-Verify laws in 2011. Our complete E-Verify survey can be found at http://www.troutmansanders.com/immigration/, with a full discussion of the 17 states with E-Verify-related laws and the E-Verify requirements for federal contractors. As a general rule, the state requirements apply only to new hires after the effective date of each law, while the federal contractor requirements apply to additional, existing employees who will perform work pursuant to the federal contract.

- **Alabama** – Public contractors must use E-Verify starting January 1, 2012, and all employers in Alabama must use E-Verify starting April 1, 2012.

- **Florida** – Effective January 4, 2011, and revised May 27, 2011, state agencies that are under the direction of the Governor must require that their contractors use E-Verify for new hires during the term of the contract.

- **Georgia** – All employers in Georgia with more than 10 employees must use E-Verify. This provision becomes effective on January 1, 2012, for employers with 500 or more employees; July 1, 2012, for employers with 100 or more employees; and July 1, 2013, for employers with more than 10 employees.

- **Indiana** – Employers entering into or renewing public contracts on or after July 1, 2011, must use E-Verify.

- **Louisiana** – Employers who bid on or contract with a public entity for the physical performance of services within Louisiana, and their subcontractors, must use E-Verify for all employees in the state, effective January 1, 2012.

- **Minnesota** – Minnesota's E-Verify requirement expired on April 4, 2011, then was re-enacted effective July 22, 2011. Employers with state contracts for services worth more than $50,000 must use E-Verify.

- **North Carolina** – All employers with 25 or more employees must use E-Verify. This provision becomes effective on October 1, 2012, for employers that employ 500 or more employees; January 1, 2013, for employers that employ 100 or more employees; and July 1, 2013, for employers that employ 25 or more employees.

- **South Carolina** – Amended the existing law that included an alternative to E-Verify, and now requires all employers in South Carolina to use E-Verify by January 1, 2012.

- **Rhode Island** – On January 5, 2011, Rhode Island rescinded its requirement that state contractors use E-Verify; therefore, it is no longer in effect.

- **Tennessee** – All employers with more than 5 workers must use E-Verify or maintain copies of certain identification documents. This provision becomes effective on January 1, 2012, for employers with 500 or more employees; July 1, 2012, for employers with 200 or more employees; and January 1, 2013, for employers with 6 or more employees.

- **Virginia** – Expanded the E-Verify requirement from state agencies only to include contractors with the state who have more than an average of 50 employees for the previous 12 months and enter into a contract in excess of $50,000, effective December 1, 2013.

I-9s: The Deceptively Simple Form That Lands Employers In Hot Water

As you should be well aware, all employers are required to complete and retain I-9 forms for new hires. This deceptively simple, one-page form has landed many employers in hot water. Primarily, the I-9 regulations require employers to use I-9 forms to verify the employment authorization of all new hires. However, companies can incur substantial fines even for technical violations involving a completely legal workforce. In addition, the I-9 regulations prohibit document abuse and certain discriminatory practices. Companies trying to be vigilant about employment eligibility verification have often become overzealous, requiring more or different documents than are actually mandated by the I-9 form, resulting in an allegation of discrimination. For this reason, employers must be aware of these competing demands and properly train representatives responsible for the I-9 process.

To emphasize the importance of this issue, U.S. Immigration and Customs Enforcement (ICE) reached a historic level of enforcement in 2010, with a combined total of $50 million in financial sanctions in 2009 and 2010. Not only did the penalties from I-9 worksite enforcement actions increase 500%, the number of I-9 audits almost doubled, criminal prosecutions of employers reached a record-breaking number of 180, and 97 businesses were debarred (compared to 30 in the prior year). This high level of enforcement continues, with 1,000 new I-9 audits announced in February 2011 and another 1,000 announced in June 2011.

On the other side of the enforcement coin, the Department of Justice Office of Special Counsel (OSC) has been turning up the heat on employers engaging in discriminatory I-9 related practices. The OSC protects U.S. citizens and certain work-authorized individuals from employment discrimination based upon citizenship or immigration status, particularly as it relates to unfair documentary practices in the employment eligibility verification process, encompassing both the I-9 and E-Verify programs. The OSC has announced 12 settlements in 2011 for employers it alleged engaged in discriminatory practices, such as requiring more documents than necessary to complete the I-9 form—which is one of the most common errors we see when reviewing companies' I-9 compliance. This number may seem small, but when compared to the fact that OSC announced only 1 settlement each in 2009 and 2008, and none in 2007, the increase in OSC activity is significant. Penalties included both civil fines and back pay (and reached $290,400 for one employer in Missouri).

What Should Employers Do?

So, how does a reasonable employer walk this fine line between verification and discrimination? Companies must reasonably ensure that the employees they hire are eligible to work, yet they must not request more or different documents than are required to establish a worker's identity and eligibility to work or reject documents that appear to be reasonably genuine on their face. To accomplish this level of compliance, employers must establish thorough verification policies and ongoing training programs that achieve the delicate balance between these competing demands in the I-9 and E-Verify process. Specifically, employers should:

- Develop written I-9 policies (and E-Verify policies, if applicable) and conduct regular reviews to ensure policies are followed.
- Provide regular training for company representatives responsible for I-9/E-Verify completion.
- Conduct regular, independent audits of I-9 records.
- Treat all people the same when announcing a job, taking applications, interviewing, offering a job, verifying eligibility to work, hiring, or firing.

As the statistics and anecdotes show, worksite enforcement is not going away. Employers must equip themselves with the knowledge and training necessary to succeed if faced with a government audit or investigation. Starting with the steps outlined above will ensure you are on your way to a comprehensive level of compliance.

If you have questions about I-9 compliance, please contact Aimee Todd or Mark Newman in Troutman Sanders LLP's Immigration group.

The NLRB's Poster Child: New Rule Requires Employers to Post Information Regarding an Employee's Rights Under the NLRA

By **Michael D. Kaufman** and **Gary D. Knopf**

In August 2011, the National Labor Relations Board (the Board) issued a Final Rule requiring employers to post notices informing their employees of their rights under the National Labor Relations Act (the NLRA). The Board issued this requirement, which goes into effect January 31, 2012, in response to its belief "that many employees protected by the NLRA are unaware of their rights under the statute." The Final Rule applies to all employers subject to the NLRA, which includes all retail businesses with an annual gross volume of business of $500,000 or more and non-retail businesses with annual inflows or outflows across state lines that meet or exceed $50,000. In addition, federal contractors who are already required by the United States Department of Labor to post similar notices must also comply with this new poster requirement.

The New Requirements

As an initial matter, the Final Rule requires covered employers to post an 11-by-17-inch poster that describes employees' labor law rights. In particular, the poster must state that employees have the right to:

- discuss their working conditions;
- act together to improve wages and working conditions;
- form, join and assist a union;
- bargain collectively with their employer;
- strike; and
- choose *not* to do any of these activities.

Communicating the Notice to Your Employees

In addition, as discussed below, the Final Rule requires (i) particular methods of communicating the notice, and (ii) that the poster be translated in particular languages.

(i) Method of Communication

To communicate the notice effectively, the notice must be physically posted in areas where an employer typically posts other similar notices to employees. The poster must be displayed *at least as prominently* as those other notices.

In addition to posting a *physical* notice, employers that communicate with their employees by internet or intranet regarding other employment-related matters must post the notice on those sites as well. This may be accomplished by posting an exact copy of the poster on the site or by posting a link to the poster with an introduction that states, *"Important Notice About Employee Rights to Organize and Bargain Collectively with Their Employers."*

(ii) Foreign Language Requirement

The new rule also requires the notice to be posted in other languages if at least 20 percent of the employer's workforce is not proficient in English. However, upon request, the Board will provide translations of the notice in other languages, and it will also post the notice in other languages on the Board's website. Employers will not be required to post the notice in a language that has not been translated by the Board.

Moreover, if an employer's workforce includes two or more groups that speak a foreign language, which each constitute at least 20 percent of the workforce, the employer has the option of (i) posting the notice in both languages or (ii) posting the notice in the language spoken by the larger group. If the second option is chosen, however, the employer must distribute copies of the notice to the other employees in their own languages (to the extent the notice is available in that other language).

Challenges to the New Requirements

Many employer groups have criticized the new rule, claiming that the Board does not have authority to enact such a rule. Significantly, in September 2011, the National Association of Manufacturers sued the Board over the notice requirement, maintaining that Congress did not expressly authorize the Board to issue the posting rule as it has with other mandatory workplace notices.

The deadline to post the poster with the required information is **January 31, 2012**. While the federal courts may overturn the notice requirement, employers should plan to follow the above guidelines for now, because once the rule goes into effect (and to the extent that the rule is not overturned), the Board may impose harsh consequences for failure to comply. Specifically, the failure to comply with the notice requirement may be treated as an unfair labor practice under the NLRA. The Board also may extend the six-month statute of limitations for filing a charge involving *any other* unfair labor practice allegations against the employer who fails to post the notice. Finally, if the Board finds that an employer knowingly and willfully failed to post the notice, such failure may be used as evidence of unlawful motive in the other alleged violation.

Employers' Ability to Post Their Own Notices

Even if the notice requirement holds up and employers are required to post notices of employee rights under the NLRA, employers are not left without rights of their own. In fact, section 8(c) of the NLRA allows employers to express their own views on whether the company would benefit from a union, provided management's communication does not contain a "threat of reprisal or force or promise of benefit." Thus, employers may post their own notices that express their view that a union would not be in the employees' or the company's best interests.

For further assistance in complying with the Board's notice requirement, you can visit the Board's website at https://www.nlrb.gov/poster, where copies of the poster may be downloaded for free, or contact a member of the Troutman Sanders LLP Labor & Employment group.

Getting Paid the Same: Claims Under the EPA

By **Tashwanda C. Pinchback** and **Rebecca Shanlever**

Your company has a diverse sales force that includes both men and women. All of your salespeople are responsible for calling on existing and potential customers, renewing and increasing existing accounts, and closing sales with new accounts. All receive a base salary plus commissions and, although their base salaries differ, their commission rates are the same. One of your female salespeople, hired on the same day as a male, learns that her overall compensation last year was significantly less than his. She complains to human resources about not getting paid the same for "equal work." What's your response?

What is the EPA?

The Equal Pay Act (EPA), which was enacted in 1963 as an amendment to the federal minimum wage and overtime law, was designed to address pay disparities between men and women who performed similar work. Historically, many employers paid men more than women for the same jobs, often justifying it based on a man's status as the sole breadwinner for his family. The EPA prohibits this practice and requires "equal pay for equal work." Although the EPA's original purpose was to ensure that women were paid as much as men in similar jobs, both men and women may bring claims under the statute. The EPA covers all elements of an employee's compensation, including base salary, overtime, bonuses, stock options, profit sharing, and benefits.

Almost all EPA litigation focuses on the equal work element: how does an employee establish that she performed the same job as a man? Under the EPA, "equal work" means jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions (and in the same type of work location). The jobs do not have to be identical, but they must be substantially equal. It is the content and duties of the job, not the job title or the employer's job description, that controls.

Elements of the EPA may overlap with other federal anti-discrimination laws, notably Title VII of the Civil Rights Act of 1964 (Title VII), and employees often bring claims under both statutes. But an EPA claim is distinct in several ways. Both the EPA and Title VII prohibit sex discrimination, but the EPA is limited to disparities in pay and does not cover other types of employment actions. The EPA does not require an employee to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before pursuing her claim in court, and an employee has two years (three years in some cases) to file suit under the EPA, as opposed to 180 days for a Title VII claim. Under the EPA, the two-year clock starts ticking each time the employee receives unequal pay, so an employee who alleges ten years of unequal pay would be able to recover as long as she files her lawsuit two years (or three years in the case of willful violations) after she received her last paycheck. However, if she waits until two or three years from the last discriminatory paycheck, she will only be able to recover for that last paycheck.

Unlike Title VII, the EPA does not require an employee to prove that the employer intentionally discriminated against her because of her gender. However, the employee must establish that the comparable jobs require equal skill, effort, and responsibility and are performed under similar working conditions. Once the employee demonstrates those elements, the employer may be liable unless it can prove that the difference in pay was based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or "any factor other than sex." Under Title VII, in contrast, an employer need only articulate a legitimate non-discriminatory reason for the difference in pay, and the burden would shift back to the employee to prove intentional discrimination. Most employers defend EPA cases by arguing that their pay decisions are based on factors "other than sex." One popular argument, which has been accepted by some courts, but rejected by others, is the "market rate" defense—meaning that a male candidate's higher salary in his previous position required the employer to pay him more than a female candidate who made less in her last job. Employers may also argue that greater industry experience, an advanced degree, or higher profitability of a particular business are factors "other than sex."

Because the burden of proof under the EPA differs from the burden under Title VII, an employee who alleges sex discrimination under Title VII and unequal pay under the EPA can lose her Title VII case while simultaneously winning her EPA case. For example, in a recent case an employee alleged that she was denied a bonus, but her male comparator received a bonus. The United States Court of Appeals for the Fifth Circuit upheld a jury's conclusion that the employer did not discriminate against the employee because of her sex (in violation of Title VII), even though the jury did find that the employer violated the EPA. *King v. Univ. Healthcare Sys., LC*, 645 F.3d 713, 725 (5th Cir. 2011).

In the case of your complaining female salesperson, it might sound like there is cause for concern, but

you would need to review the skill, effort, and responsibilities required in both jobs, as well as determine the working conditions. Is the male counterpart assigned more customers? Does he supervise any other employees? Does he have a different sales territory? A salesperson with a larger customer list, additional responsibilities, and a territory covering a downtown metropolitan area may not be performing work that is "equal" to that of a colleague with fewer customers, no supervisory responsibilities, and a sales territory in the suburbs. You would also look at each element of compensation. Is the male employee's base salary greater, or does he make more in commissions? Did you hire him away from a competitor, where he was making more than the female salesperson? The commission component of these employees' compensation is likely based on their "quantity of production," and if you paid the male salesperson a higher salary that was consistent with his previous job, that may be a "factor other than sex." Some courts, however, reject the notion that paying a male employee more than his female counterpart in order to entice him to relocate qualifies as a "factor other than sex."

An employee who succeeds on an EPA claim is entitled to different remedies than one who sues under Title VII. The successful EPA plaintiff gets her lost wages (meaning the difference between her pay and that of her comparator) for the two- or three-year statute of limitations period. If her employer cannot establish that it acted in good faith (meaning that it had reasonable grounds for believing that it was not violating the Act) she will receive liquidated (i.e., double) damages in an amount equal to the lost wages. The EPA also subjects employers to criminal liability. Under Title VII, an employee would be entitled to additional damages, including additional compensatory damages (for pain and suffering or emotional distress), as well as punitive damages. Both laws, however, require the employer to pay the successful employee's attorney's fees, which drives many of these cases.

Identifying and Addressing Pay Disparities

So what is your response to the complaining salesperson? As with other employee complaints of unlawful conduct, complaints about unequal pay should be taken seriously, investigated, and, if appropriate, corrected. You must also be cautious of any adverse employment action taken against the employee after her complaint is made, as it would be unlawful to retaliate against her. If you determine there has been an EPA violation, you must increase the compensation of the lower-paid employee, not reduce that of the higher-paid employee. Even absent an employee complaint, some employers find it useful to take the proactive step of conducting a detailed compensation analysis. A compensation analysis is typically done by an outside consultant, who looks for compensation disparities by comparing the pay of similarly-situated employees and ruling out non-discriminatory factors like education, prior work experience, performance, productivity, and time in the job as the basis for the disparity. Any remaining significant differences in pay are not likely to have occurred by chance in a neutral process, and an employer should consider re-evaluating its compensation or decisions procedures.

For more information on the Equal Pay Act, please contact the Troutman Sanders LLP Labor and Employment group.

Georgia Supreme Court Opinion Alert: Is Signing a Garnishment Answer the Unlicensed Practice of Law?

By **Kristina N. Klein** and **Harrilee Cheshire** (Litigation Paralegal)

Among the wide variety of mandatory withholdings that payroll departments deal with are wage garnishments. In addition to computing and withholding the statutory amounts from the affected employee's earnings, the employer must file an answer with the applicable court each month and pay the withheld funds into the registry of the court. An employer's failure to handle this process properly can lead to entry of a default judgment against the employer for the full amount of the judgment that the plaintiff holds against the employee. Thus, Georgia employers must be diligent in complying with the garnishment statutes.

Traditionally, many human resources or payroll personnel have handled this entire process, including the signing and filing of the garnishment answers with the court. On September 12, 2011, however, the Georgia Supreme Court affirmed an opinion issued in June 2010 by the Georgia Bar Standing Committee on the Unlicensed Practice of Law (*In re: ULP Advisory Opinion No. 2010-1)*, which provided that an employee who signs a garnishment answer on behalf of a corporate employer may be charged with the unlicensed practice of law if he or she is not licensed to practice law in Georgia.

To put these rulings in context, for many years the rule has been that corporations may not appear *pro se* in a Georgia court of record, which technically means that even garnishment answers must be signed by an attorney licensed to practice law in Georgia. But, because neither plaintiffs nor the courts generally would object to answers that were signed by a company employee (and if the issue were raised, an amended answer would cure the defect), most employers assumed the risk and continued to file garnishment answers signed by non-lawyer employees. Given the Georgia Supreme Court's recent ruling, however, the non-lawyer employee who signs a garnishment answer may be exposed to a charge of the unlicensed practice of law.

In late October 2011, the Chairman of the House Judiciary Committee announced that he will work with the State Bar to draft an amendment to the garnishment statutes to allow routine garnishment answers to be signed by non-lawyer employees of corporations. This seems only fair given the rule that arguably allows a garnishment to be initiated by a judgment creditor by the filing of an affidavit signed by a non-lawyer agent of the plaintiff. Until corrective legislation is passed and becomes law, however, the Georgia Supreme Court's opinion governs, and garnishment answers must be signed by an attorney licensed to practice law in Georgia.

"Sale of Part or All of an Employer's Business": Potential Pitfalls For Buyers and Sellers Under the Federal WARN Act

By **Michael D. Kaufman** and **James M. McCabe**

Under the federal Worker Adjustment and Retraining Notification (WARN) Act, employers must provide advance warning of mass layoffs and plant closings to every affected employee. This article explores the general requirements of the WARN Act, and some potential pitfalls employers should avoid when buying or selling part or all of a business.

General Requirements Under the WARN Act

- **Employers Subject to the Act**

An employer is covered by the WARN Act if, among other things, it has (1) 100 or more employees (excluding certain part-time employees) or (2) 100 or more employees who in the aggregate work at least 4,000 hours per week (excluding overtime hours). If such an employer fails to provide the notice as provided by the WARN Act, the employer can be liable for back pay to each affected employee for each day of the violation.

- **WARN Notice**

Under the WARN Act, at least 60 days before a "plant closing" or "mass layoff" (as defined below), an employer must provide written notice to every affected employee (or to the union representative of the affected employee) and to certain government officials. For government officials, the written notice must be given to the entity designated in the state where the closing or layoff is to occur and to "the chief elected official of the unit of local government within which such closing or layoff is to occur."

- **Definitions of Plant Closing, Mass Layoff, and Employment Loss**

In determining whether the WARN notice must be provided, an employer must analyze whether there has been a "plant closing" or "mass layoff." A plant closing is defined as "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more" full-time employees. A mass layoff is defined as a reduction in force at a single site of employment that results in an employment loss, during any 30-day period, of:

(1) 33% or more of the workforce and 50 or more full-time employees; or
(2) more than 500 full-time employees.

At times, the above-referenced 30-day periods may be extended to a 90-day period. The definitions of

“plant closing” and “mass layoff” can be confusing. However, one helpful rule of thumb is: if fewer than 50 employees incur an “employment loss” (as defined below) at a single site of employment, it is <u>not</u> a mass layoff or a plant closing.

Employment loss is defined as (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period.

However, in some situations, different rules apply to an employment loss in the context of a sale of part or all of a business. These different rules present potential pitfalls for both buyers and sellers of businesses.

<u>Pitfalls For Sellers</u>

Any plant closing or mass layoff occurring as part of, or contemporaneously with, a business sale must be preceded by WARN notice. The question is: does the seller or the buyer have the responsibility to provide this notice? Under the WARN Act, the seller is responsible for providing such notice for a plant closing or mass layoff that occurs before or on the “effective date” of the sale. This means that if the plant closing or mass layoff occurs before the effective date of the sale and the seller fails to provide WARN notice, the seller may be liable for this failure <u>even after the sale of the business</u>.

This general rule, however, is complicated by the fact that the WARN Act does not define what a “sale of part or all of an employer’s business” means. In general, a sale of a business can be accomplished through the sale of its stock or through the sale of all or substantially all of its assets. In a stock purchase, the seller’s employees automatically become the buyer’s employees on the effective date of the sale. However, in an asset purchase, the seller usually terminates the employment of its employees as part of the sale itself, and then the buyer usually rehires some or all of those employees. In the asset purchase situation, the seller’s termination of employees usually occurs on or before the effective date of the sale. The question then becomes: does the seller or the buyer have the responsibility to provide notice in that situation? The short answer (discussed more fully below) is: generally speaking, if the business is sold as a going concern and the seller has no reason to believe that the buyer intends <u>not</u> to hire the seller’s employees, then the buyer, <u>not the seller</u>, is responsible for providing the WARN notice to the seller’s employees. Often, the buyer and the seller will have a provision in their asset purchase agreement dealing with hiring the seller’s employees.

Under the WARN Act, the seller is responsible for providing notice for terminations that occur <u>up to and including</u> the effective date of the sale. So, it would seem that if the employees’ employment with the seller was terminated on the effective date of the sale, then the seller would be responsible for notice, even if immediately after the effective date of the sale, the buyer rehires all of the seller’s employees. However, the Act also provides that “any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.”

Several lower courts have interpreted these provisions to mean that a seller is not responsible for WARN notice, even if the seller technically terminates its employees on the effective date of the sale, if (1) the business is sold as a “going concern” and (2) the seller’s employees are still employed by the seller <u>on the effective date of the sale</u>. These courts have recognized that, while the sale of the business technically results in a termination of all employees of that business by the seller, the WARN Act was not intended to impose liability on the seller for this technical termination, and therefore no liability will be imposed on the seller <u>provided the seller reasonably believes that its employees would be rehired by the buyer</u>. In coming to this conclusion, these courts have noted that “it is presumed that a sale of a business as a going concern involves the hiring of the seller’s employees *unless something indicates otherwise*.” Indeed, as one court has noted, if the seller had the responsibility to provide notice in such a situation, “one could imagine a situation in which no employee would remain by the time the closing date arrived.” This result, courts have concluded, is not what was intended by WARN.

However, in circumstances where a business is not being sold as a “going concern,” or where the seller is otherwise aware that the sale of the business will result in a plant closing or mass layoff because the buyer does not intend to rehire the seller’s employees, then the seller will still have the responsibility to provide WARN notice to the seller’s employees. Accordingly, to avoid these obligations, sellers

generally should not terminate their employees before the effective date of the sale and should require the buyer to indicate in writing that the buyer intends to hire all of the seller's employees (or at least that the buyer will not fail to hire the seller's employees due to a plant closing or massive layoff).

Pitfalls For Buyers

After the effective date of the sale, the buyer is responsible for providing the required WARN notice to the seller's employees of a plant closing or mass layoff. Further, and as noted above, any employee of the seller on the effective date of the sale will be considered an employee of the buyer immediately after the effective date of the sale. This means that, even if the buyer never actually hires those employees, it may still be responsible for providing the WARN notice to the seller's employees if the buyer decides not to hire the seller's employees due to a plant closing or mass layoff. Accordingly, if the buyer does not intend to hire the seller's employees, the buyer should ensure that the seller terminates the employees before the effective date of the sale (and not as a part of the sale) or that the buyer hires the seller's employees and then provides the required WARN notice before terminating their employment.

Concluding Thoughts

To avoid the pitfalls that sellers and buyers face under the WARN Act, the parties should carefully examine any terminations of the seller's employees that may trigger notice requirements. In particular, the timing of any terminations as part of the sale should be carefully considered in light of the responsibilities of the parties, and the parties should determine when and who will provide that notice. In this regard, buyers and sellers can avoid some of the pitfalls of determining WARN notice responsibilities by stating in their contract for the sale of the business what will happen to the seller's employees as a result of the transaction.

One final point that employers should keep in mind is that many states have their own versions of the WARN Act that sometimes impose different requirements and, therefore, the applicable state law should be consulted as well before the sale of the business.

For advice or training regarding the application of the WARN Act to your business, please contact an attorney in Troutman Sanders LLP's Labor and Employment group.

More Gridlock? Some Very Partisan Proposals Flood the Congressional Docket

By **Rebecca E. Ivey**

This year's spectacular show of partisan gridlock over raising the debt ceiling left the American public less than satisfied. This gridlock shows no signs of abating. The makeup of Congress has once again changed, as Republican Bob Turner won the special election to replace Democrat Anthony Weiner. The return of Gabrielle Giffords marked a rare high point, as she traveled to Washington, D.C., to take part in the debt ceiling vote.

Consistent with this theme of stalemate, the employment bills introduced (and working their way through the process) exhibit the same polarized nature as the houses of Congress themselves. With a Congress this divided, what legislation really stands a chance?

THE ARBITRATION FAIRNESS ACT (H.R. 1873, S. 987)

Current status of law: The Federal Arbitration Act, passed in 1925, applied to disputes between commercial entities of generally similar sophistication and bargaining power. Since its passage, courts have interpreted the Act broadly, so that it covers agreements between employers and employees, and between businesses and consumers, with the result that employment and consumer disputes are now routinely subject to arbitration. Arbitration clauses have become extremely prevalent. In fact, it is almost impossible to find any standard customer agreement that does not include an arbitration clause, and many employment contracts also contain arbitration clauses. Such arbitration agreements typically require disputes to be submitted to binding arbitration and prevent a potential plaintiff from pursuing a lawsuit in court. Arbitration of disputes confers many benefits on a business or employer, including lower expense, predictability, confidentiality of the proceedings and the outcome of the dispute, and

limited court review of an arbitrator's decision.

What would change: This legislation would impose a rule that mandatory pre-dispute arbitration clauses in employment, consumer, and civil rights cases are not enforceable. Employees and consumers would be able to bring their disputes in court if they so chose, and could make that choice at any time.

Why you care: The Act would dramatically change the effect of existing and future employment contracts and relationships, as well as consumer contracts. If you routinely include arbitration clauses in employment (or consumer) contracts, you will need to plan for a very different enforcement scheme regardless of whether you revise your contracts accordingly.

Likelihood of becoming law: This bill has not garnered any G.O.P. support, which is not a real surprise. However, its Democratic support is strong. In the context of this very partisan Congress, however, this bill will likely fail.

THE PROTECTING JOBS FROM GOVERNMENT INTERFERENCE ACT (H.R. 2587, S. 1523)

Current status of law: Currently, the National Labor Relations Board (NLRB) adjudicates alleged violations of the National Labor Relations Act (NLRA), which protects workers' rights to organize and can punish employers for inhibiting these rights or retaliating against employees for exercising these rights. In our last Legislative Update we discussed how the NLRB filed a complaint against The Boeing Company alleging that Boeing's decision to locate its second assembly plant for the production of its 787 Dreamliner commercial jet in South Carolina, a right-to-work state, rather than Washington, represented illegal retaliation against union employees.

What would change: This legislation would explicitly prohibit the NLRB from ordering any employer to close, relocate, or transfer employment under any circumstance.

Why you care: For those employers with an organized workforce, the specter of a Boeing-type dispute is a terrifying prospect. This legislation would nip that possibility in the bud.

Likelihood of becoming law: This bill passed the House on September 15, 2011 after a party-line vote, with eight Democrats (all from right-to-work states) crossing the aisle to support it, but seven Republicans doing the same in opposition. The Senate reception is expected to be cold, and it is unlikely that President Obama will sign this bill even if it passes both houses.

AMERICAN JOBS ACT OF 2011 (S. 1549, S. 1660)

Current status of law: Employers currently must comply with a complicated scheme of payroll taxation. They also need to withhold taxes on behalf of employees in accordance with the Internal Revenue Code, in addition to paying taxes on earnings, sales tax, and more.

What would change: The payroll tax provisions of the bills would cut payroll taxes for employers in half for the first $5 million in payroll, eliminate payroll taxes for firms that hire new workers or increase wages (capped at $50 million in payroll increases), provide tax credits for hiring unemployed workers (and greater tax credits for hiring unemployed veterans), and cut payroll taxes for workers in half. Both also contain anti-discrimination provisions prohibiting discrimination against the unemployed. In addition, the bills contain provisions regarding unemployment compensation and infrastructure projects. The only difference between the two bills is how the cost of the provisions are offset—S. 1549 includes specific offsets, S. 1660 introduces an income surtax on the extremely wealthy.

Why you care: These pieces of legislation combine initiatives that employers will love and hate in one big package. The payroll tax provisions are extremely helpful, particularly for small businesses, and the hiring tax credits certainly don't hurt. However, the anti-discrimination provision is a tough pill to swallow.

Likelihood of becoming law: Even with the publicity these bills have received recently, Congress does not appear very excited about them. Under the sponsorship of Senate Majority Leader Harry Reid (D-NV) both were reported out of committee and sent to the Senate floor. S. 1660 failed a cloture

motion, and will not be considered by the full Senate. S. 1549 awaits its fate next. If it passes the Senate, which is not definite, it will have a difficult time in the House, even though the payroll tax provisions are not controversial. Absent significant changes, this bill is unlikely to become law.

AMERICAN JOBS ACT OF 2011 (H.R. 2911)

Current status of law: The Internal Revenue Code sets up a double taxation system for corporations whereby the corporation and the individual stockholders are both taxed on earnings.

What would change: This bill would, believe it or not, reduce the federal income tax on corporations to zero (including the alternative minimum tax).

Why you care: As you can see, this is NOT the same bill as the Senate bill above with the very same name. The word on the street is that House Democrats were so slow in introducing President Obama's jobs bill that Representative Louis Gohmert (R-TX) snatched the name for his very different bill instead. For those businesses that have set up operations as a corporation, this bill would dramatically reduce income taxes.

Likelihood of becoming law: Do you have any doubt about this? It's a nonstarter that won't get out of committee.

THE LEGAL WORKFORCE ACT (H.R. 2885)

Current status of law: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) established a voluntary Internet-based pilot program known as E-Verify, through which employers verify the work authorization of new hires. Certain states require employers to use E-Verify, but as of yet, there has been no federal mandate to use the program.

What would change: This legislation would require employers to begin to use E-Verify on a graduated schedule based on the size of the employer's workforce.

Why you care: You would be required to use E-Verify within the next few years.

Likelihood of becoming law: It is likely that some strengthening of the E-Verify system will be enacted this Congressional cycle. Will it be this bill? It has surged into the forefront by reporting out of committee favorably. Keep an eye on the legislation—it's more likely than most to become law.

MILITARY FAMILY LEAVE ACT OF 2011 (S. 1112)

Current status of law: The Family and Medical Leave Act (FMLA) was recently amended to include various provisions applicable to military families, including up to 26 weeks of unpaid leave for an employee who provides care for a service-member, and up to 12 weeks of unpaid leave for certain "qualified exigencies," or enumerated circumstances, associated with deployment, service, and return.

What would change: This legislation would specifically provide two weeks of unpaid leave for a spouse, child, or parent of a service-member, but unlike the FMLA, it does not specifically enumerate the circumstances in which leave may be taken.

Why you care: The FMLA leave requirements are complicated enough. Adding another, similar leave entitlement to the mix won't make them any simpler for your human resources department.

Likelihood of becoming law: This bill hasn't garnered significant support. It looks likely to languish in committee.

EMPLOYMENT IMPACT ACT OF 2011 (H.R. 2204, S. 1219)

Current status of law: There is no law that requires federal agencies to consider the impact of

regulations on employment statistics.

What would change: This legislation would require federal agencies to release a detailed impact report for any major proposed regulation on jobs gained, lost, or sent overseas before their implementation.

Why you care: This bill would not affect employers directly. However, by imposing an extra duty on federal agencies, the bill's supporters believe it will effectively reduce regulation. While this may seem like a good idea on its face, there will certainly be costs associated with the creation of such reports. So, even though this bill attempts to minimize regulation on business, the costs of its implementation would come out of taxpayers' (i.e., businesses') pockets.

Likelihood of becoming law: While Republicans generally support this measure, it probably doesn't have the bipartisan support to make it through both houses, even if it is reported out of committee. However, making the federal government consider employment issues before it regulates is an idea with significant appeal. It may be too early to call this one.

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