Labor and Employment Law:

The Employer's Compliance Guide

This publication is designed to provide a detailed overview of federal labor and employment law and to serve as a useful reference for the types of employment issues most likely to arise in the workplace.

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- **Insightful analysis** from leading practitioners and our editorial staff.
- **Implementation tools** we call "practice tools" to help you take action.
- **Regular updates** to make sure you stay in compliance.

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➤ Looking Ahead: 11 Emerging Employment Challenges

In today's rapidly changing workplace landscape, it is critical for employers to stay ahead of the curve on impending legislation and regulatory developments. Prudent employers will take a proactive approach to such likely developments and remember that "forewarned is forearmed."

Keeping current with developing trends will enable employers to accomplish three goals:

- gain strategic insight, allowing them to quantify the scope and level of effort likely to be required of their HR staff in the coming year;
- undertake the tactical work needed to implement that insight; and
- assess the likely impact of the expected changes on their organization.

The following are likely to be the issues and challenges that will be the focus of discussion and some action in the near future:

1. New Supreme Court Decisions

On June 19, 2008, the U.S. Supreme Court issued four new decisions. First, in *Meacham v. Knolls Atomic Power Laboratories*, the Court made it easier for employees to prove they have suffered discrimination on account of their age. According to the Court, when older workers are disproportionately affected by an adverse employment decision, the employer bears the burden of explaining whether there was a reasonable explanation other than age for the company's action. The majority opinion acknowledged that the decision will make it "harder and costlier to defend" against age discrimination lawsuits.

Second, in *Kentucky Retirement Systems v. EEOC*, the Court held that Kentucky's retirement benefits system for policemen, firemen, and other "hazardous position" workers does not discriminate against workers who become disabled after becoming eligible for retirement based on age.

Third, in *Chamber of Commerce v. Brown*, the Court overruled the 9th U.S. Circuit Court of Appeals to hold that a California law that forbids private employers that receive state funds in excess of $10,000 from engaging in any activity or communications to assist, promote or deter union organizing, unless the employer can prove that the money used for such activity did not come from the state is preempted by the National Labor Relations Act (NLRA).

And fourth, in *MetLife v. Glenn*, the Court held that an Employee Retirement Income Security Act (ERISA) plan administrator that both evaluates and pays claims operates under a conflict of interest when reviewing disability claims under ERISA.

In addition, in late May 2008, the Court decided two employment cases that make it easier for private and public employees to raise retaliation claims. First, in *CBOCS West Inc. v. Humphries*, the Court made it easier for private employees to sue their employers for retaliating against them for filing a discrimination claim. A former assistant restaurant manager alleged that he was fired after filing a complaint about racially derogatory treatment by another manager. At issue was whether under Section 1981 (the older Civil War-era anti-discrimination law)

an employee who alleges race discrimination may also argue retaliation. The Court held that retaliation claims for opposing race discrimination could be brought under Section 1981.

Second, in *Gomez-Perez v. Potter*, the Court allowed a federal worker to maintain a retaliation claim under the Age Discrimination in Employment Act (ADEA). A postal worker argued that her employer had violated the federal-sector provision of the ADEA by retaliating against her for filing an Equal Employment Opportunity Commission (EEOC) age discrimination complaint. At issue was whether a federal employee who was a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA. The Court held that such a claim is authorized.

Still pending before the Court is *Crawford v. Metro Gov't*, in which the Court will consider whether the anti-retaliation provisions of Title VII of the Civil Rights Act protect employees from being discharged for voluntarily participating in their employer's internal investigation of harassment. The 6th U.S. Circuit Court of Appeals affirmed summary judgment for the defendants. This case will be argued in October.

2. The Americans With Disabilities Act (ADA)

There is currently a push to amend the Americans With Disabilities Act (ADA). Supporters of the measure believe that the remedial purposes of the ADA have never been fully realized because of several U.S. Supreme Court rulings that have interpreted the ADA too narrowly. In addition, although the sponsors of the bill contend that the pending legislation is merely intended to *restore* the law's original intent, those opposed to the legislation argue that it would significantly expand the law by revising the definition of disability by eliminating the current requirement that an impairment or disability "substantially limit a major life activity."

The bill moved a step closer to passage when a substitute bill, with some but not all of the ADA Restoration Act's proposals, was passed by two House committees in June 2008. The substitute bill reflects a compromise between the disability and business communities, who agree that some amendments were appropriate but that the ADA Restoration Act went too far.

In other ADA news, on June 17, 2008, the U.S. Department of Justice published new regulations regarding Titles II and III of the ADA. Among other things, the new regulations propose to adopt the 2004 Accessibility Guidelines for Buildings and Facilities (ADAAG). Title II of the ADA covers programs, activities and services of public entities and state and local governments whereas Title III applies to public accommodations, commercial facilities and private entities offering certain examinations and courses and private entities primarily engaged in transporting people.

3. Associational Discrimination

A growing trend is to expand the class of employees protected by Title VII and other federal laws to those associated with someone who belongs to one of the traditionally protected classes.

Two federal circuit courts recently decided cases under Title VII. The 2nd U.S. Circuit Court of Appeals held that a former assistant basketball coach, who was Caucasian, could maintain his Title VII racial discrimination claim that he was terminated from his position, at least in part, based on his marriage to a black woman. Similarly, the 6th U.S. Circuit Court of Appeals held that an employee could maintain a discrimination claim that he was discharged because his fiancée filed a discrimination charge with the EEOC against their mutual employer. In rejecting summary judgment for the employer, the court ruled that the anti-retaliation provisions in Title VII protect a related or associated third party from retaliation under such circumstances.

Associational claims can also arise under the ADA, which expressly states that discrimination occurs by "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."

The 7th U.S. Circuit Court of Appeals reinstated the associational discrimination claim of a nurse manager who alleged that she was fired because of the escalating costs of her husband's cancer treatments. Associational discrimination occurs when an employer discriminates against an employee as a result of "the known disability of an individual with whom [the employee] is known to have a relationship." Although the nurse received "outstanding" evaluations and various promotions, the hospital nonetheless terminated her and indicated that she was "ineligible to be rehired in the future." Finding that the nurse could maintain her claim, the 7th Circuit stated that there was direct evidence that associational discrimination might have motivated the hospital's decision to terminate her.

Though the number of associational discrimination cases is currently small, employers should be aware that family members and friends of employees might be able to maintain a discrimination claim based on actions taken against those they are associated with. One question yet to be decided by any court is how close the relationship needs to be. While it is clear that a family member would be a close enough relationship, it has been suggested, but not yet decided, that those merely dating might also be close enough to maintain a third-party associational claim. Associational discrimination is an area of law that employers will need to watch.

5. Employee Free Choice Act (EFCA)

Unions are gearing up for a fight. In March 2008, four unions (all affiliated with the AFL-CIO) with a combined membership of more than 2 million workers formed a strategic alliance to work on common legislative goals, such as passage of the Employee Free Choice Act (EFCA). They hope that by pooling their efforts and resources they can pass favorable legislation for working families.

Also in March 2008, the AFL-CIO adopted a plan to recruit 10 percent of the members of its affiliates to work toward passage of the EFCA. It wants to have 1 million union members sign cards, e-mails or send faxes urging passage of the legislation. As part of this effort, the four-union strategic alliance has committed to mobilize at least 15 percent of its members as part of the AFL-CIO's efforts.

6. Immigration

Immigration legislation remains an important issue to watch. While the federal government still has not passed a comprehensive bill, there are bills pending in Congress and state legislatures.

It is possible that smaller, single issue, legislation might make it through Congress. One such bill that is pending would revamp the H-1B visa program. The H-1B visas are granted to highly-skilled, college-educated foreign workers. On the one hand, big businesses have lobbied hard to increase the number of visas allowed, whereas, labor groups oppose increasing the visas because they say it encourages employers to bring in lower-paid foreign workers rather than use U.S. workers.

Increased enforcement of federal laws continues. In April 2008, the Immigration and Customs Enforcement (ICE) arm of the Department of Homeland Security (DHS), in coordination with the Justice Department and other local, state and federal law enforcement agents, raided poultry plants in five states and arrested more than 300 alleged undocumented alien employees for committing crimes such as identity theft to secure their jobs.

States continue to weigh in on the federal E-Verify system — which allows employers to use combined DHS and Social Security Administration (SSA) databases to verify whether employees are eligible to work in the United States. Like Arizona, Mississippi and South Carolina have passed laws mandating use of the E-Verify system.

In June 2008, a federal judge in Oklahoma City postponed enforcement of employment-related portions of the state's immigration law, finding substantial likelihood that it is pre-empted by federal immigration law. The law, which was to take effect July 1, 2008, included a requirement that public employers and those who contract with them had to use E-Verify or another approved verification system to confirm the legal status of all new hires.

The Missouri Senate approved comprehensive immigration reform in May 2008, sending the bill to the governor for his signature. The legislature experienced great difficulties trying to pass the bill because, among other things, the two chambers did not agree on the bill's employment-related provisions, including a requirement that business entities and public employers participate in E-Verify.

The New Employee Verification Act of 2008 (NEVA) (H.R. 5515), which is currently pending, would create a new electronic verification system within three years of enactment. While NEVA would not require re-verification of all employees, it would require re-verification of employees whose documents had expired. This new system would, in part, use biometrics to verify an employee's identity and eligibility to work.

7. Retiree Health Benefits

More than four years after it was first introduced, in late December 2007, the EEOC's final rule creating an exemption to the ADEA to permit employer-sponsored retiree health benefits to be altered when recipients become eligible for Medicare or comparable state-funded health

benefits went into effect. The new rule was supported by business groups and labor unions but was opposed by senior groups such as AARP.

In related news, the U.S. Supreme Court denied review of a 3rd U.S. Circuit Court of Appeals decision involving a lawsuit filed by AARP against the EEOC, in which AARP challenged EEOC's authority to issue the exemption. Following this denial of review, the 3rd Circuit's ruling upholding EEOC's authority to enact the exemption is final.

In addition, EEOC recently announced publication of proposed rulemaking regarding disparate impact under ADEA in light of the Supreme Court's *Smith v. Jackson* case. The rule has been cleared for public comment.

8. Discriminatory Pay in the Wake of Ledbetter

The U.S. Supreme Court held in *Ledbetter v. Goodyear Tire & Rubber* that a pay discrimination claim filed pursuant to Title VII must be filed with the EEOC within 180 or 300 days from when the allegedly discriminatory pay decision was made and that the period for filing such a claim does *not* begin anew with each paycheck issued following the challenged pay decision.

Disliking the decision, Congress introduced several bills to counter it. One such bill, the Ledbetter Fair Pay Act (H.R. 2831), passed in the House last July. Although the Senate version of the bill was also introduced in July it was then referred to committee and hearings were held in January 2008. No further action was taken until April 2008, when Senate Majority Leader Harry Reid's motion for a cloture vote failed to gain sufficient support. This kills the bill, for now. In addition, the President has expressed his opposition to the bill and has indicated he would veto it if it did pass.

9. Genetic Discrimination

After languishing for 10 years, the Genetic Information Non-Discrimination Act (GINA) (H.R. 493), which makes it unlawful for employers or health insurers to discriminate based on a person's genetic information or test results, has finally been signed into law. Now EEOC will issue final regulations on the employment title (within one year after enactment) and the employment portion will take effect in November 2009.

Although the House passed the bill in April 2007, it surprisingly stalled in the Senate, where it was subject to a "hold" by Sen. Tom Coburn, R-Oklahoma, who insisted that there be a "business necessity" exemption to allow employers to collect genetic information from employees. Opponents argued that the expemption would create a large privacy protection loophole. A clause was added to the bill that appeased Sen. Coburn, which then freed it up for a vote and the measure passed unanimously. On May 1, 2008, the bill returned to the House and was again overwhelmingly approved. The president signed the bill into law on May 21, 2008.

10. New FMLA Regulations

In a somewhat surprising move, DOL published proposed regulations in the Feb. 11, 2008 *Federal Register*. The proposals included changes to the employer notice requirements regarding

employee qualification for leave and designation of leave while also clarifying the rules regarding substitution of paid leave, and the requirement that employees comply with the employer's call-in procedures before taking unscheduled, intermittent leave. However, the proposals did not include any changes to the amount of time an employee can take of incremental leave of less than a day. DOL hopes to issue the final regulations before the end of the Bush term.

DOL reported receiving more than 4,000 comments during the comment period that ended April 11, 2008. The comments focused mostly on unscheduled leave, serious health conditions and medical certification. Generally, business associations preferred tightening employee use of leave and supported reducing administrative burdens on employers, whereas employee advocates favored more flexibility in the use of leave.

In addition to public comment on the proposed regulations, DOL also sought comment on the newly enacted military family leave provisions. The military leave proposals do not contain regulatory language, but instead pose a series of specific questions open for public comment.

Perhaps more changes to the FMLA will be forthcoming. Rep. Rahm Emanuel, D-Ill., has introduced the Crime Victims Employment Leave Act (H.R. 5845), which is legislation that would expand FMLA protections to victims of violent crimes and domestic violence. While a number of states have laws that offer such protection, as of now, there is no such protection on the federal level.

11. No-Match Letters

DHS continues to press the use of the SSA's "no-match" letter, in what some see as a backdoor attempt to enforce immigration laws. Back in August 2007, the ICE announced plans to publish a final rule requiring employers who receive an SSA "mismatch" letter to take specific steps to resolve the mismatch within a 93-day period or suffer serious consequences. Implementation of the final rule hit a snag when the AFL-CIO sued to stop its enforcement. A federal judge granted a preliminary injunction barring the government from sending out the so-called mismatch letters to employers for failing to address workers' mismatched Social Security numbers. Thus, no letters were sent in 2007.

Still wishing to use the no-match letters, in March 2008, DHS issued a supplemental proposed rule regarding its controversial no-match rule to address issues raised by the judge who granted the injunction blocking implementation of the final rule. It was published in the March 24 edition of the *Federal Register*.

While the no-match letters are not new — the SSA has been sending them out annually for several years — what is new is DHS's attempt to increase employer responsibility for quickly resolving the discrepancy or face liability. The supplemental rule maintains the safe harbor provision that gives employers 30 days to determine if internal error caused the mismatch. Failure to respond to the letter is considered a "knowing" violation of immigration law. Opponents of the rule argue that DHS has not changed the rule and is merely trying to repromulgate the rule.

In addition to the supplemental rule, a group of Senators introduced a bill to allow the DHS to use no-match letters when building a case against employers who knowingly hire illegal aliens. It is still in the early stages of the legislative process.

Employers should watch what happens, for this is surely not the end of this fight. If no-match letters are issued, then employers need to respond diligently to avoid facing stiff penalties.