Employment Law Update
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WINTERS Law Firm

ARE YOU PREPARED FOR THE ECONOMIC STIMULUS BILL? YOU HAD BETTER BE!

As the details of the economic stimulus bill are rolled out, employers will quickly learn that there will be a significant impact on the cost of doing business as a consequence of the bill. One such impact will be felt on COBRA benefits. [1]

COBRA (the Consolidated Omnibus Budget Reconciliation Act) provides for the continuation of group health insurance coverage that might otherwise be terminated when the individual has a qualifying event. A qualifying event for an employee has been defined as voluntary termination of employment for reasons other than gross misconduct; reduction in the number of hours of employment; a qualifying event for an employee's spouse includes voluntary termination of the covered employee's employment for any reason other than gross misconduct; reduction in the number of hours of employment, covered employee's eligibility for Medicare, divorce or legal separation, death of the covered employee, loss of dependent child status. The qualifying employee pays up to 100% of the premium with an additional 2% administrative fee. COBRA covers employers with 20 or more employees.

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009. Among many provisions in the Act, one of the most significant includes the new COBRA regulations. The key concepts you need to be aware of include:

- The Act creates a new "qualifying event" that allows involuntarily terminated employees and their covered dependents to be eligible for a 65% COBRA premium subsidy for up to nine (9) months. That means that the employee will pay 35% of the premium with the remaining 65% to be subsidized by the employer.
- Eligible employees must have been enrolled in the health plan and must have had a qualifying event. The employee must have earned less than $125,000 if single or $250,000 if filing jointly.
- Employers will be able to claim a credit in the amount of the subsidy when it files its 941 Employment Tax Return. If the employer has subsidized a higher dollar value than can be claimed in credit, it may be eligible for a tax refund.
- The qualifying event must have occurred between September 1, 2008 and December 31, 2009.
- Employers must reach back to September 1, 2008 and notify employees and their dependents of the new provisions. This includes employees who originally declined COBRA. The Department of Labor has been charged with the responsibility of creating a model notice within thirty (30) days of the enactment of the law. Look for this notice in the coming weeks.
- Employees who have become eligible for other health insurance do not qualify for the subsidy.
- The law does not allow for reimbursement of premiums of coverage period beginning before February 17, 2009. However, employees will most likely pay full premiums while notices are sent out and there is a sixty (60) day transition period to allow for repayment or extension of credit for those overpayments.
- If the company has discontinued its health plan, there is no obligation on the part of the employer to provide COBRA under the new law.

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[1] This is not the only impact of this bill. This White Paper is only a summary of the impact on COBRA and should not be construed as a comprehensive analysis of compliance requirements of the Stimulus Bill. Legal counsel should be consulted for a full discussion of the influence on employers.

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FAIR PAY ACT

On January 29, 2009, President Obama signed into law the Fair Pay Act of 2009. The Fair Pay Act is also known as the Lilly Ledbetter Act. Ms. Ledbetter worked for Goodyear Tire and Rubber co. for 19 years. Upon her retirement, she realized (with some assistance from an anonymous note) that she had been paid differently than her male counterparts while employed by Goodyear. She filed a charge of discrimination based on sex with the EEOC within 180 days of discovering the unequal pay, and with her Right to Sue letter in hand, sued her employer. A jury found in favor of Ms. Ledbetter, awarding her $3.5Milllion. Goodyear appealed, arguing that any discrimination that had occurred was years prior to Ms. Ledbetter's filing and therefore she had failed to file within the requisite 180 days. Ledbetter argued that each paycheck created a discriminatory act by itself because each time she was paid less, it was due to the earlier discriminatory practice. The court agreed with Goodyear and in a close vote, so did the Supreme Court. The Court stated that unless the pay system itself was discriminatory, each separate paycheck is not in and of itself a discriminatory act giving rise to a claim of pay discrimination. The Court further stated that the legislative intent of the short deadline for these charges was to protect employers from the burden of defending employment decisions that were old and stale. Fair Pay overturns that decision. The Act is effective on a retroactive basis oddly enough back to the day before the decision was handed down by the Supreme Court. That makes the Act applicable to all pay discrimination charges that were pending or after that date under Title VII, ADEA, ADA and the Rehabilitation Act.

Let's think about the way the act is worded. It states that the Ledbetter Act amends Title VII. What does Title VII protect? All of the protected classes, not just sex. That means that the Act opens the door for compensation discrimination claims based on race, religion, disability, national origin, etc. The Act also amends ADEA and ADA and the Rehabilitation Act of 1973. Thus, the Act amends the 300 day filing period under Title VII. Keep in mind though the claims must be compensation related but is stated as a compensation "*decision*" or practice. Very broad in scope. The language of the Act also provides that "*an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title… when an individual is affected by the application of a discriminatory compensation decision or practice.*" This appears to open the door for a spouse, domestic partner, children or other dependents of the employee who were "*affected*" by the practice to file a charge under the Act.

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AGE DISCRIMINATION IN EMPLOYMENT

When the federal government required one of its defense contractors to reduce its work force, the contractor first evaluated employees based on the criteria of performance," "flexibility," and "critical skills." after adding points to scores for years of service, the employer arrived at a list of 31 employees to be laid off. On their face, the criteria were age-neutral, but all but one of the employees chosen to receive a pink slip were at least 40 years old, the age group protected by the federal Age Discrimination in Employment Act (ADEA).

The laid off employees sued their former employer under the ADEA, alleging the disparate impact form of age discrimination. Disparate impact refers to the use of policies or criteria by an employer in making employment decisions that are not overtly based on age, but which, when applied, allegedly have a disproportionate impact on older individuals. (The other type of employment discrimination known as "disparate treatment," asserts that the employer intentionally treated applicants or employees differently because of their age.)

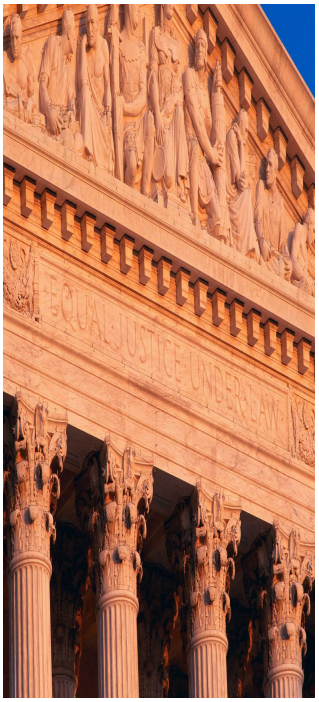
The plaintiffs first established, using statistical experts, that such a skewed result against older workers under the layoff criteria would rarely happen by chance, and that the same factors that were most closely linked statistically to the older employees– flexibility and critical skills– were also the factors most influenced by the discretion of the contractor's supervisors.

The contractor countered that it was not liable because the ADEA provides that an employer action is not unlawful differentiation among employees based on "reasonable factors other than that of age" (RFOA). A jury returned a multimillion-dollar verdict for the plaintiffs. Ultimately, the case reached the United States Supreme Court, which upheld the judgment for the plaintiffs.

The critical issue determined by the Supreme Court was whether the RFAO element needed to be proven by the plaintiffs or the by the defendant employer. In other words, did the plaintiffs have to prove that there were no reasonable factors other than age underlying the employer's decision, or did it fall to the employer to present an "affirmative defense: and prove the existence of the other reasonable factors? Examining the language of the ADEA and taking note of a previous ruling where a similar provision in the law was in the nature of an affirmative defense, the Court ruled that RFOA is an affirmative defense that the employer must prove and, in this case, had not.

The Court's opinion anticipated criticism, which, in fact, was forthcoming, that its decision could open the floodgates for similar claims and make it too easy for plaintiffs to prevail. It pointed out that, even before the RFOA affirmative defense comes into play, the plaintiff in an ADEA disparate impact case must isolate and identify specific performance practices by the employer that are responsible for statistical disparities disfavoring older workers. As the Court put it, "[t]his is not a trivial burden."

However, concerns about tilting the scales too far against employers should be directed at Congress, according to the Court, since it created the RFOA concept and made it a defense to be proven by employers.



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What is the Age Discrimination in Employment Act?

The Age Discrimination in Employment Act (ADEA) of 1967 prohibits employers from discriminating against employees, or job candidates, on the basis of age. This law covers workers who are 40 years of age and older. An employer must have at least 20 workers to be covered by this law. The Equal Employment Opportunity Commission (EEOC) enforces the Age Discrimination in Employment Act.

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What must you do as an employer? First, be aware that there are still some questions in this bill such as what is ñinvoluntary terminationò? It has been long understood that an employer does not have to offer COBRA to an employee terminated for gross misconduct. One could argue that termination for gross misconduct is involuntary termination. It would appear that it could now be construed that COBRA must be offered to all departing employees, no matter what.

From a practical standpoint, employers should identify individuals who became eligible for COBRA between September 1, 2008 and December 31, 2009. Send this list to your Plan Administrator or Third Party Administrator if they provide your COBRA services. They will use this information to send the notices regarding the new law. If you perform your own COBRA services, be prepared to notify these individuals when the Department of Labor provides the model notice. Your payroll system must be adjusted to deal with the subsidy and the payroll tax credit, or if not equipped to do this, your payroll administrator must be aware of the change in the 941 form. Employers will be required, either through its Plan Administrator or TPA or its own records, to keep track of who is on the subsidy program, when they were notified and when the subsidy expires. As with any change in employment law, there are posters for you to hang. They can be found on the Department of Labor website at www.dol.gov/COBRA.

As the new law becomes reality, there may be great confusion in the availability of the subsidy. We are prepared to assist employers with working through the maze of new legislation!

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EXECUTIVE ORDER MANIA

The President has limited legislative authority most of which is exercised under the Executive Order provision. Since taking office, President Obama has issued several Executive Orders regarding labor issues, all of which have been supported and touted by labor unions.

Executive Order 13494 governs allowable costs regarding union activity; Order 13496 requires notice of employee rights under the federal labor laws; Order 13502 encourages Project Labor Agreements on federal construction projects.

We will provide more details in a future issue on these Executive Orders since it is understood that this is just the beginning of labor-friendly initiatives that we shall see from our current administration.

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HARRASSMENT POLICY VIOLATES FREE SPEECH

WHEN a male graduate student pursing a degree in military history was inclined to speak his mind in the classroom discussions about women in combat and women in the military more generally, he felt inhibited by the university's broadly worded policy on sexual harassment.

In pertinent part, the policy stated that "all forms of sexual harassment are prohibited, including...expressive, visual, or physical conduct of a sexual or gender-motivated nature, when...such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment." The student sued the university to prohibit enforcement of the policy on the ground that it has a chilling effect on the exercise of his right to free speech.

A federal appeals court sided with the graduate student. The sexual harassment policy's prohibition of expressive conduct of a "gender-motivated nature" that has the purpose or effect of either unreasonably interfering with other individuals or creating an intimidating, hostile, or offensive environment was unconstitutionally overbroad under the First Amendment. It impermissibly swept within its reach speech that should not be subjected to restrictive regulation.

Regarding the "gender-motivated" characteristic of speech, the court wondered: "whose gender must serve as the motivation, the speaker's or the listener's? And does it matter? Additionally, we must be aware that 'gender,' to some people, is a fluid concept. Even if we narrow the term 'gender-motivated' to 'because of one's sex,' we are far from certain that this limitation still does not encompass expression on a broad range of social issues."

The term "gender-motivated" also necessarily required an inquiry into the motivation of the speaker, so that the policy punished not only speech that actually caused disruption, but also speech that merely intended to do so. To protect core forms of speech, there should have been a requirement in the policy that the conduct at issue objectively and subjectively create a hostile environment. A school must show that, before prohibiting it, targeted speech is so sever or pervasive that it will actually cause material disruption, and the university's policy was fatally deficient for not having such a requirement.

The First Amendment guarantees wide freedom in matters of adult public discourse.

It was important to the court's decision that the challenged harassment policy was that of a university, as opposed to an elementary school or a high school. It is well recognized that, in the words of the United States Supreme Court decisions, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" and "[t]he First Amendment guarantees wide freedom in matters of adult public discourse."

Discussion by adult students in a college classroom should not be restricted, while certain speech which cannot be prohibited to adults may be prohibited to public and high school students. This is particularly true when considering that public elementary and high school administrators have the unique responsibility to act in the place of parents, a disciplinary and protective role not shared by their counterparts in colleges and universities. Thus, in the case of the plaintiff graduate student, the court kept in mind that the university's administrators were granted less leeway in regulating student speech than are administrators responsible for younger and more vulnerable students

FAIR PAY ACT

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The only ray of hope with this Act for employers is that despite the fact that an employee can reach back to infinity, the existing two year limitation on back pay under Title VII remains in place. That means any award of back pay would be limited to the two years preceding the filing of the claim. Keep in mind that is only for BACK PAY awards and does not include punitive or compensatory damages.

What can employers do to avoid claims under these changes? There are several protective measures one can take. First, make certain your policies do not create disparate impact. Check the practices and make certain they are consistent and can be easily documented. Take a look at how you arrive at compensation decisions. Make certain you can document and explain why certain decisions were made for transfers, promotions, bonuses, etc. There should be a secondary review process by someone other than the immediate supervisor (HR for example). You should be reviewing your job descriptions for the newly enacted ADA amendments. While you are doing that, also make sure they accurately reflect the tasks and requirements of the position so as to not run afoul of this Act. Performance appraisals often are our downfall. Make sure these are consistent, focus on true job performance, skill sets, etc.

There is no foolproof way to avoid charges of discrimination under the new Act but at the very least, be prepared to have strong reasoning for your decision making backed by clear policies and practices, thus creating a much stronger defense should you receive a charge.

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LEGAL DISCLAIMER:

The actual resolution of legal issues depends upon several variables, particularly the specific facts of the matter.

This newsletter is not intended to provide legal advice specific to any one matter, but rather to provide insight into legal developments and issues.

Always consult with legal counsel before taking action on matters covered by this newsletter.