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SUPREME COURT APPROVES OF DISPARATE IMPACT CLAIMS INVOLVING AGE DISCRIMINATION

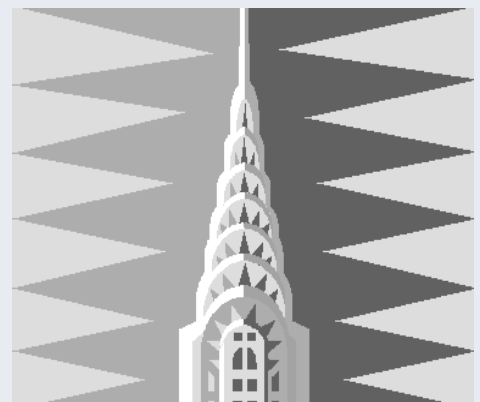
M. Leslie Parpart

Under the March 30, 2005 decision of the United States Supreme Court in *Smith v. Jackson*, employees may now sue their employers under a theory of disparate impact under the Age Discrimination in Employment Act (ADEA). Enacted in 1967, the ADEA makes it unlawful for an employer "to limit, segregate, or classify his employees in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." Claims of disparate impact are based on the theory that some policies, which appear neutral on their face, actually disproportionately hurt older workers in their application.

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While the impact of the Court's ruling allows workers over the age of 40 to pursue disparate impact claims of discrimination under the ADEA, it also permits employers to defeat such claims if they can prove that they relied on "reasonable" factors in making their employment decisions. The plaintiffs in *Smith v. Jackson*, all police officers, sued the City alleging that its performance policy resulted in a larger percentage pay raise for employees with less than five years of tenure than for those with more years of service. The plaintiffs claimed that this policy had an unfavorable impact on employees over the age of 40. The Supreme Court held that plaintiffs in ADEA cases may file a valid claim alleging an unfavorable impact. Nevertheless, the police officers' disparate impact claim in *Smith* failed because they did not present adequate

evidence supporting their claim. The Court noted that the City's policy of giving larger raises to less senior employees was a decision based on a "reasonable factor other than age" that supported the City's legitimate goal of retaining police officers.

In light of the Court's ruling, employers should review their policies and procedures to confirm that they do not, in their application, adversely impact protected classes of employees, including those over 40. Further, employers should document the business reasons for employment decisions that impact a broad group of employees, and contact an attorney before implementing any policy that may adversely effect a large number of older workers. ♦

THE OFCCP ISSUES GUIDELINES FOR INVESTIGATING SYSTEMIC COMPENSATION DISCRIMINATION

Sara J. Bass

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246, which prohibits federal contractors from discriminating on the basis of race, color, national origin, religion, or sex. As part of the enforcement process, the OFCCP regularly conducts compensation audits to determine whether federal contractors are discriminating against employees through their compensation practices. The purpose of these OFCCP compliance reviews is to uncover *systemic* compensation discrimination, not discrimination against a particular individual employee. Until recently, the OFCCP had issued little guidance on how to perform compliance

reviews, and the OFCCP's own staff often relied on inconsistent and conflicting approaches when auditing.

Recently, the OFCCP published two sets of proposed guidelines that aim to establish a uniform, formal policy for evaluating contractors' compensation practices. The first set of guidelines explains the methodology the OFCCP will use to conduct its analysis of contractors' compensation plans. The second set of guidelines explains how contractors may conduct their own compensation analysis in order to comply with the OFCCP's regulations.

OFCCP METHODOLOGY

Under the new guideline, the OFCCP will investigate systemic compensation discrimination by (a) conducting a statistical analysis on Similarly Situated Employee Groups (SSEGs); and (b) gathering anecdotal evidence of compensation practices through employee interviews.

The OFCCP will conduct a statistical analysis to determine if there are statistically significant pay discrepancies within SSEGs, after taking into account legitimate factors that tend to influence compensation. SSEGs must contain employees who are similarly situated in relation to the work they perform, their responsibility level, their skills, and their qualifications. In addition, they must be large enough to yield a meaningful statistical analysis. In its analysis, the OFCCP will take into account legitimate factors that may influence compensation such as education, experience, performance, productivity, and location. The OFCCP will also give contractors the opportunity to explain any disparities.

In determining whether a violation has occurred, the OFCCP will also consider any anecdotal evidence of compensation discrimination. The OFCCP normally will not assert a claim of systemic compensation discrimination without providing anecdotal evidence to support the OFCCP's statistical analysis. Likewise, the OFCCP will rarely assert a claim of compensation discrimination based on anecdotal evidence alone.

OFCCP SELF-EVALUATION GUIDELINES

OFCCP affirmative action regulations require contractors to evaluate their compensation systems to determine whether there are any gender or race-based disparities.

While the OFCCP will continue to allow contractors to choose their own form of compensation self-evaluation techniques, it also provides an incentive for contractors to implement a compensation evaluation system that conforms to its methodology (as outlined above). Specifically, the OFCCP will deem a contractor to be in compliance if the contractor's self-evaluation system meets the following general standards:

(a) The contractor groups employees into SSEGs comprising at least 80% of the workforce. The SSEGs must contain at least 30 employees as well as 5 employees in each protected and non-protected class.

(b) On an annual basis, the contractor performs some type of statistical analysis that evaluates the SSEGs and accounts for factors that legitimately affect compensation. If a contractor has at least 250 employees, it must use a multiple regression analysis.

(c) The contractor investigates any statistically significant disparity to determine whether the disparities are explained by legitimate factors or are otherwise not the result of unlawful discrimination.

(d) The contractor creates and maintains certain documents regarding the analysis and underlying decisions.

(e) If a contractor chooses to comply with these standards, it must either turn over the results of its compensation analysis to the OFCCP or certify under oath that the analysis has been done under the attorney-client privilege. There are benefits and drawbacks to each of these options. On the one hand, if a contractor chooses to turn over the results to the OFCCP, the OFCCP will generally defer to the contractor's methodology and conclusions. Employers should note, however, that there is some risk that the data will be obtained by a third party through a Freedom of Information

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THE OFCCP ISSUES GUIDELINES FOR INVESTIGATING SYSTEMIC COMPENSATION DISCRIMINATION

Act request. If that happens, the contractor will no longer be able to claim any attorney-client, work product or self-critical analysis privilege over the information. On the other hand, if a contractor chooses to certify rather than turn over the results to the OFCCP, the information will remain confidential, but the OFCCP will not give any deference to the contractor and will conduct a full-blown audit of its compensation practices.

The compensation analysis guidelines proposed by the OFCCP have not been issued in their final form (although many believe that the OFCCP has already begun analyzing contractors' compensation data using the methodology described in those guidelines).

Nevertheless, every federal contractor should study and evaluate the new regulations to determine whether and to what extent the methodology proposed by the OFCCP makes sense for their operations. ♦

FREEDOM OF SPEECH V. DISRUPTIVE NUISANCE: HOW DOES AN EMPLOYER DEAL WITH NOISY PICKETERS' RIGHT TO SUPPORT THEIR UNION?

Theresa Y. McDaniel

Imagine that you are the human resources director for a new restaurant called "Wood's Restaurant," located in an office building. Wood has hired a contractor to complete some remodeling in the restaurant. The contractor, in turn, has hired a non-union carpenter as a subcontractor to perform some of the remodeling.

You arrive at work on Monday morning and are met by 20 people dressed in red shirts passing out flyers. There are four other people dressed in red holding a stationary banner

measuring 30-by-4 feet directly in front of your office building reading, "Shame on Wood's Restaurant," in large letters and, in smaller letters across the bottom, "Labor Dispute." As you walk towards the building entrance, a person in red thrusts a flyer into your face. The flyer states that Wood is a rat who uses non-union workers who are paid substandard wages and health benefits.

The union members and supporters show up for the rest of the week. Occasionally, the members blow whistles, shake cans and yell "rat" to passerbys. Some of your customers have also complained that union picketers have

physically blocked their path to the building entrance. On two days, three picketers walk in a circle carrying placards that read, "There are rats in this building." The union has indicated that they will be back next week and every week after that until the non-union carpenter is gone. The restaurant owner has no control over the carpenter. The union's presence is hurting his business because some of his customers are avoiding the area. What can he do?

UNION ACTIVITY: HOW FAR CAN IT GO?

The scenario above is similar to those that many employers have to face, and the actions employers may take are unclear under the law. On the one hand, the National Labor Relations Act (NLRA) prohibits unions from coercing neutral employers to stop doing business with employers with whom the union has a labor dispute. City ordinances and state laws may also give some additional protections to employers from the union's activities. For example, in Georgia and in most states it is unlawful for any person to prevent or attempt to prevent any individual from continuing in the employment of any employer or from entering or leaving any place of employment of such employer by the use of force, intimidation, violence, or threats of violence. Also, under the NLRA, the union is not allowed to picket the restaurant because it does not have a primary labor dispute with it. Therefore, the union members carrying placards can be stopped. Other activities, such as blocking entrances to your building, threatening or intimidating customers, and physically touching people, are almost always illegal.

On the other hand, some of the activities of the union are protected by the First Amendment. The First Amendment and the

NLRA allow unions to truthfully advise the public, including consumers, that a product is produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. Therefore, if the union peacefully distributes flyers (or handbills) outside your building that notify the public that the carpenter is paying substandard wages, the union members are protected by the First Amendment rights.

But what about the enormous banner in front of your building reading "Shame on Wood's Restaurant" and "Labor Dispute?" The fate of the union's banner is not as clear under the law. Some legal authorities assert that the banner is a form of illegal picketing, which signals to customers and employees to sympathize with the union by not entering the building, without providing additional information about the labor dispute. The National Labor Relations Board has indicated recently that these large banners are "confrontational" speech and can be restricted. Some court cases, however, have equated banners with outdoor billboard advertising and therefore, protected free speech. While the final determination on the characterization of bannering has not been made, it is important to remember that the banner, even if it is lawful handbilling, still cannot block the entrance to your building or impede traffic. Therefore, your company can request, at a minimum, that the banner be placed in a safe (and possibly less conspicuous) area.

TIPS ON SURVIVING THE UNION'S PRESENCE:

(1) Stay calm. You should advise your staff to limit their interactions with the union members and certainly not confront them. If an employee of your company takes any action that the union believes is threatening it may file
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FREEDOM OF SPEECH V. DISRUPTIVE NUISANCE: HOW DOES AN EMPLOYER DEAL WITH NOISY PICKETERS' RIGHT TO SUPPORT THEIR UNION?

an unfair labor charge against your company for interfering with a lawful demonstration.

(2) *Seek legal counsel.* Some of the activities of the union may warrant injunctive relief from a court. For example, in our scenario, your company could ask a court to prohibit the union from intimidating your customers and blocking their paths to the building. You probably will not be able to prevent all of the union's activities, but you can minimize the effect of their presence.

(3) *Document the union's activities.* If your company decides to seek help from the courts,

you will want to show the court what actions the union has taken. Demonstrative evidence will be key.

Balancing the union's right of free speech and your right to conduct the Company's normal business operations without unlawful interference by the union can be tricky. Knowing the limits the law places on the union's activities will be half the battle. Acting accordingly will help your company get through the experience with minimal hardship. ♦

SEXUAL STEREOTYPING MAY BE DIRECT EVIDENCE OF DISCRIMINATION

Kate Stricker

In *Back v. Hastings on Hudson Union Free School District*, the United States Court of Appeals for the Second Circuit recently held that stereotyping individuals based on gender can constitute "direct evidence" of sex discrimination. Direct evidence is evidence that standing alone, allows a jury to find sex discriminating.

In *Back*, the plaintiff, a public school psychologist, claimed that she was denied tenure because of a perceived lack of commitment to her job. In this regard, the plaintiff alleged that the employer repeatedly questioned whether she could perform her job duties and maintain her required work hours with "little ones" at home, and also questioned whether the plaintiff's commitment to her job would change once she received tenure.

The Second Circuit ruled that comments made about a woman's apparent inability to combine work and motherhood constituted direct evidence of gender-based sex discrimination. The court emphasized that stereotypes include both "the supposition that a woman *will* conform to a gender stereotype (and therefore will not, for example be dedicated to her job), [and] the supposition that a woman is unqualified for a position because she does *not* conform to a gender stereotype."

This case should remind employers about the importance of regular anti-harassment and diversity training programs. Through such efforts, employers can help employees understand that sex-based stereotyping is not limited to assumptions based on a woman's physical appearance. ♦

CCLASS ACTION FAIRNESS ACT MAY BE GOOD FOR BUSINESS, BUT WHAT ABOUT EMPLOYERS?

Jeffery Robertson

On February 18, President Bush signed The Class Action Fairness Act of 2005 (CAFA) into law. The new law is intended to discourage “forum shopping” by plaintiffs’ attorneys by expanding federal jurisdiction over class action lawsuits and also requires increased judicial scrutiny of class action settlements. Although the CAFA was largely supported by businesses, particularly those that have been plagued by consumer class action lawsuits in the past, it is not clear what benefit, if any, it will have for those same businesses when it comes to class action lawsuits filed by employees.

NOTABLE PROVISIONS OF THE CAFA

The most notable provision of the CAFA confers federal court jurisdiction over certain kinds of class actions. Specifically, federal jurisdiction under the CAFA exists where 1) the aggregate value of the claims (as opposed to the value to a single plaintiff) exceeds \$5 million; 2) there are at least 100 members of the class; and 3) at least one member of the class is a citizen of a state that at least one of the defendants is not a citizen of. One of the primary goals of this provision is to discourage “forum shopping” — the practice of making a calculated decision to file a class action in the jurisdiction with the most beneficial legislation or with a history of large verdicts in similar actions.

This new rule, however, has several exceptions. For example, there is no federal jurisdiction where two-thirds or more of the class members and the primary defendant(s)

are citizens of the state in where the action was originally filed. In addition, if more than one-third and less than two-thirds of the class members share citizenship with the primary defendant(s), federal courts do not have discretion on whether or not to hear the case.

One of the other notable provisions of the CAFA deals with settlement agreements. Under the new law, so-called “coupon settlements” (where class members receive coupons instead of monetary damages) must be scrutinized by the court and any attorneys’ fees must be based on the value of the coupons redeemed or the actual work performed by the plaintiffs’ attorneys rather than on the value of all coupons issued. In addition, any proposed settlement that requires any class member to pay his or her attorney an amount that results in a net loss to the class member will not be approved unless the court determines that non-monetary benefits to the member substantially outweigh any loss. Obviously, these changes are intended to curb the spread of class action lawsuits that have resulted in exorbitant attorneys’ fees yet minimal recovery to individual class members. The CAFA also places an additional burden on defendants. Under the new law, defendants must make numerous disclosures to state and federal officials within 10 days of filing a proposed settlement with the court.

THE EFFECT OF THE CAFA ON EMPLOYMENT LAWSUITS

Although the CAFA is expected to significantly change the legal landscape for consumer-based class action lawsuits, its impact

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CCLASS ACTION FAIRNESS ACT MAY BE GOOD FOR BUSINESS, BUT WHAT ABOUT EMPLOYERS?

on employment lawsuits may be minimal. This is largely due to federal courts already having jurisdiction over most employment discrimination lawsuits because those lawsuits are brought pursuant to federal anti-discrimination laws such as Title VII. Furthermore, the CAFA does not reference § 16(b) of the Fair Labor Standards Act, the provision under which "collective action" wage-hour and age discrimination lawsuits are brought.

It does appear, however, that defendants in federal employment class actions may be subject to the settlement notice requirements outlined above, which could result in additional burdens for employers defending such claims. Any other tangible effect is impossible to predict given the infancy of the law. ♦

GUARDING AGAINST RETALIATION CLAIMS: STRATEGIES FOR DISCIPLINING EMPLOYEES WHO HAVE ENGAGED IN PROTECTED ACTIVITY

Krista R. Green

The decision to discipline an employee is never an easy one. That decision becomes all the more complex when dealing with an employee who has engaged in protected activity. Consider the following scenarios:

An employee whose performance is below-average is passed over for a promotion. The employee files a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) complaining she was denied the promotion due to her race. The employee then begins arriving habitually late to work. The employee's manager wishes to discipline the employee but is afraid this action will be deemed retaliation for the employee's EEOC charge. What should the manager do?

Almost all state and federal discrimination laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act

(ADEA), protect employees who file complaints of discrimination or other unlawful employment actions from being retaliated against for filing such complaints. Unlawful retaliation includes, but is not limited to, demotion, discipline, termination, salary reduction, a negative evaluation, a change in job assignment, or any type of negative treatment, if the treatment is because of the employee's complaint or "protected activity." Protected activity includes both: 1) opposition activity - where the employee opposes an employment practice that the employee believes is unlawful; and 2) participation activity - where the employee participates in an investigation, hearing, or litigation arising from a charge of discrimination or other illegal practice. Even if the original complaint turns out to be unfounded, an employee can still succeed on a retaliation claim if she can prove that something negative happened as a result of the complaint. Thus, it is critical for managers to understand the sensitivity of the

situation when disciplining an employee who has engaged in protected activity and be prepared to defend their disciplinary action with strong, supported evidence.

DISCIPLINE IN THE FACE OF PROTECTED ACTIVITY

There is no question that disciplining an employee who has engaged in protected activity presents a dilemma. If handled incorrectly, the discipline will likely be viewed as retaliation by the employee and in the worst case, by a jury. However, if carried out properly, it is possible to discipline an employee without giving her the impression that she is being retaliated against. Thus, employers who confront this dilemma should take the following precautionary measures to minimize the risk of a retaliation claim:

1) Establish a Policy Prohibiting *Retaliation*

Even before an employee complains about an alleged violation of a state or federal labor or employment law, the employer should have in place a clear policy prohibiting retaliation. The policy should spell out exactly what retaliation is and state clearly that the employer will not tolerate retaliation from anyone, whether they are officers, managers or other employees. The policy should also specify the steps employees should take if they feel they are being retaliated against, and provide multiple avenues for complaining about the retaliation (such as supervisor or human resources). This alternate avenue is critical, for example, if the employee feels it is their direct supervisor who is retaliating against them.

2) Ensure the Discipline is *Justified*

The first step in any disciplinary process should be for a manager or human resources representative to investigate the alleged

misconduct by the employee and ensure that she has gathered all of the relevant facts. The company official should meet with any witnesses who observed the conduct and document the interviews appropriately. The official should also meet with the employee who allegedly violated the policy to hear her side of the story and document this meeting as well. Following the investigation, the official should consider all of the evidence and make a fair and complete finding of whether the proposed discipline is warranted in this particular instance.

3) *Confirm Policies and Practices and Treatment of Similarly Situated Employees*

The company official should review the standards or policies that the employee allegedly violated to ensure the conduct engaged in by the employee constitutes a violation of a company policy or practice. Management should also verify the company's past practice and ask whether this person is being treated as other employees have been treated in similar situations. Consistency is essential in defending against retaliation claims. For example, if the employee at issue has been late to work three times and the employer wishes to give the employee a written warning, it is important to verify whether other employees who have also been late to work three times (or less) have also been given written warnings. If other employees who have been late to work three times or more have received lesser discipline or no discipline at all, this disparity in discipline can be used as evidence of unlawful retaliation.

4) *Communicate with the Employee and Have a Witness Present*

If the company decides that discipline is appropriate, a manager or the representative

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GUARDING AGAINST RETALIATION CLAIMS: STRATEGIES FOR DISCIPLINING EMPLOYEES WHO HAVE ENGAGED IN PROTECTED ACTIVITY

should meet with the employee to discuss the discipline and the reasons behind the discipline. If the employee has violated a written policy, the manager or human resources should specifically reference the written policy that the employee has violated. The official may also want to have a witness present during this meeting who can verify what was communicated to the employee and document the conversation. The manager/human resources should also be prepared to respond to the employee if they claim they have been retaliated against.

5) Documentation According to Company Practice

Both the actual discipline and the conversation with the employee explaining the reasons behind the discipline should be well documented. This documentation should follow company practices and procedures for disciplinary or grievance procedures. It is also important that the documentation be consistent with the documentation of similar offenses committed by other employees. The

documentation should enumerate the employer policy or practice violated by the employee and, if possible focus on objective (rather than subjective) factors. Decisions based on objective factors are generally easier to defend in the context of a retaliation claim.

A final word of advice, the fewer people who know about an employee's complaint, the smaller the chance is that someone will retaliate against the complainer and in fact, supervisory employees who are unaware of the complaint cannot be found to have retaliated against the employee. Thus, when dealing with a complaining employee, the employee should be encouraged to complain directly to human resources and human resources should endeavor to keep the investigative process as confidential as possible.

By following these recommended measures and applying them in a consistent manner to all employees, employers can reduce the risk of litigation and be better prepared to defend against those suits if they occur. ◆

MANAGING INTERMITTENT LEAVE UNDER THE FMLA

Andrew P. Sherrod

As employers subject to the Family and Medical Leave Act are well aware, the FMLA grants certain eligible employees the right to take up to 12 workweeks of unpaid leave in a 12-month period in the event that the employee or certain members of the employee's family have a "serious health condition," or in the event that the employee needs time off in connection with the birth,

adoption, or placement of a child. While employees will often take their leave all in one stretch, the FMLA also allows for the 12 weeks of leave to be taken on an "intermittent" basis in certain circumstances.

"Intermittent" leave under the FMLA is leave taken in separate blocks of time due to the same qualifying reason. If the "qualifying reason" for the leave is the birth or placement of a child for adoption or foster care, an

employee may take FMLA leave on an intermittent basis only if the employer agrees. Employer consent is not required when intermittent FMLA leave is medically necessary for the treatment of, or recovery from, an employee's own serious health condition, or for the employee to provide care to an immediate family member who has a serious medical condition. In order for leave to be a "medical necessity," however, there has to be a medical need for the leave (no voluntary treatments or procedures), and that medical need must be such that it is best accommodated through an intermittent leave schedule. A typical situation in which intermittent leave could be appropriate is when an employee needs to be away from work periodically to attend regular medical treatments, such as chemotherapy for cancer. However, employees may also request intermittent leave for less predictable conditions, such as migraine headaches.

Because periods of intermittent leave can be unpredictable and therefore difficult to cover, many employers find intermittent leave harder to manage than FMLA leave that is taken all in one block. Employers also may become frustrated if they feel as though an employee is abusing intermittent leave by taking time off for reasons that do not qualify under the FMLA. In order to best limit the effect of legitimate intermittent leave requests on business productivity, and to reduce the incidence of employees taking advantage of intermittent leave, employers need to have a sound understanding of the rights that the FMLA provides to them, as well as to their eligible workforce.

NOTICE OF INTERMITTENT LEAVE

The first step in preparing for an employee's intermittent leave comes with the employee's obligation to provide notice of such leave. If the need for intermittent FMLA leave is foreseeable based on an expected birth, adoption or placement of a child, or on a planned medical treatment for a serious health condition, the employee has an obligation to give the employer at least 30 days notice of the beginning of the leave. If 30 days notice is not practicable for an otherwise foreseeable leave (for instance, because the employee does not know when the leave will begin, such as in an adoption or foster care situation), then the employee needs to give such notice as soon as possible and practical, which ordinarily would entail at least verbal notification within one or two business days of becoming aware of the need for leave. An employee only needs to give notice of intermittent leave once, but the employee must inform the employer as soon as practicable if scheduled leave dates change, are extended, or were unknown initially.

In addition, for foreseeable intermittent leave periods, the employee must confer with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the business operations of the employer. If the employee fails to consult the employer regarding a treatment schedule, the employer is free to initiate such discussion with the employee and to require that the employee attempt, subject to health care provider approval, to devise a leave schedule that will not unduly disrupt the employer's business. Thus, with regard to foreseeable intermittent leave, the employee and employer should work together to establish a leave schedule that meets both of their needs.

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MANAGING INTERMITTENT LEAVE UNDER THE FMLA

For conditions for which leave is not foreseeable, however, managing intermittent leave becomes more difficult. When the approximate timing of the leave cannot be foreseen, the employee simply must give notice of the FMLA leave "as soon as practicable" under the circumstances, which again is typically between one and two days. Obviously, given the short or post hoc notice involved with unforeseeable intermittent FMLA leave, such leave poses greater logistical and productivity concerns for employers, since it may prove difficult to find cover for an employee taking unforeseeable FMLA leave if notice is not given until shortly before the employee's scheduled work time. By exercising the rights that the FMLA provides them, however, employers can limit the inconvenience posed by unforeseeable intermittent leave.

MEDICAL CERTIFICATIONS

Upon receiving a notice that an employee intends to take FMLA leave, the employer may require the employee to submit a medical certification from a health care provider. The information provided in the medical certification can help the employer in accommodating the intermittent leave. For example, the medical certification should include: the date on which the serious health condition began, the probable duration of the condition, the actual or estimated dates upon which treatment is expected to be given and the duration of such treatment, an estimate of the probable interval between treatments, and a statement of medical necessity for the intermittent leave. In addition, employers should remember that if there is a doubt as to the validity of this initial medical certification,

the employer may obtain, at its expense, a second medical opinion regarding the employee's condition. If there is a conflict between the original medical certification and the second opinion, the employer may require, again at its own expense, a third opinion of a health care provider approved jointly by the employer and employee, whose opinion is final and binding.

TRANSFER

An effective means of coping with a foreseeable intermittent leave is to transfer the employee to an available alternative position during the intermittent leave period. The alternative position does not have to have equivalent duties, as long as it is equivalent in pay and benefits. An employer can even raise pay and benefits for an otherwise non-equivalent existing position in order to transfer the employee. Thus, transferring an employee to an alternative position for which it might be easier to find replacement work, or which does not have as great an impact on productivity as the position previously held by the employee, is a way that employers can reduce the impact of intermittent leave on their businesses.

Employers must remember, however, that the FMLA does not allow transferring an employee for purposes of discouraging the employee from taking FMLA leave, or if the transfer causes a hardship on the employee. The Department of Labor provides the following examples of such hardship: assigning a white collar employee to perform manual labor, reassigning a day-shift employee to the graveyard shift, and reassigning a headquarters employee to a branch office

located a significant distance away from the employee's normal location.

REQUESTING RECERTIFICATION

In situations involving unforeseeable intermittent FMLA leave, employers may become suspicious of particular absences, wondering if the employee could be taking advantage of his or her intermittent leave days for reasons unrelated to the condition covered by the original medical certification. Unfortunately, there is not much an employer can do with regard to an isolated incident, as an employer is generally unable to require a recertification in less than the minimum period specified on the medical certification as being necessary for the leave. However, if the employer has reason to believe that the circumstances described in the original medical certification have changed significantly (for instance in terms of dramatically increased

duration or frequency of absences), or if the employer receives information that brings the continued validity of the original certification into doubt, the employer is within its rights to request a recertification. Therefore, if an employee's intermittent absences begin to occur at times other than those indicated on the medical certification, or begin to occur more frequently or longer than previously certified, the employer should consider requiring the employee to obtain a new certification. Doing so may cut down on the potential for employees taking advantage of intermittent leave.

Thus, while intermittent leave can tedious to manage and a burden on an employer's operations, knowing and using the protections provided to employers under the FMLA can help reduce that hardship. ♦

NEW USERRA NOTICE/POSTER REQUIREMENT – EFFECTIVE MARCH 11, 2005

Brendon McLeod

A recent amendment to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) requires that *all* employers provide covered employees with written notice of their rights, benefits and obligations under USERRA. The notification requirement is part of the New Veterans' Benefits Improvement Act (VBIA), which broadens health care, housing, education and other benefits for veterans and their families. Among other things, the new law increases the period of health care coverage for employees called to active duty from eight months to 24 months when that coverage would otherwise terminate due to the employees' absence from work.

The easiest and most practical way for employers to meet their notice obligation is by posting a notice of rights, benefits and obligations under USERRA in a prominent place where employees customarily check for such information – such as an employer bulletin board where other federal law compliance posters are displayed. The notice may also be provided to employees by other means, such as handouts, mailings, or email distribution. The DOL has created a compliance poster for employers to use that outlines all of the new notice requirements. It is available at www.dol.gov/vets/programs/userra/poster.pdf. ♦

LEGISLATIVE UPDATE

Matt Almand

GENETIC BIAS BILL GAINING STEAM IN CONGRESS AND GETTING HEAT FROM EMPLOYERS

After more than six years of negotiations, Congress appears on course to finally pass legislation designed to curb genetic bias among employers and health insurers in making personnel decisions. The employer provisions of the Genetic Information Nondiscrimination Act of 2005 (S. 306, H.R. 1227) would bar employers, employment agencies, labor organizations, and job training from using individuals' genetic information when making decisions about hiring, firing, job placement, or promotion. The measure would also prohibit health insurers from using an individual's genetic information to deny coverage or determine rates or premiums.

An employee's or job applicant's genetic information is defined in the Act as information about a person's genetic tests, a family member's genetic tests, or the occurrence of a disease or disorder in family members. The legislation would prohibit employers from requesting genetic information from employees and job applicants. An employer who obtains genetic information about their employees inadvertently, through compliance with other laws (i.e. Family and Medical Leave Act), or through certain efforts to preserve employee health (i.e. employee wellness programs) would be in violation of the Act only if they used the information to discriminate against employees. Any genetic information already in the possession of the employer must be kept confidential.

Enforcement of employment discrimination based on genetic information will be through the same procedures and remedies as under Title VII of the Civil Rights Act. However, the Act has several unique features. First, the Act limits a plaintiff's right to sue for genetic discrimination to intentional acts of discrimination. However, the Act purports to establish a commission housed and funded by the Equal Employment Opportunity Commission (EEOC) that will revisit the possibility of allowing disparate impact claims six years after enactment. Furthermore, the employment provisions of the Act would cap damages at \$300,000 per case for employers with more than 100 workers.

Recently, the medical and science communities have worked toward the development of new diagnostic tests, preventative strategies, and treatments for genetically based diseases. However, individuals allegedly refrain from participating in research or receiving necessary testing out of fear that potential employers may deny them employment because of the genes they inherited. Consequently, according to sponsors of the bill, this fear of genetic discrimination slows the pace of science.

Opponents of the Act express several significant concerns. First, employer groups disapprove of the creation of more liability for employers. Specifically, the Act resorts to jury trials with punitive and compensatory damages, which will necessarily invite additional litigation. Second, because more than half the states currently have laws addressing genetic discrimination and because the legislation does not establish preemption of

state laws, employers will face the problem of trying to comply with the numerous genetic discrimination laws already in existence. Finally, opponents argue that the Act is premature because there is no evidence that employers are currently discriminating against employees and job applicants on the basis of their genetic information. In fact, there is only one recorded case of genetic discrimination where the EEOC successfully sued an employer under the Americans with Disabilities Act (ADA). Opponents are concerned that if the Genetic Information Nondiscrimination Act is enacted, the EEOC will have the ability to sue employers on the same facts under *both* the Act and the ADA.

On February 17, 2005, the Senate passed the Act by unanimous vote, and Representative Judy Biggert (R-Ill.) introduced the House's version Act on March 10, 2005. If passed, the law will go into effect 18 months after enactment and the EEOC is directed to issue regulations enforcing the employment provisions one year after enactment.

DOL IMPLEMENTS NEW CHILD LABOR REGULATIONS

The Department of Labor released its Final Rule on Child Labor which places limitations on child labor in several areas, including cooking duties, driving, and roofing occupations. The new regulations were published in the December 16, 2004 *Federal Register* and became effective February 14, 2005.

Restaurant. The rules governing restaurant workers place restrictions on the type of cooking and cooking-related work that may be performed by children aged 14 and 15

at retail, food service and gasoline service establishments. The rule eliminates the "in plain view" rule that had limited youth workers to cooking positions "at soda fountains, lunch counters, snack bars, or cafeteria serving counters" where they were "in plain view" of customers. The new rules are more stringent and specify which cooking activities are permissible and which are prohibited. Specifically, the rules prohibit 14- and 15-year-olds from any cooking except cooking on grills that are electric or have no open flame. Further, youth workers in this age category are prohibited from cooking with equipment such as rotisseries, broilers, pressurized equipment, deep fryers where baskets are lowered and raised through devices, and cooking devices that operate at extremely high temperatures. Additional rules regulate the work performed by 14- and 15-year-olds in the areas of kitchen preparation, cleaning and baking.

Driving. The new rules also strengthen driving regulations by incorporating 1998's Drive for Teen Employment Act, which amended the Fair Labor Standards Act to prohibit employees under the age of 17 from performing any on-the-job driving. Additionally, the regulations restrict driving for 17-year-olds to those employees who have a valid state drivers license, have completed a state approved driver education course, and have no record of moving violations. The new rules do not require record keeping, but do provide guidance about maintaining records or driving logs so that employers may prove compliance.

Roofing. In addition to the restaurant and driving rules, the Final Rule further prohibits children aged 16 and 17 from all

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roofing occupations broadly defined to include work performed "on or about a roof." The term "on or about a roof" is not limited to those situations where youth workers are actually standing on a roof, but also includes working in close proximity to a roof with equipment such as air conditioners, cable and satellite dishes, gutters, and roof trusses. Examples of duties that are "on or about a roof" are standing or working on ladders or scaffolding and being transported to and from the roof in mechanical devices, such as hoists. Youth workers who are employed pursuant to a bona fide apprenticeship or student-learner program are exempt from these specific regulations.

Other rules issued by the Department of Labor regulate minors who work with explosives, paper balers and compactors. While there will be a 60-day grace period on enforcement of these new rules before the Department of Labor will pursue monetary penalties, employers must prove they were unaware of the changes before being exempt from penalties during this period.

FOUR NEW OSHA PROPOSALS INTRODUCED IN HOUSE

On February 10, 2005, the House Education and Workforce Committee Republicans approved four new Occupational Safety and Health Act reforms introduced by Rep. Charles Norwood (R-Ga.) on February 10, 2005. Although there is currently no companion bill in the Senate, Sen. Johnny Isakson (R-Ga.), the new chair of the Senate Employment and Workplace Safety Subcommittee, has already voiced his plans to

expedite the Acts through his subcommittee upon arrival from the House. The Acts can be summarized as follows:

- (1) The Occupational Safety and Health Small Business Day in Court Act (H.R. 739) will give the Occupational Safety and Health Review Commission (OSHRC) the ability to make exceptions when a small business misses the 15-day deadline for filing a response to OSHA citations;
- (2) The Occupational Safety and Health Review Commission Efficiency Act (H.R. 740) will aid in the timely investigation of cases by increasing the membership of the OSHRC from three to five commissioners;
- (3) The Occupational Safety and Health Independent Review of OSHA Citations Act (H.R. 741) will clarify that the OSHRC is an independent entity that the courts reviewing OSHA issues are to give deference; and
- (4) The Occupational Safety and Health Small Employer Access to Justice Act (H.R. 742) will allow small employers to be awarded attorneys' fees and court costs when they contest OSHA citations and prevail in court. ♦

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