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IN THIS ISSUE...

EEOC ISSUES NEW RULE REGARDING BURDEN ON EMPLOYERS IN ADEA DISPARATE IMPACT CASES 1

INDIVIDUAL LIABILITY FOR FMLA VIOLATIONS 3

EMPLOYERS MUST PROTECT THEIR EMPLOYEES FROM A HOSTILE WORK ENVIRONMENT, EVEN IF THE HOSTILE ENVIRONMENT IS CAUSED BY A CUSTOMER, ACCORDING TO EEOC 4

KELLEY DRYE VOLUNTARILY DROPS MANDATORY RETIREMENT POLICY 4

NO MONEY DAMAGES IN SUITS BROUGHT AGAINST STATES FOR FAILING TO GIVE EMPLOYEES TIME OFF UNDER FMLA 5

EEOC ISSUES NEW RULE REGARDING BURDEN ON EMPLOYERS IN ADEA DISPARATE IMPACT CASES

On March 30, 2012, the Equal Employment Opportunity Commission (EEOC) issued a final rule concerning disparate impact claims under the Age Discrimination in Employment Act (ADEA). A disparate impact claim arises under the ADEA when an employer uses a facially neutral employment practice that has an unjustified adverse impact on individuals over the age of 40. A facially neutral employment practice is one that does not appear to be discriminatory on its face; rather it is one that is discriminatory in its application or effect.

In the past, the Supreme Court upheld the EEOC's longstanding position that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, even if the harm was not intentional. However, the Court disagreed with the part of the EEOC's regulations which said that if an employee proved in court that an employment practice disproportionately harmed older workers, the employer had to justify it as a "business necessity." The Supreme Court ruled that employers defending ADEA claims of disparate impact do not have to prove business necessity. Rather, employers need only prove that the practice was based on a reasonable factor other than age (RFOA). The Court has also said that the RFOA defense is easier to prove than the business necessity defense, but it did not otherwise explain RFOA.

The EEOC's rule, which became effective on April 30, 2012, does two things: (1) It makes the existing regulations consistent with the Supreme Court's holding that the defense to an ADEA disparate impact claim is RFOA, not business necessity; and (2) it explains the meaning of the RFOA defense to employees, employers, and those who enforce and implement the ADEA.

The final rules revise the ADEA regulations at 29 C.F.R. §§ 1625(b) through (e). Section 1625(e)(1) provides that a reasonable factor other than age is one that **is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.** The question of whether a differentiation is based on a non-age factor must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

To successfully assert the RFOA defense under the final rule, an employer must show that **the employment practice was both reasonably designed to further or achieve a legitimate business purpose** and **administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.**

Perhaps most helpful to employers is the non-exhaustive list of considerations set forth in the final rule at § 1625(e)(2) that may be taken into account to determine whether an employment practice is based on a reasonable factor other than age:

- The extent to which the factor is related to the employer's **stated business purpose**;
- The extent to which the employer **defined the factor accurately** and **applied the factor fairly and accurately**, including the extent to which managers and supervisors **were given guidance or training** about how to apply the factor and avoid discrimination;
- The extent to which the employer **limited supervisors' discretion** to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- The extent to which the employer **assessed the adverse impact** of its employment practice on older workers; and
- The **degree of the harm to individuals within the protected age group**, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer **took steps to reduce the harm**, in light of the burden of undertaking such steps.

According to the EEOC, employers need not show that they used each of the considerations listed in the regulation. Rather, the considerations are meant to describe the most common characteristics of reasonable practices. The defense could be met absent any of the considerations, and, likewise, the defense is not automatically established just because one or more of the considerations are present.

Employers will most commonly face age-based disparate impact claims in connection with their hiring and layoff practices, but these claims can easily arise in other scenarios, such as discipline. While employers are not required to search for options and use the one that has the least severe impact on older individuals, an employer's efforts to reduce the harm to older individuals will be relevant to the employer's defense.

In order to avoid liability in age-based disparate impact claims, employers may consider doing the following:

- *Identify any practices or policies that may be having a disparate impact on older workers and identify the causes of the disparate impact so that you can eliminate the causes or establish a reasonable factor other than age-based on the EEOC's identified considerations.*
- *Moving forward, have a clear, stated business purpose for each of your employment practices.*
- *Make sure that the factors you use to evaluate employees are related to your stated business purposes.*
- *Apply each factor fairly and accurately, and make sure that you take into account potential harm to older workers.*
- *Do not give supervisors unconstrained discretion to evaluate employees or applicants using subjective criteria. Provide guidance to supervisors when asking them to evaluate subjective criteria that touch on age-based stereotypes, such as flexibility, willingness to learn, and technological skills.*
- *Document the reasons for the design and administration of your practice. Although employers are not required to keep special documentation to prove that they reasonably designed and administered their practice to achieve a legitimate business purpose in light of potential harm to older workers, documentation can help establish the RFOA defense.*

INDIVIDUAL LIABILITY FOR FMLA VIOLATIONS

In Haybarger v. Lawrence County Adult Probation and Parole, No. 10-3916 (3d Cir. Jan. 31, 2012), the Third Circuit unanimously held that supervisors, in both the private and public sectors, can be personally liable for violations of the FMLA separate from, and in addition to, the employer.

Debra Haybarger, an Office Manager for the defendant, Lawrence County Adult Probation and Parole, often missed work in connection with her health problems, which included Type II diabetes, heart disease, and kidney problems. Ms. Haybarger's supervisor, William Mancino, Director of Adult Probation and Parole, expressed displeasure with her illness-related absences, questioned her regarding why she needed to visit the doctor with such frequency, and formally disciplined her for her medical absences. Eventually, Ms. Haybarger's employment was terminated based on Marcino's recommendation.

Thereafter, Ms. Haybarger sued Lawrence County Adult Probation and Parole, and Marcino, for violations of various employment laws, including the Family Medical Leave Act (FMLA). Marcino sought to have Haybarger's FMLA claims against him dismissed on the grounds that the FMLA does not allow for individual liability. After considering the language of the FMLA, Department of Labor Regulations, and cases interpreting the Fair Labor Standards Act, the Third Circuit recognized that supervisors may be held individually liable for FMLA violations.

The FMLA includes in its definition of employer "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such an employer." Thus, a supervisor who was responsible in whole or in part for an alleged FMLA violation may be liable even if that supervisor is not the ultimate decision maker.

The Third Circuit joined the Fifth and Eighth Circuits, and opposed the Sixth and Eleventh Circuits, in permitting individual liability under the FMLA.

Individual supervisors can be held liable despite the fact that they are not high-level officials or the fact that they do not have final authority of the employee. They need only exercise some control over the employee and be at least partially responsible for the FMLA violation. Managers and supervisors need not intend to violate an employee's FMLA rights – they can be held liable even for unintentional FMLA violations.

Provide supervisors and managers with FMLA responsibilities with periodic FMLA training and secure insurance to cover the defense and resolution of FMLA claims filed against individual supervisors.

EMPLOYERS MUST PROTECT THEIR EMPLOYEES FROM A HOSTILE WORK ENVIRONMENT, EVEN IF THE HOSTILE ENVIRONMENT IS CAUSED BY A CUSTOMER, ACCORDING TO EEOC

On February 27, 2012, the EEOC announced that the owner/operator of a Hurricane Grill and Wings restaurant franchise in Royal Palm Beach, Florida, is paying $200,000 to settle a class sexual harassment lawsuit.

The lawsuit, filed by the EEOC, alleged that the restaurant permitted a customer to sexually harass certain female servers. When the company discovered that one of these female servers had hired an attorney to assist her in filing a Complaint with the EEOC, the company terminated the server's employment.

The EEOC further alleged that the restaurant permitted this customer to grab the female servers' breasts and buttocks, humiliate them with sexual innuendos, and invite them to join him and his wife in a ménage a trois.

The EEOC's Miami regional attorney, Robert E. Weisberg, noted that Title VII requires an employer to prevent known sexual harassment created by other employees or customers. The restaurant had a responsibility to protect its employees regardless of the harasser's status. Rather than fight the lawsuit, the restaurant chose to settle.

Do not assume that you have no duty to protect your employees if their harassers are not also employed by you. Although you may not be able to control the initial acts of a third party, you must take steps to stop harassment during subsequent incidents, particularly if the same individual continues to harass an employee or employees.

KELLEY DRYE VOLUNTARILY DROPS MANDATORY RETIREMENT POLICY

On April 10, 2012, the law firm Kelley Drye and Warren settled an age discrimination case with the Equal Employment Opportunity Commission over its retirement policy. The policy allegedly cut pay to a discretionary bonus and stripped attorneys of partner status once partners reached the age of 70. Eugene D'Ablemont filed a federal age discrimination lawsuit, and Kelley Drye voluntarily dropped the policy shortly thereafter.

The settlement, which expires in April 2015, requires the firm to pay D'Ablemont approximately $574,000 in back pay and a percentage of fees for his services. Additionally, all partners are required to attend a two-hour training session on age discrimination laws within six months. Members of the executive committee will attend an additional hour-long session. In addition, the firm is required to provide the EEOC with records of any age discrimination complaints it receives. Kelley Drye insists that its decision to settle was based on a cost-benefit analysis and was not an admission of any wrongdoing.

In 2005, the EEOC filed suit against Sidley Austin filed by the EEOC on behalf of 32 former equity partners claiming age discrimination. The law firm also denied wrongdoing, yet settled the case in 2007 for $27.5 million. Also in 2007, the American Bar Association passed a resolution recommending that law firms get rid of their mandatory retirement policies.

If your company still has a mandatory retirement policy, it is probably time to do away with it. In light of the EEOC's new rule, discussed supra, such a policy is likely to expose you to liability for age discrimination.

NO MONEY DAMAGES IN SUITS BROUGHT AGAINST STATES FOR FAILING TO GIVE EMPLOYEES TIME OFF UNDER FMLA

On March 20, 2012, the United States Supreme Court, in Coleman v. Court of Appeals of Maryland, No.10-1016, held that States cannot be sued for money damages for failure to give an employee time off under the FMLA to recover from an illness.

Daniel Coleman was employed by the Court of Appeals of the State of Maryland. When he requested sick leave, he was told he would be terminated if he did not resign. He then sued in the U.S. District Court for the District of Maryland, alleging that his employer violated the FMLA by failing to provide him with self-care leave.

The FMLA, at 29 U.S.C. § 2612(a)(1), entitles employees to take up to 12 work weeks of unpaid leave per year for (A) the care of a newborn son or daughter; (B) the adoption or foster-care placement of a child; (C) the care of a spouse, son, daughter, or parent with a serious medical condition (A through C are the so-called "family care" provisions); and (D) the employees' own serious health condition when the condition interferes with the employee's ability to perform at work (the so-called "self-care" provision). The FMLA also creates a private right of action for equitable relief and damages "against any employer (including public agency) in any Federal or State court." §2617(a)(2).

In Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 730-32, the Supreme Court held that Congress could subject States to suit for violations of the FMLA's family-care provision on evidence of family-leave policies that discriminated on the basis of sex. Unlike in the family-care provision at issue in the Hibbs case, the self-care provision was not directed at an identified pattern of gender-based discrimination and was not congruent and proportional to any pattern of sex-based discrimination of the part of the states. Thus, Coleman's case was dismissed on sovereign immunity grounds, as states may not be subject to suits for damages based on violations of a comprehensive statute unless Congress has identified a specific pattern of constitutional violations by state employers.

The vote in this case was 5-4. All three female justices dissented, joined by Justice Stephen Breyer.

Note that the plurality opinion in the Coleman case only affects State employers. Regardless of public or private sector status, it is important that all employers apply their leave policies to all employees equally.

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