



Employment: High Profile Issues and Workplace Controls

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General Topics To Be Covered

- ▣ The Expanded Enforcement Agenda in Washington
- ▣ Legislative and Regulatory Developments
- ▣ Employee Misconduct, Including Workplace Violence
- ▣ Social Media
- ▣ Wage and Hour Law



The Expanded Enforcement Agenda in Washington

The Expanded Enforcement Agenda in Washington 2010 Means Increased Funding for Agencies

■ EEOC Funding Increases

- 2010 Budget increased by 6.7% from 2009
- Hired 155 investigators in 2009

■ EEOC 2009 Statistics

- 2009 charges were down 2.2% from 2008
- Majority of charges were race and sex discrimination claims
- 11 fewer lawsuits were filed by the EEOC than filed in 2008
 - More of these suits focused on violations of the Americans with Disabilities Act and fewer involved Title VII than in 2008

The Expanded Enforcement Agenda in Washington 2010 Means Increased Funding for Agencies

▣ Proposed 2011 DOL Funding Increases

- The proposed budget allocates \$14 billion to DOL's discretionary fund
 - Up from \$13.3 billion in 2010
- Wage and Hour Division seeks \$244 million
 - Up more than \$20 million from 2010
- Office of Federal Contract Compliance Program seeks \$113.4 million
 - Up from \$103 million in 2010

The Expanded Enforcement Agenda in Washington

Specific Initiatives – Misclassification Initiatives

- WHD has hired 250 new investigators, a one-third increase in staffing

- DOL is currently focusing on the misclassification of employees, including:
 - Independent Contractors
 - Exempt v. Non-Exempt Employees

The Expanded Enforcement Agenda in Washington

Specific Initiatives – Misclassification Initiatives

□ Independent Contractors

- Focus is on detecting and deterring employers from misclassifying employees as independent contractors and improving coordination between state and federal enforcement authorities

□ Exempt v. Non-Exempt Classifications

- Expect a focus on cases involving managers and assistant managers in the retail industry, insurance adjusters, loan officers/originators, stockbrokers, pharmaceutical sales representatives, and similar positions

The Expanded Enforcement Agenda in Washington

Specific Initiatives – Immigration Initiatives

- April 2009, the DHS issued updated worksite enforcement guidance emphasizing the enforcement priorities of ICE, including:
 - Dangerous criminal aliens
 - Employers that cultivate illegal workplaces and knowingly hire illegal workers

The Expanded Enforcement Agenda in Washington

Specific Initiatives – Immigration Initiatives

■ ICE Inspections

- November 2009, ICE announced that 1,000 employers were issued Notices of Inspection – putting employers on notice that ICE intends to audit I-9 Forms

■ USCIS Site Inspections

- Media are reporting that USCIS intends to visit 20,000 new sites as part of its data-mining initiative

■ Increased Use of E-Verify

- Federal web-based system operated by DHS and SSA that allows employers to enter information from Form I-9 and E-Verify processes data and determines employment eligibility
- Now mandatory for many federal contractors

The Expanded Enforcement Agenda in Washington

Specific Initiatives – Equal Pay Enforcement

□ National Equal Pay Enforcement Task Force

- Announced during President Obama's 2010 State of the Union Address
- Established earlier this year to ensure that agencies charged with equal pay enforcement work together to ensure that all industries are covered

The Expanded Enforcement Agenda in Washington

Specific Initiatives – Systemic Discrimination

□ EEOC's Systemic Discrimination Initiative

- Initiative was adopted by EEOC in April 2006, but with budget difficulties, pursuit of the initiative was hampered
- 2010 and 2011 will provide an influx of funding to hire the staff necessary to advance the initiative's goals
- Expect to see a more aggressive agency in 2010 and 2011



Legislative and Regulatory Developments

Legislative and Regulatory Developments

Labor Relations – Employee Free Choice Act

- The Employee Free Choice Act would provide:
 - Certification of a union when the majority of the workforce signs authorization cards
 - Mediation if employer and union cannot reach an agreement within 90 days and binding arbitration within 120 days
 - Increased penalties for unfair labor practices committed during an organizing campaign or first contract negotiations

Legislative and Regulatory Developments

Labor Relations – RESPECT Act

- Re-Empowerment of Skilled Professional Employees and Construction Tradeworkers (“RESPECT”) Act would amend the definition of supervisor in the NLRA:
 - To be classified as a supervisor, the employee must spend the majority of his or her time engaged in supervisory activities

Legislative and Regulatory Developments Labor Relations – NLRB Rule-Making

- Potential NLRB rule-makings are likely to:
 - Require that all employers post workplace notice of NLRA rights
 - Expedite election procedures and establish standard, appropriate units
 - Mandate that employers bargain with union representatives representing a “minority” of employees

Legislative and Regulatory Developments

Wage Discrimination – Paycheck Fairness Act

- The Paycheck Fairness Act would modify the Equal Pay Act. The most important modifications include:
 - Changing an employer’s affirmative defense from showing that the pay difference was based on a factor other than sex to showing that the pay difference was job-related
 - Modifying the non-retaliation provision to prohibit retaliation against employees who “inquired about, discussed or disclosed” the wages of an employee
 - Employees working in HR are excluded
 - Allowing class actions to be certified by opt-out rather than opt-in
 - Adding compensatory and punitive damages and attorneys and expert fees to available recovery

Legislative and Regulatory Developments

Wage Discrimination – Lilly Ledbetter Act

- The Lilly Ledbetter Fair Pay Act was signed by President Obama on January 29, 2009
- It modified non-discrimination statutes by asserting that discrimination in compensation occurs when:
 - A discriminatory compensation decision or other practice is adopted;
 - An individual is subjected to a discriminatory compensation decision or other practice; or
 - An individual is affected by the application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from the decision or other practice

Legislative and Regulatory Developments

ADA Amendments Act

- The ADA Amendments Act would define “disability” broadly - favoring coverage of individuals and deemphasizing the importance analyzing whether an “impairment” is a disability
 - This will shift the focus from determining whether the employee has a disability to evaluating the employer’s actions
- In 2009, the EEOC filed more than twice as many suits asserting ADA claims as it did in 2008
- Despite seeing a decrease in overall charges, the agency received an increase of disability discrimination claims
 - 21,451 charges in 2009 as compared to 19,453 in 2008 – a 10% increase
 - Disability charges comprised 23% of the overall charges in 2009, up from 20.4% in 2008

Legislative and Regulatory Developments

ADEA – Legislative Response to *Gross*

■ *Gross v. FBL Financial Services, Inc.*

- In 2009, the Supreme Court held that under the ADEA, a plaintiff must prove that age was the *but-for* cause of an adverse employment action, and not merely a motivating factor

■ Protecting Older Workers Against Discrimination Act

- Legislative response to *Gross* that would amend the ADEA to prohibit discrimination on the basis of age if the person's age is a motivating factor for the practice or decision
- POWADA would put the ADEA in line with Title VII

Legislative and Regulatory Developments

ADEA – Proposed Rule-Making

- The EEOC has proposed rules to clarify the ADEA’s exemption for “otherwise prohibited” employer actions that are “based on reasonable factors other than age”
- A “reasonable” factor is one that is objectively reasonable:
 - When viewed from the position of a reasonable employer under similar circumstances
 - Both in its design and the way it is administered
- To establish a “reasonable factor other than age defense” an employer should show that the practice was:
 - “[R]easonably 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

Legislative and Regulatory Developments

ADEA – Proposed Rule-Making

- The proposed rules explain that “other than age” is only available when the employment practice is not based on age
- Factors determining whether a practice is done for reasons “other than age” include the extent to which:
 - The employer gave supervisors unchecked discretion to assess employees subjectively
 - Supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes
 - Supervisors were given guidance or training about how to apply the given factors and avoid discrimination

Legislative and Regulatory Developments

Employment Non-Discrimination Act

- The Employment Non-Discrimination Act would amend Title VII to prohibit discrimination against an employee because of:
 - That employee's *actual or perceived* sexual orientation or gender identity
 - The sexual orientation or gender identity of a person with whom the employee associates
- Important provisions:
 - Facially neutral business practices are not prohibited
 - Dress and grooming standards are permitted, but an employee must be allowed to conform to the standards of the gender with which she or he identifies
 - An employer may deny an employee access to shared shower or dressing facilities, but must provide reasonable access to facilities that are consistent with his or her gender identity
 - An employer does not need to construct new or additional shower or dressing facilities

Legislative and Regulatory Developments

Arbitration Fairness Act

- The Arbitration Fairness Act would amend the Federal Arbitration Act to make unenforceable pre-dispute agreements in a number of instances, including employment disputes
- If passed, the Act would render existing agreements unenforceable

Legislative and Regulatory Developments

Franken Amendment

- The Franken Amendment was signed by President Obama on December 19, 2009
- The Amendment prohibits covered contractors from entering into mandatory employment arbitration agreements on certain subjects and prohibits contractors from enforcing existing arbitration agreements



Employee Misconduct, Including Workplace Violence

Employee Misconduct, Including Workplace Violence

- The 2009 National Business Ethics Survey, by the Ethics Resource Center, confirmed that cost-cutting measures undertaken during the recession have significantly increased employee misconduct
- Misconduct and the ADA
 - Employees may attempt to excuse misconduct by subsequently claiming that it was the result of a disability
 - But it is well-settled that the law does not immunize an allegedly disabled employee from termination for misconduct, regardless of whether the conduct was the manifestation of the alleged disability



Social Media

Social Media

Internet Searches in the Hiring Process

- ▣ Potential Problems when decision-makers use social networking sites or other internet postings at the hiring stage:
 - Negligent Hiring
 - Revelation of Protected Information
 - Privacy Laws
 - Off-Duty Conduct Statutes

Social Media Pitfalls When Employees Post on the Internet

- ❑ Reputational Harm
- ❑ Discrimination and Harassment Liability
- ❑ Trade Secrets Revealed
- ❑ Federal Trade Commission Rule Violations
- ❑ Notice of Employee's Protected Class
- ❑ Violation of Non-Solicitation Clauses



Wage and Hour Law

Wage and Hour Law Rules and Modern Technology

- Non-exempt employees may be working overtime if they check PDAs or e-mail after their workday has ended
- To limit liability:
 - Establish policies to limit the distribution of technology
 - Encourage non-exempt employees to adopt practices to keep work at the workplace
 - Monitor compliance with any company policies limiting the use of remote work devices
 - Do not assume that the employer can accept the benefits of work performed off-site