May
2009
Volume 1
Issue 2

BEAN KINNEY & KORMAN PC
ATTORNEYS

# Employment Law Newsletter

## Inside This Issue:



## Our Practice Areas:

BUSINESS & CORPORATE

- Appellate Practice
- Business Services
- Construction Law
- Copyright/Trademark
- Creditors' Rights
- Employment Law
- Government Contracts
- Immigration
- Land-Use, Zoning, & Local Government
- Landlord/Tenant
- Lending Services
- Litigation
- Mergers and Acquisitions
- Nonprofit Organizations
- Real Estate Services
- Title Insurance

INDIVIDUAL SERVICES

- Alternative Dispute Resolution
- Domestic Relations
- Negligence/Personal Injury
- Wealth Management & Asset Protection
- Wills, Trusts & Estates

### Employment Changes Underway and Ongoing

By: Philip Keating

As discussed in the prior issue of the Employment Law Newsletter, the onset of the administration of President Obama and a Democratic majority in the U.S. Congress has resulted in a flurry of activity designed to modify U.S. employment laws. This activity is occurring both in the legislative arena with numerous proposals in Congress and the regulatory arena as various government agencies such as the Equal Employment Opportunity Commission ("EEOC"), the U.S. Department of Labor ("DOL") and Department of Homeland Security ("DHS") announce their regulatory agendas.

Fair Pay Act

One significant piece of legislation, the "Lily Ledbetter Fair Pay Act of 2009," already has been approved by the U.S. Congress and signed in to law by President Obama. This law amends Title VII of the Civil Rights Act of 1964 and establishes that the 180 day statute of limitation for filing a fair pay act claim is measured from each paycheck received, and not when the allegedly discriminatory pay rate was imposed. This law reverses a U.S. Supreme Court decision in 2007, and has the effect of keeping potential wage claims against employers alive for a much longer period of time.

Employee Free Choice Act - Card Check

The second piece of legislation that has received the most attention and potentially would have far reaching impact is the so called Employee Free Choice Act ("EFCA"). The EFCA would dramatically change the law governing labor-management relations and is designed to make it much easier for unions to become the bargaining representative of an employer's workforce. There are two main provisions to the current version of the EFCA. The first involves what is known as "card check" and would allow unions to become the official bargaining representative of a group of employees if fifty percent (50%) of the group signs a union authorization card. There would be no secret ballot in these cases. Obviously the employer concerns are about the influence that may be brought to bear on employees by union supporters and whether the decision to sign an authorization card would be an exercise of free will. Thus, the focus of the opposition to the EFCA has been to maintain the secret ballot process.

The second primary provision of the EFCA would require mandatory arbitration between the union and the employer on the terms of the initial collective bargaining agreement. If the parties themselves do not reach agreement within 130 days of the union being recognized, an arbitration panel appointed by the Federal Mediation and Conciliation Service will impose the terms of a two year contract. Employers obviously will lose the right to not agree to terms they consider too onerous and contrary to their business interests. This approach also will encourage unions to make extreme bargaining demands with the hope that the federally appointed arbitrators will reach some supposed middle ground, regardless of the Employer's legitimate business interests.

The legislative status of the EFCA is that the bill will not advance unless at least 60

2300 Wilson Boulevard, 7th Floor, Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

**Employment Law Changes Underway and Ongoing**
*Continued from Page 1*

U.S. Senators agree to it. At present, the EFCA supporters are several votes short of the 60 vote threshold. The supporters of EFCA are working diligently to obtain the needed votes and reportedly are proposing minor amendments to the basic proposal to obtain converts. Employers should make their opinions heard to Senators and members of Congress on this proposal.

Other Legislative Proposals

There are other legislative proposals in the U.S. Congress that bear watching. A congressman from the Orlando, Florida area has introduced a bill known as the Paid Vacation Act of 2009 that would mandate employers to provide paid vacation to employees who have been employed for at least one year, have worked 1,250 hours and work a minimum of 25 hours per week. At the outset, only employers with 100 employees or more would be covered but that would decrease to 50 employees after three years.

Another bill known as the Healthy Families Act also has been introduced with over 100 co-sponsors. This bill requires that employers with 15 or more employees provide for employees to earn one hour of paid sick leave for every thirty hours worked. The maximum accrual is 7 days (56 hours) per year. The sick leave could be used by the employee for their own or a family member's illness, preventative care appointments, and for a number of other situations.

Finally, the proposed Small Business Health Options Program, otherwise known as the "Shop Act", would create state or nationwide health insurance purchasing pools for employers with less than 100 employees. The bill also includes provisions on tax credits for employers under certain conditions and banning the practice of rating insurance coverage based on claims experience.

All of these legislative proposals need to be followed and, again, it is important for business owners and employers to make their voices heard in the legislative debate. However, the biggest issue, other than the EFCA, is yet to come and that is the health care reform debate. We will update these issues as they develop.

Regulatory Agendas

In recent weeks, the EEOC issued its regulatory agenda for the next six months. During this period, the EEOC expects to issue final regulations implementing the Genetic Information Nondiscrimination Act, propose update regulations under the Americans with Disabilities Act, and update regulations for the Age Discrimination in Employment Act as a result of a U.S. Supreme Court decision concerning how to consider what is known as the reasonable factors other than age defense. The Department of Homeland Security, which includes the various departments involved with immigration matters, announced that their priority in terms of employment of unlawful aliens will be on employer I-9 enforcement and related sanctions. Thus, employers are advised to review and update their I-9 compliance procedures.

## Amendments to the Americans With Disabilities Act Brings Major Changes in Employment Law Part II

By Arianna Gleckel

In our prior issue we addressed the first three (of seven) major amendments under the Americans With Disabilities Act Amendments Act of 2008 (ADAAA) that is the most expansive amendment to the Americans with Disabilities Act (ADA) in the past decade. The new law became effective January 1, 2009. Employers need to understand these changes and the impact such amendments have on employer obligations in order to remain in compliance with the ADA. Here are the final four changes under the ADAAA.

Fourth, the ADAAA eliminates the consideration of mitigating measures when determining whether an impairment "substantially limits a major life activity." Now, courts must analyze the existence of a covered impairment or disability without consideration of any mitigating measures, such as medication, prosthetic devices, or neurological modifications. One exception that has been carved out is for visual impairments. The use of eyeglasses or contact lenses may be considered in determining whether an impairment substantially limits a major life activity.

Fifth, the ADAAA expands when an individual will be considered "regarded as" having a disability. Being "regarded as" having a disability is now determined based on whether the person "has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."

An employee does not meet the requirement of "being regarded" as having such an impairment if the impairment is a transitory and minor impairment with an actual or expected duration of 6 months or less.

Sixth, under the ADAAA employers are not required to offer reasonable accommodations to employees who claim they were "regarded as" disabled.

Seventh, the last major change is that the ADAAA contains several other provisions that are favorable for employers. The ADAAA explicitly states that reverse discrimination (discrimination against non-disabled individuals) is not an actionable claim. It also keeps the ADA's prior exclusions for the use of illegal drugs, sex-based conditions, such as gender-identity disorder, and psychological-criminal conditions, such

**Amendments to the American With Disabilites Act Brings Major Changes in Employment Law, Part II**
*Continued from Page 2*

as pyromania or kleptomania.

So what should employers do now to comply with these changes? Employers should keep records or logs of requests made by employees, the accommodations provided and/or denied, and any notes related to the reasons for such decisions. Employers should also provide additional training for human resources professionals and members of management, so as to educate their staff on the proper procedures under the ADAAA and the ADA as a whole.

For additional information on complying with these ADA changes, contact Arianna Gleckel at agleckel@beankinney.com.

## Will New Legislation Void Employers' Arbitration Clauses in Employment Agreements?

By Arianna Gleckel

Does your employment agreement contain a provision which requires employees to arbitrate employment disputes? If so, new legislation, if passed, will outlaw such provisions and will void existing arbitration clauses in employment agreements.

On February 12, 2009, U.S. Representative Henry Johnson of Georgia introduced the Arbitration Fairness Act of 2009 (H.R. 1020) which has been referred to the Subcommittee on Commercial and Administrative Law but has not yet been voted on in the House.

The bill was motivated by a concern in Congress that the Federal Arbitration Act ("FAA"), which was adopted in 1925 to allow parties to enter into binding and enforceable arbitration agreements, now favors large corporations who require consumers and employees to submit any claims or disputes to binding arbitration without the right to have a judge or jury resolve the dispute.

Congress also found that most employees have no option but to accept compulsory arbitration provisions as a condition of their employment. This trend of including mandatory arbitration provisions has led to "a poor system for protecting civil rights and consumer rights because it is not transparent." H.R. 1020 Section 2(6) (2009).

The bill states that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute. It broadly defines "employment dispute" as a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act.

"Predispute arbitration agreement" is defined as any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement. If passed, this Act would invalidate all mandatory arbitration provisions included in employment agreements, handbooks or any other documents which the employee must complete as a condition of employment.

Under this legislation, if there is a dispute as to whether the Act applies to an arbitration agreement, the issue will be determined by the court applying federal law, and not the arbitrator. This bill does not apply to arbitration provisions in collective bargaining agreements.

Similar legislation was introduced in 2007 but did not make it to a vote (110th Congress H.R. 3010). However if passed this time around, employers will need to review all agreements, handbooks and other documents that employees must sign as a condition of their employment and revise any mandatory arbitration language.

For additional information on revising arbitration language to your employment agreements, contact Arianna Gleckel at agleckel@beankinney.com.

## Contact Us

2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com


**New I-9 Form Implemented and Acceptable Form Updates**

By Philip Keating

Since 1986, employers have been required to verify the identity and authorization for employment of all new employees hired. This verification is done through the use of Form 1-9 and the review of specified documentation establishing identity and employment authorization.

The I-9 Form and the list of acceptable documents has been updated. The new form and accompanying instructions are available on the U.S. Citizenship and Immigration Services web site at www.uscis.gov. Prior editions of the 1-9 Form may not be used.

It is particularly important that employers review their I-9 compliance procedures to be certain that the correct form is being used and the correct documents being reviewed. The focus of U.S. government offices with respect to unauthorized employment will be on employers. Therefore, it would be prudent for employers to conduct an I-9 self-audit and correct any identified issues.

On a related matter, the proposed requirement that many government contractors enroll in and utilize the "E-Verify" program has been delayed. However, it is expected that "E-Verify" will soon be a requirement for companies with federal government contracts.

For more information about the I-9 Form and compliance, contact Philip Keating at pkeating@beankinney.com.




BEAN KINNEY & KORMAN PC
ATTORNEYS

2300 Wilson Boulevard, 7th Floor
Arlington, VA 22201


GETTING IT DONE®