

H.R. ALERT*

APRIL - AUGUST 2008

Since our last *H.R. Alert* was issued in March of this year, both the legislative, executive and judicial branches have been quite busy in issuing legislative and legal pronouncements which affect employers of all sizes.

In this issue of our *H.R. Alert*, we will cover the key legislative, administrative and judicial developments which merit close attention.

United States Department of Labor Unveils Labor Compliance Assistance Update

On May 6, 2008, the United States Department of Labor unveiled the *FirstStep* Recordkeeping, Reporting and Notices e-laws Advisor. This is the latest tool of the Department of Labor to assist employers seeking to comply with federal employment laws. By using this tool, employers can readily determine which recordkeeping, reporting and notice requirements apply to them under the major laws administered by the

Department of Labor. This new e-laws Advisor has been integrated with the revised and expanded *FirstStep* poster and *FirstStep* employment law overview advisors. All three advisors assist employers in identifying the federal employment laws relevant to them and then explain how to comply with the requirements. This new e-laws Advisors is available at the following url: www.dol.gov/elaws/firststep.

Department of Labor Announces its “Transforming the American Workplace: A 21st Century Vision” Summit

On July 31, 2008, the Department of Labor kicked off its “Transforming the American Workplace: A 21st Century Vision” summit. The summit focused on including people with disabilities in the American workforce, seeking to reduce barriers to employment. This inaugural summit attracted representatives of various industries in both the public and private sectors. The Office of Disability Employment Policy (“ODEP”) is

leading a 21st Century federal response to address the employment of people with disabilities. For more information on how ODEP facilitates the development and implementation of both policies and practices in addressing the employment of people with disabilities and providing employment related support, visit www.dol.gov/odep.

Executive Order Requires All Federal Contractors to Use E-Verify

On June 6, 2008, President Bush issued Executive Order 12989 (“EO 12989”), directing all federal departments and agencies to require federal contractors to use the government’s E-Verify Program. Pursuant to EO 12989, all federal contractors must verify the employment eligibility of all new hires and current employees assigned to work on future federal contracts. E-Verify is the web-based program operated by U.S. Citizenship and Immigration Services, in partnership with the Social Security Administration, that allows employers to verify the work authorization of new employees. Federal contractors who refuse to use E-Verify will be

deemed ineligible to do business with the federal government. EO 12989 also instructs federal agencies not to do business with federal contractors who “knowingly employ unauthorized alien workers.”

The Department of Homeland Security (“DHS”) will soon issue rules, regulations or orders that it deems necessary to implement the Executive Order. According to EO 12989, federal contractors may be suspended or completely dismissed by a contracting agency based on their noncompliance. Moreover, EO 12989 states, “Contractors that adopt rigorous employment eligibility

(continued on page 2)

(continued from page 1)

confirmation policies are much less likely to face immigration enforcement actions and they are generally more efficient and dependable than contractors that do not employ the best available measures to verify the work eligibility of the workforce.”

The EO 12989 applies to federal contracts involving more than \$3,000. Contractors who are involved in contracts involving more than \$3,000 must enroll in E-Verify within thirty (30) days of signing the contract and must begin verifying the employment eligibility of all new employees that are hired after enrolling in E-Verify. Moreover, contractors must continue to use the E-Verify Program for the life of the contract. Newly hired and newly assigned employees must be verified within three

(3) days of hire or assignment.

Federal contractors should immediately begin implementing the E-Verify system to ensure a smooth transition once an effective date is announced. (*Note:* participation in E-Verify does not exempt employers either from completing, retaining and making available for inspection I-9 forms that relate to their employees or, from complying with other applicable legal requirements.)

More information on E-Verify can be found at: www.dhs.gov/ximgtn/programs/gc_1185221678150.shtm

Governor Jindal Signs Bill Allowing Guns at Worksite Parking Lots

On July 2, 2008, Louisiana Governor Bobby Jindal signed into law Senate Bill 51 (Act 684). The law enacts La. R.S. 32:292.1, which provides generally (with some notable exceptions) that a person who lawfully possesses a firearm may transport or store the firearm in a locked, privately-owned motor vehicle in any parking lot, parking garage, or other designated parking area. This would include a parking lot or garage provided by employers.

The law further prevents most employers from prohibiting a person from transporting or storing a firearm in the foregoing manner. The law does, however, allow an employer to adopt policies specifying that the firearms be stored in locked, privately-owned motor vehicles on property controlled by the employer and hidden from plain view, or within a locked case or container within the vehicle.

Fortunately for employers, there is some protection against the inevitable lawsuit. An employer will not be liable in a civil action for damages resulting from or arising out of an occurrence involving a firearm,

transported or stored under this law. The law also does not specifically grant employees the right to carry firearms or any other weapons into the workplace. The law sets forth various exemptions that will enable an employer to craft workplace firearms policies that curtail firearms on workplace premises.

This new law became effective on August 15th. As you might expect, there was and is staunch opposition to this legislation by employers and business owners. Legal challenges against comparable legislation in other states has been met with favorable results. Indeed, a similar challenge in Louisiana is likely. Nonetheless, in the absence of any judicial ruling declaring the new firearms law unconstitutional, either in whole or in part, employers should review their policies to address the possession of firearms by employees at work in light of this new law.

Senate Bill 51 (Act 684) can be read in its entirety at the following url: www.legis.state.la.us/billdata/streamdocument.asp?did=504213

U.S. Supreme Court Issues Key Employment and Labor Decisions as October Term Concludes

In a year already marked by several significant employment law decisions, the Supreme Court handed down several new opinions in May and June, establishing

important precedent in areas ranging from age discrimination and retaliation to employee benefits and labor.

Age Discrimination: *Meacham v. Knolls Atomic Power Laboratory*

On June 19th, in *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008), the Court held that the employer—not the plaintiff/employee—bears the burden of establishing a “reasonable factor other than age” defense in a disparate impact suit under the Age Discrimination in Employment Act (ADEA). Disparate impact cases are those in which there is no evidence showing intentional, overt age discrimination. Instead, the employee alleges that the employer implemented some job requirement or other policy that impacts older workers more than younger workers. A common example is a physical strength or fitness requirement.

countered that the subjective assessment policy was a reasonable, non-age-based means of furthering legitimate business goals. The lower court held that the employees had the burden of proving that the policy was not reasonable.

In *Meacham*, the company was engaged in a reduction in force, and had a policy of relying on subjective assessments, rather than objective measures, in deciding which workers to cut. A group of employees over forty sued, complaining that the subjective assessments had a disparate impact on older workers. The employer

The Supreme Court reversed, holding that the burden of showing that a policy is based on a “reasonable factor other than age” (RFOA) lies with the employer, not the employee. The Court said that the statutory language of the ADEA indicates that an RFOA argument should be treated as an affirmative defense. Thus, the defendant/employer has the burden to produce evidence and ultimately to persuade the Court of reasonableness. The Court, however, re-emphasized that an employer does not have to show that the policy in question was a “business necessity,” only that it represents a “reasonable” means of furthering a legitimate business objective.

Employee Benefits: *Metropolitan Life Ins. Co. v. Glenn*

In *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008), the Court considered whether an insurer that simultaneously (1) serves as administrator of an employer’s benefits plan and (2) also pays out benefits under the plan, has a “conflict of interest” for purposes of the Employee Retirement Income Security Act (ERISA). Under ERISA, plan administrators must provide a “full and fair review” of benefits denials. This requires appropriate safeguards at the review level, including segregating the reviewer from the initial decision-maker, insulating the reviewer from financial considerations, and applying a consistent approach. While conflicts of interest are not barred outright, they must be weighed as a factor when a court determines the proper level of scrutiny to apply in reviewing a denial of benefits.

of interest. The Court previously had ruled that such a conflict exists where *the employer itself* both funds the plan and evaluates claims. *Glenn* establishes that a conflict also exists where the plan administrator is an outside insurance company. The Court noted, however, that the significance of the conflict in reviewing any given benefits determination will turn on the particular facts of the case.

The Court held that MetLife’s dual role of both evaluating and paying benefits claims did create a conflict

Some commentators characterize the Court’s holding as a “split-the-difference” approach, in which outside plan administrators are subject to scrutiny for conflicts of interest, but the weight given to that conflict is decided on a case-by-case basis. Others suggest that this ad hoc approach will make it more difficult for employers to predict the results in future denial of benefit cases. In any event, employers should carefully consider an insurer’s accuracy in claims processing as part of the process of selecting a plan administrator.

Age Discrimination in Employee Benefits: *Kentucky Retirement Systems v. EEOC*

In *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008), a sharply divided Court held 5-4 that Kentucky's disability retirement system does not violate the Age Discrimination in Employment Act (ADEA), even though age is a factor in calculating benefits for some workers. Under the rules of the Kentucky plan, employees who become disabled prior to retirement age receive certain benefits. If an employee is over fifty-five at the time of becoming disabled, he receives normal benefits. If he is under fifty-five, but nonetheless has sufficient years of service, he receives higher benefits payments. Attorneys for the Kentucky plan argued that the distinction is fair because it provides more benefits for younger disabled workers who have had less time to accumulate funds for retirement, and therefore need more assistance than older workers.

The majority agreed, holding that the distinction in this case was not arbitrary or motivated by bias against

older workers. It found that the policy drew lines based on "pension status," which Kentucky was not using as a proxy for age. The Court also observed that Kentucky's system "does not rely on any of the stereotypical assumptions that the ADEA sought to eradicate." The dissenting opinion advocated a more literal application of the ADEA, and criticized the majority for undercutting the basic framework of that statute, which prohibits disparate treatment unless some specific exemption or defense in the Act applies.

It should be noted that the Court's opinion was heavily dependent upon the facts of the case. Employers should not presume that any age-based distinctions in benefits plans will be upheld. The practical upshot is more narrow: to state a claim under the ADEA, a plaintiff must produce sufficient evidence to show that the differential treatment under a benefits plan was "actually motivated" by age, not pension or other relevant status.

Labor Law: *Chamber of Commerce of U.S. v. Brown*

Finally, in *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408 (2008), the Supreme Court ruled that the National Labor Relations Act (NLRA) preempts a California law which prevented employers from using state funds "to assist, promote, or deter union organizing." The Court held that the state law regulated conduct that Congress intended to leave unregulated.

The California law, passed with strong union backing, prohibited employers receiving state grants from using any portion of the money to "assist, promote, or deter" union organizing campaigns. Since no employer would expend funds to "assist" in union organization, the law was effectively an attempt to prevent employers receiving

state grants from opposing unionization.

The Court held that the NLRA implicitly prohibits any government authority—including state governments—from attempting to restrict non-coercive employer or employee speech on the decision whether to unionize. The Court rejected arguments that the law was neutral on unionization, and that California had a right to expend state funds as it saw fit. While the decision may have little immediate practical impact on employers outside California, the 7-2 margin is a sign that NLRA preemption of state labor regulations remains robust under the current Supreme Court.

Supreme Court Holds That Employees May Bring Race-Based Retaliation Claims With Fewer Restrictions Under Section 1981

On May 27, 2008 the Supreme Court issued its opinion in *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008). The Court held, for the first time, that plaintiffs may bring claims for race-based retaliation under Section 1981 of the Civil Rights Act of 1866. Retaliation

claims already are available under Title VII of the Civil Rights Act of 1864, but that statute imposes significant limits on damages and requires plaintiffs to submit their claims for review by the Equal Employment Opportunity Commission (EEOC) before they may file suit. The

CBOCS ruling will have substantial consequences for employers, including exposure to unlimited damages, and perhaps a longer time period for employees to file retaliation suits.

In *CBOCS*, Humphries, an African-American assistant manager at an Illinois Cracker Barrel restaurant complained to a district manager that his supervisor's reports contained racially offensive remarks. The district manager took no action. Instead, he terminated Humphries' employment based on a report from another employee that Humphries left the store safe open overnight. Humphries filed suit under both Title VII and Section 1981, alleging race discrimination and unlawful retaliation for his complaints about the alleged racial remarks. Humphries' Title VII claims were dismissed because he failed to pay a filing fee on time. The district court also dismissed his Section 1981 retaliation claim, holding that the statute does not authorize such claims.

The Supreme Court disagreed, and in a 7-2 decision, held that plaintiffs may recover for race-based retaliation under Section 1981. The majority opinion, written by Justice Breyer, acknowledged that Section 1981 does not expressly prohibit retaliation against employees who raise concerns relating to race. However, the Court held that its previous decisions required it to interpret Section 1981's protections broadly. The dissent, written by Justice

Thomas and joined by Justice Scalia, called the majority's deference to precedent a "fig leaf" and said that Section 1981 should be strictly interpreted in accordance with its plain statutory language.

The *CBOCS* decision is likely to trigger an increase in the already-growing number of retaliation lawsuits filed by employees. For plaintiffs, Section 1981 provides a far easier road to victory on retaliation claims than Title VII does. First, it allows plaintiffs to bypass administrative review by the EEOC and go directly to court. Second, employees may have up to four years to file suit—far longer than the 180 day limit under Title VII. Third, Section 1981 contains no cap on compensatory or punitive damages, in contrast to Title VII's ceiling of \$300,000. Fourth, Section 1981, unlike Title VII, applies to small employers with fewer than fifteen employees, opening them up to retaliation suits (and unlimited damages) for the first time. Finally, Section 1981, unlike Title VII, can be used to sue both employers and individual employees.

Considering the prospect of unlimited damages under *CBOCS* alongside the Supreme Court's current, broad interpretation of what actions may give rise to a retaliation claim, it is absolutely imperative that employers have in place effective policies for addressing complaints relating to retaliation, harassment and discrimination in the workplace.

New Law Prohibits Genetic Bias and Limits Genetic Data Collection and Use

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act ("GINA"). The new law becomes effective November 21, 2009. GINA applies to both group health plans (Title I) and Employers (Title II). Title I of GINA, modeled on HIPPA, regulates group health plans and health insurers. It takes effect with the plan year that begins one year after enactment (for calendar year plans, January 1, 2010). The three federal agencies responsible for enforcement of Title I, namely, the Department of Labor, Health & Human Services and the Treasury Department, must issue final regulations by May 21, 2009.

Title I imposes penalties of up to \$100 per day for each affected participant or beneficiary up to an overall limit of \$500,000 or 10% of the plan sponsor's total annual health plan expenditures, provided the violations were due to reasonable cause as opposed to willful neglect.

Title II of GINA is modeled on employment discrimination laws such as Title VII and the Americans With Disabilities Act. It regulates employers and employment agencies, labor organizations and training/apprenticeship programs. It also takes effect November 21, 2009. The EEOC is to issue final regulations by May 21, 2009.

(continued on page 6)

(continued from page 5)

Title II generally prohibits employers from collecting an employee's genetic information and requires any such data be kept in separate confidential files. This accords with the purpose of GINA, which is to restrict the acquisition of genetic information, regulate its disclosure and prohibit its use in the employment context. Generally, it will be an unlawful employment practice for an employer to request or purchase genetic information with respect to an employee or a family member of the employee; however, there are limited exceptions such as the following:

- Genetic information can be collected in the law enforcement context and can be acquired through publicly available material such as obituaries in newspapers.
- Genetic information can be acquired during the operation of a wellness program if the employee's participation is voluntarily and in writing. Moreover, any individually identifiable genetic information cannot be disclosed to the employer, except in

aggregate terms that don't disclose the identity of specific employees.

Genetic information can also be collected for purposes of genetic monitoring. Genetic monitoring can be conducted by an employer if the following conditions are met:

- (i) if such monitoring is required by statute;
- (ii) the employee's participation is voluntary;
- (iii) the employee is informed of the findings;
- (iv) the monitoring is conducted in accordance with applicable regulations; and
- (v) any identifiable genetic information is not disclosed except in aggregate terms that does not disclose the identity of specific employees.

Use of Genetic Information

GINA generally prohibits the use of genetic information in the employment context but disclosure is limited to the following circumstances:

1. to the employee (or family member receiving genetic services) after written request;
2. to an occupational health researcher if the research is conducted in compliance with federal regulations;
3. to government officials who are investigating compliance with GINA if the information is relevant to the investigation;
4. to process a request for leave under the FMLA;
5. to make a mandatory report to a public health agency in the event of a contagious disease that poses an imminent hazard; and
6. to those entities as permitted by HIPAA and in response to a court order. (*Note:* an employer may not disclose genetic information simply in response to a subpoena or discovery request; a court order is required and the court order should be secured with the knowledge of the employee or family member to whom the information refers; if the employee has not been advised of the court order, the employer must inform the employee of the court order and any genetic information that was disclosed in accordance with the court order.)

As noted, various federal agencies will be tasked with implementing regulations interpreting GINA's provisions. Accordingly, all those who will be affected under the broad scope of GINA should stay tuned. We will keep all of our readers abreast of any further developments in this area.



Save the Date

Texas Employment Law Breakfast Briefing September 11

Sugar Land Employment Law Breakfast Briefing October 2

New Orleans Employment Law Seminar November 6

Texas Employment Law Seminar November 13

For more information, contact Abigail Gravois at
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