The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed

CONTENTS

Kollman & Saucier, P.A.
The Business Law Building
1823 York Road
Timonium, MD 21093
P. 410.727.4300
F. 410.727.4391

To be added to our mailing list or if you have comments or questions, please email us at kgauvey@kollmanlaw.com.

ADA

ADA Likely to be Amended

by Eric Paltell

In the next few months, we are likely to see Congress pass significant revisions to the Americans With Disabilities Act ("ADA"). The changes in the law will, among other things, modify the definition of disability and expand coverage to persons not presently covered by the law.

The ADA Amendments Act ("ADAAA") has already passed the U.S. House of Representatives by a vote of 402 to 17. On August 1, 2008, the ADAAA was introduced into the U.S. Senate, with several modifications to the version passed by the House. More than 65 U.S. Senators have agreed to co-sponsor the bill, which has bipartisan support from both employee advocacy groups and business organizations (including the Society of Human Resources Management).

Some of the more significant revisions to the ADA that are included in the legislation are:

- Reversing the Supreme Court's 1999 *Sutton v. United Airlines* decision, which holds that a person is not disabled under the ADA if the condition (such as nearsightedness or hypertension) can be controlled through medication or other mitigating measures;
- Creating non-exclusive list of "major life activities;" and
- Expanding the definition of a person "regarded as disabled" to include persons treated differently because of a real or perceived impairment, regardless of whether the impairment is a "major life activity."

The House version of the bill would amend the ADA to remove from the definition of "disability" the requirement that the condition "substantially limit" one or more major life activities. In place of that phrase, which has been defined by 17 years of court decisions, the House version would define a disability as a condition that "materially restricts" a major life activity. This could be a dramatic change in the law, especially since there is no case law or regulatory guidance to shed light on what is meant by "materially restricts." The version of the ADAAA introduced in the Senate does not make this change, opting instead to preserve the "substantially limits" language.

It is likely that the ADAAA will have enough support in Congress to override any attempt by the President to veto the legislation. Morever, the White House has indicated that the President very well may sign the ADAAA into law. Thus, the only real question is whether the version passed by the Senate will differ from the House version, and what compromises will be worked out between the two chambers.

Sex Discrimination

Paycheck Fairness Act Threatens Employers with Unlimited Penalties

by Ken C. Gauvey

In 1963, Congress passed the Equal Pay Act, which made it unlawful to discriminate based on sex by paying wages to employees of one sex at a rate less than wages paid to employees of the opposite sex. Today, this provision can be found in 29 U.S.C. § 206(d). Any employer who violates this provision can be required to pay the employee twice the wages they should have earned as well as the attorneys' fees and costs of any employee who was forced to recoup these wages. Now, the House of Representatives has passed a new equal pay act called the Paycheck Fairness Act. If enacted, this Act would broadly expand the penalties resulting from disparities in pay between male and female employees.

While such conduct has been illegal since 1963, the Paycheck Fairness Act expands existing penalties to unrestrained levels. The Act would make compensatory and punitive damages available as remedies to Equal Pay Act cases. It also authorizes class actions, mandates training by the EEOC, and includes a non-retaliation clause.

In expanding these damages available to claimants, the Act provides no statute of limitations nor does the Act indicate whether it applies only to causes of action arising after the Acts enactment. These omissions, combined with increased penalties, make actions under this Act attractive to plaintiffs.

Fortunately, a similar bill introduced by Senator Clinton in 2007 has been sent to committee. Equally fortunate, President Bush has vowed to veto the Act if it ever gets to him. Hopefully, the future administration will see the Act the same way.

Labor

Obama, McCain and the Employee Free Choice Act

by Eric Paltell

As readers of this newsletter know from past articles, the Employee Free Choice Act ("EFCA") is one of the most controversial pieces of employment legislation being considered by Congress. The law would dramatically change the way unions organize workers in this country by eliminating the secret ballot election and replacing it with a "card check" Under a "card check" procedure, a union would win the right to represent employees if a majority of employees in a bargaining unit signed "authorization cards" or a petition supporting union representation.

The EFCA would also provide that, in the event a union and employer cannot agree on a first contract within 90 days, a federal mediator would be called in to try to broker an agreement. If no agreement is reached within 30 days, either the union or the employer could call in an outside arbitrator to determine the terms and conditions of employment for the employees. The EFCA also includes provisions to increase penalties on employers for violations of the National Labor Relations Act ("NLRA").

The EFCA is shaping up to be a significant and hotly contested issue in this fall's Presidential election. Barack Obama is a co-sponsor of the legislation, and he has promised labor organizations that he will sign the law if he wins the presidency in November. According to the Washington Times, Senator Obama told the AFL-CIO:

"we're ready to play offense for organized labor. It's time we had a President who didn't choke on saying the word "union." A president who strengthens our unions by letting them do what they do best: organize our workers."

In contrast, John McCain strongly opposes the EFCA, and has co-sponsored an opposition bill called the "Secret Ballot Protection Act" (S1312). That legislation would eliminate the use of the card check procedure. According to Senator McCain, the EFCA is a "poorly disguised attempt by the labor unions to swell their ranks at the expense of workers rights and employers."

Organized labor has devoted tremendous resources to assist Senator Obama in getting elected. By some estimates, labor unions will spend more than 300 million dollars on the Presidential and Congressional elections. The Service Employees International Union ("SEIU") has said that it will spend 150 million dollars in support of pro-labor candidates, primarily with the hope of making the EFCA law. Senior SEIU officials have predicted that with passage of the EFCA, they would be able to organize a million or more workers a year, compared to the hundred thousand a year they are currently organizing.

To counter the efforts of organized labor, the United States Chamber of Commerce has launched the "Workplace Freedom Initiative." According to Chamber President Tom Donahue, the AFL-CIO effort will "take away the protection of a private ballot, giving union organizers free rain to publicly pressure workers into signing cards stating support for a union."

Given the likelihood of Democrats increasing their representation in both the House and the Senate, it may not even matter if McCain or Obama wins the election. It is not at all farfetched to envision the EFCA garnering a veto-proof margin of support and becoming the law of the land. For this reason, employers should be preparing for a significant increase in organizing activity in the years to come.

Immigration

Not All Work Experience is Created Equal

by Ken C. Gauvey

In any employment-based immigration matter, one of the key issues involves the work experience of the foreign national the employer wants to hire. The government wants to know why the employer is choosing to hire the foreign national rather than any minimally qualified U.S. worker. That's an interesting term actually. There are not a whole lot of employers who are out there looking for the minimally qualified candidate, but this is the requirement foisted upon employers by immigration regulations. To deal with this conundrum, the Department of Labor requires employers to go back in time to see if the foreign national met the minimum requirements necessary for the position when they were hired. In other words, a foreign national's experience in the position cannot be the basis for turning away U.S. workers.

When drafting a job description, employers are required to list the essential qualifications for the position. The description should be as specific as possible. Employers are discouraged from drafting a job description tailored to the foreign national. Rather, the description should match the actual requirements for the position. It is assumed, and the Department of Labor as well as Homeland Security will make sure, that the foreign national was qualified for this position at the time of his hire. If not, then the job description may result in disqualifying the foreign national.

There are a couple of exceptions to this rule. The first one is that the employer can show that the foreign national gained the necessary experience while working for this employer, but in a position that was not substantially comparable to the position for which certification is being sought. The second exception, and by far the more difficult to prove, is that the employer can show that it is no longer feasible to train a worker to qualify for the position. Both of these standards are pretty high, and attempts to prove them will likely result in audits and further inquiries into the available position itself.

A substantially comparable job or position is defined as one where the same job duties are performed more than 50% of the time. This must be documented by job descriptions, organizational charts, payroll records, etc. Even if this threshold is met and the employer can satisfy its burden in showing that the position for which it is seeking the foreign national is not comparable to the other work the foreign national did for the company, the Department of Labor has specified that any education and training received by the foreign national that was paid for by the employer cannot be used to qualify for the position.

The second exception is that the employer can show that it is no longer feasible to train a replacement for the foreign

national. To meet this burden the employer must document the increase or decrease in its business, the change in its workforce, hiring practices or training practices which makes such training infeasible. This is an extraordinarily high standard to meet.

This topic is really all about timing. This issue is almost purely one of sponsoring an employee for green card status, which typically occurs after the employee has been working for the employer for six years as an H-1B. The regulation's effect is that employees must remain in a state of stagnation for six to eight years. If the position they are working in advances with them, then they may end up disqualifying themselves out of a job when they develop new skills while working for the same employer. This process requires employers to judge employees at the time they were hired and not at the time the employer began the process of sponsoring their employee for a green card.

When considering the process of sponsoring an employee, employers should always consult with an immigration attorney before going forward. There is nothing simple about this process and acting otherwise not only damages the future of the employee, but the employer can also suffer some severe repercussions as well.

Religious Discrimination

EEOC Announces New Religious Discrimination Guidelines

by Ken C. Gauvey

The EEOC has launched a new religious discrimination manual. This manual is supposed to form the basis for EEOC investigations into allegations of religious discrimination. While these new guidelines retain the legal definition of reasonable accommodation, they appear to be an attempt by the EEOC to broadly expand the terms "religion" and "reasonable."

It is, of course, fairly difficult to make a claim under Title VII for religious discrimination where religion is not an issue. Evidently recognizing this, the EEOC has taken steps to significantly expand the term "religion" into new and uncharted areas. According to the EEOC, religion is no more than a belief system. It does not have to involve any type of deistic belief, but rather can just be a code of moral and ethical values held by the employee. This can be true even if this employee is the only one to hold such values.

This appears to be an unwieldy definition. The EEOC has evidently taken the stand that employers must now accommodate a moral and ethical belief system that may be completely contrary to that of the employer. The exception here is that if the belief system causes harm to the employer, or causes the employee to act contrary to the best interests of their employment the employer will likely not have to accommodate the employee.

In other words, the EEOC has now taken the "religion" out of religious discrimination. Employers no longer have to worry about prayer, sabbath, etc., but the actual moral and ethical codes of its employees. It is going to be difficult for the EEOC to enforce this, and the vague definitions it has provided is going to leave a lot of the interpretation of this new manual in the hands of its investigators.

The next major change in the new manual is the notion of religious accommodation. The guidelines provide that an individuals limited proselytizing should be accommodated. As an example, the manual provides that invoking the name of a deity in routine greetings should not be discouraged. In order to disallow even proselytizing, employers are now required to prove an undue hardship in allowing this type of conduct. Employers must now be prepared to document the effect of proselytizing on workplace rights of co-workers and on customers.

The good news here is that the EEOC is not the final word in this area, but merely the first step. The courts are the ultimate deciders in religious discrimination actions. The downside is that the courts are likely to have a lot more to decide in the future.

Kollman & Saucier, P.A. has launched a new podcast to keep employers up to date on important changes in employment, labor and immigration law. The first topic is the EEOC's new Religious Discrimination guidelines. You can get the new podcast at http://kollman-saucier.com/_podcasts.html or you can download it on iTunes.

Kollman's Corner

Conscience in the Workplace

by Frank L. Kollman

Conscience is a strange thing. The federal government prohibits discrimination against health care workers in hospitals receiving federal funds who have religious or moral objections to performing certain services, such as abortion. I seem to recall, however, that California recently prohibited health care professionals from refusing to treat homosexuals for religious reasons. The potential for conflicting religious, moral, and ethical objections is great.

Government has no business interfering in matters of conscience in the workplace. If an employee is asked to do something legal, he should be expected to do it. If the employee has a religious objection, the employer should be required to determine whether there is a reasonable accommodation. If not, he should be expected to do it or lose his job. Moral objections to legal activity should have no role in the workplace.

Employers should be allowed, within the scope of current employment laws, to determine what is moral in the workplace. Employees with objections should consider working someplace else. Government cannot, and should not, legislate morality.

For more thoughts and comments by Frank Kollman, visit his blog at http://kollmanlaw.com/blogs