KAUFMAN & CANOLES
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Legal Update

Summer 2009

Employment Law Update

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COBRA Subsidy and Related Changes Now in Effect

The American Recovery and Reinvestment Act of 2009 (ARRA) — signed into law on February 17, 2009 — established a new government subsidy ("Subsidy") designed to help the thousands of workers who recently lost their jobs continue health care benefits at an affordable (or at least lower) rate. In short, the Subsidy provides that terminated employees who elect continuation coverage under COBRA (the Consolidated Omnibus Budget Reconciliation Act of 1985) are required to pay only 35% of the premium that would otherwise be charged under the employer's plan, with the government subsidizing the remaining 65%. The employer must cover the cost of the remaining premium payment, but will be reimbursed that expense through a subsequent payroll tax credit or refund. To obtain this tax credit, employers should use the updated Form 941, *Employer's Quarterly Federal Tax Return*.

There are some important limits to this new Subsidy. It is not retroactive and applies only to periods of health coverage beginning on or after February 17, 2009. Also, the Subsidy applies only to workers who were involuntarily terminated between September 1, 2008 and December 31, 2009. Employees not eligible for COBRA coverage are not otherwise eligible for the Subsidy, nor does the ARRA extend or change the length of available COBRA coverage (18, 29, or 36 months).

Employers with 20 or more employees are required to distribute written notices to employees who would be eligible to elect subsidized COBRA coverage, and must also provide a new opportunity to elect COBRA coverage for terminated employees who chose not to elect unsubsidized COBRA coverage at the time of termination. Virginia, like several other states, has adopted a similar law that entitles employees of smaller companies (2 to 19 employees) to continue participation in a group plan for nine months at the same group plan rate and requires employers to notify eligible employees of this additional coverage. While the Department of Labor has issued new model notices that incorporate these changes to COBRA, our team has prepared more user-friendly versions of the applicable forms as well as a series of frequently asked questions to help employers understand their rights and obligations under these new health continuation laws. Copies of our revised forms can be downloaded from our website at www.kaufmanandcanoles.com

If you have any questions or would like a copy of our FAQs, please contact any member of the Kaufman and Canoles' Labor and Employment or Benefits Teams. Also, members of both teams will be on hand to answer any specific questions at the final showing of the 25th Annual Employment Law Update on July 23rd at the Hampton Roads Convention Center.

Lilly Ledbetter Act Increases Need for Compensation Records Retention

Lilly Ledbetter is a 70-something grandmother from Alabama who retired from her job at Goodyear in 1998. When she retired, she had been an overnight supervisor for almost 20 years and was the only woman holding such a position. As of 1998, Ms. Ledbetter was paid approximately $500 less per month than the lowest-paid man doing the same job. After retiring, Ms. Ledbetter sued Goodyear claiming that as a result of refusing a sexual advance from a male supervisor in the early 1980s, her compensation was negatively affected and her raises did not match those of her male co-workers. A jury initially agreed with Ms. Ledbetter and awarded her damages. However, in May of 2007, the U.S. Supreme Court ruled against her holding that only pay decisions made in the 180-day period before she filed a Title VII Discrimination Charge could be challenged and the "continuing effect" of earlier discrimination was not actionable.

The first bill signed into law by President Obama effectively reversed the Supreme Court's decision. The Lilly Ledbetter Act of 2009 allows an employee to challenge an allegedly-discriminatory salary decision within 300 days (180 days in some states other than Virginia) of any date the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice. Thus, each time an individual is paid based in whole or in part on such a prior compensation decision, a new filing period begins – even if the decision that led to the diminished paycheck took place many years earlier. But contrary to some of the initial media hype, the Act does not allow an employee to recover damages for 20 years of alleged pay discrimination – just for discrimination occurring within the 300-day limitations period even if it was caused by a discriminatory act that took place many years earlier.

At a minimum, the Act underscores the need to document fully all decisions relating to pay and compensation and to retain those documents until well after an employee's receipt of his or her last paycheck. If such records are not kept, the employer may be at a severe disadvantage in defending such a claim. For example, in the Ledbetter case, the male supervisor who made the decisions about Ms. Ledbetter's raises in the early 1980s and again in the 1990s was dead by the time the claim was filed. So without records, Goodyear may not have had much evidence to dispute the discriminatory wage claim. Since the Act permits employees to challenge pay decisions made years or even decades earlier, ***thorough, complete, and reliable records supporting the pay decisions must be maintained indefinitely***. In short, the lesson for companies is the need for new, much more comprehensive, and indeterminate-in-time document retention procedures.

Practical Pointer

The Lilly Ledbetter Act of 2009 has not yet generated an avalanche of new case filings, but it is early yet and the House has already passed a bill permitting employees to recover unlimited compensation and punitive damages in wage discrimination cases. For a detailed briefing on the Ledbetter Act as well as other recent changes in employment law, such as the Americans with Disability Act Amendments, and final regulations on the Family and Medical Leave Act, please feel free to log onto the Kaufman & Canoles March 2009 webinar at our website **www.kaufmanandcanoles.com**.

The #1 Most Outrageous Case of the Past Decade

Each year over the last decade, the K&C Employment Law Team has provided our readers and attendees with the Most Outrageous Employment Law Cases. This year we reviewed ten years of outrageous cases and selected the Most Outrageous Employment Law Case from the past decade. We named the winner "Can You Hold Please?"

This case involved a former telephone operator at a Ft. Lauderdale, FL company who entered into a workers compensation settlement due to an alleged repetitive motion injury. The repetitive motion at issue? The employee's job was that of a phone sex operator. She claimed that her job required her to repeatedly stimulate herself to be more effective during phone conversations with customers. This is probably not the type of activity envisioned by most judges who find for employees with carpal tunnel syndrome.

To view the entire list of the 10 Most Outrageous Cases from the last decade, visit www.kaufmanandcanoles.com/publications.asp.

EEOC Charges Reach Record High

The Equal Employment Opportunity Commission (EEOC) is the principal federal agency responsible for investigating employee charges of discrimination. The final statistics for charges handled by the EEOC during its fiscal year 2008 revealed that the total number of charges increased by 15% to a record-high of 95,402 private sector discrimination charges. While there was an increase in every major category of bias, the largest annual increases were for age bias charges and retaliation charges. Charges based on race, sex, and retaliation remained the most frequently alleged violations.

According to the EEOC, the surge in charges may be due to multiple factors, including: the economic downturn; increased diversity and demographic changes in the U.S. workforce; and employees' greater awareness of federal anti-discrimination laws. The increased number of charges, combined with somewhat limited resources to investigate charges has also led to a dramatic increase in the backlog experienced by almost every EEOC office. This may increase frustration for both employers and employees as they may be required to wait as long as two years or more for cases to be investigated.

As the number of charges increases, employers can expect the EEOC to continue to urge parties to resolve cases via the EEOC Mediation Program. As confirmed by the EEOC's current Chairman, Stuart Ishimaru, the EEOC will also "continue to invest in programs such as its systemic litigation program to maximize its effectiveness."

Practical Pointer

The former Chair and current Commissioner of the EEOC, Naomi Earp, was on hand at the initial showing of the 25th Annual Employment Law Update this past November to provide insight on her agency and future possible trends. Ms. Earp is scheduled to provide a further update at the July 23, 2009 final showing of this program at the Hampton Roads Convention Center. Her comments and other practical advice on avoiding discrimination risks presented during a number of employer-orientated workshops should help attendees reduce potential discrimination liability.

2009 On the Job: Supervisory Training Clinic

The On the Job: Supervisory Training Clinic is back. This clinic is designed to provide focused training for supervisors. Our 2009 Clinic series features two topics: Workplace Harassment and Dealing with the ADA in a Changing Environment. These topics will be presented on a variety of dates to allow attendees to choose the most convenient time and place. The next clinic will be held on September 16 at the Norfolk offices of Kaufman & Canoles. For further information, please contact Kerry Martinolich at (757) 624-3158 or visit www.kaufmanandcanoles.com.

This program has been approved for 2.5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

25th Annual Employment Law Update

How Sweet It Is . . .

On July 23rd, the K&C Employment Law Team will host the final showing of the 25th Employment Law Update: How Sweet It Is . . . at the Hampton Roads Convention Center. In celebration of our silver anniversary, this one-day seminar will feature new information and materials on our most popular topics to be presented by some of our best-received speakers. In addition, Naomi C. Earp, former Chair and current Commissioner of the EEOC will be our special luncheon speaker.

Attendees will select their choice of several of our most popular educational workshops. Topics include: Effective Interviewing and Hiring; Wage-Hour Compliance; Legal Risks in Layoffs and Restructuring; Handling Unemployment Claims; and more. The day will also feature three chances to take a "Turn for Treasure" along with special guest speakers who should both educate and entertain attendees.

For more information, visit our website at www.kaufmanandcanoles.com or contact Kerry Martinolich at (757) 624-3232.

This program has been approved for 6 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

Labor & Employment

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Inside This Issue

Visit us on the web at www.kaufmanandcanoles.com for timely updates or to register for our seminars.

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