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Labor and Employment Law Update

MAY 2009

In This Issue

The Fair Pay Act May Not Be So Fair To Employers

By Paul Dubois

The recently enacted Lilly Ledbetter Fair Pay Act (the "Act" or "Fair Pay Act") has already resulted in court decisions that are alarming employers.

The Act amends federal anti-discrimination statutes to clarify that the limitations period for suing over allegedly discriminatory compensation decisions commences "each time compensation is paid." This essentially means that an employee whose compensation was established pursuant to an allegedly discriminatory decision maintains the right to sue for as long as he or she is on the payroll.

The following summary of a few of the first published decisions to apply the Fair Pay Act illustrates how employees are using this new law against their employers.

- In *Bush v. Orange County Corrections Department*, the United States District Court for the Middle District of Florida held that an allegedly race-based demotion that occurred *16 years ago* supported claims to recover money damages for the pay disparity that has persisted to the present day.
- In *Gilmore v. Macy's Retail Holdings*, the United States District Court for the District of New Jersey clarified that employees whose discrimination claims have been revived by the Fair Pay Act may recover back pay for any persisting pay discrimination over a two-year "look back" period. In this case, the plaintiff claimed that her race had been the basis of a decision to deny her the opportunity to fill in for absent coworkers in lucrative sales departments, resulting in a persisting pay disparity.
- In *Gentry v. Jackson State University*, the United States District Court for the Southern District of Mississippi held that the plaintiff could proceed with a gender-discrimination claim based on the defendant's denial of tenure and a corresponding salary increase. Even though the denial of tenure occurred outside the limitations period, the court ruled that it created an ongoing pay disparity that brought the claim within the Act's coverage.

In light of such decisions, employers are encouraged to audit their compensation policies and practices to determine whether any employees may be experiencing pay disparities based

continued on page 2

New Law Increases Litigation Risk For New York Employers Undertaking Plant Closings, Mass Layoffs, And Relocations

By Heather E. Davies

In this turbulent economy, employers are becoming increasingly susceptible to lawsuits arising from reductions in force. A new law compounds this problem for New York employers by imposing stringent – and somewhat confusing – notice requirements in the event of a plant closing, mass layoff, or relocation.

While the New York State Worker Adjustment and Retraining Notification Act ("NY WARN Act") is based on the federal Worker Adjustment and Retraining Notification Act ("Federal WARN Act"), its obligations are more restrictive and its text is less precise, making the NY WARN Act a litigation trap for unwary employers in the Empire State.

The 90-Day Notice Requirement

The NY WARN Act requires that employers provide 90 days' advance written notice of a qualifying event, which includes a plant closing, mass layoff, or relocation. An "employer," for purposes of this law, is any business enterprise that employs either (a) 50 or more employees in New York State, excluding part-time employees, or (b) 50 or more employees in New York State who in the aggregate work at least 2,000 hours per week, inclusive of overtime.

Employers must provide this notice to (1) all affected employees, (2) their union representatives, (3) the New York Department of Labor, and (4) the local workforce investment board where the work site is located. All such notices must be provided on the employer's "official letterhead" and signed by "an individual with authority to represent the employer."

continued on page 3

Government Agrees To Further Postponement Of E-Verify Requirement For Federal Contractors

By Brian D. Carlson

The federal government has agreed to delay, until June 30, 2009, the effective date of a final rule mandating that federal contractors use the E-Verify system to confirm that they do not employ persons who are not authorized to work in the U.S.

This is the third time in recent months that the government has agreed to delay the effective date of the E-Verify final rule. The government initially agreed in January to a short postponement (until February 20, 2009) of the final rule as part of a pending lawsuit by business groups challenging the government's authority to promulgate the final rule. Subsequently, the government agreed to delay further (until May 21, 2009) the effective date of the final rule as part of a review by the Obama Administration of all federal regulations that had been published but had not yet gone into effect.

As part of this latest postponement, the government has agreed that all proceedings in the pending lawsuit will continue to be suspended until June 30, 2009, in order to provide the Administration with further time to review the pending E-Verify final rule.

Requirements Of The Final Rule

E-Verify is an electronic system of U.S. Citizenship and Immigration Services that compares information from employees' I-9 Employment Verification forms with records contained in databases maintained by the Social Security Administration and the Department of Homeland Security. E-Verify enables employers to confirm the accuracy of the information provided in employees' I-9 forms, thereby reducing the risk that employers will unknowingly employ individuals who are not eligible to work in the U.S.

Up to this point, participation in the E-Verify program has been voluntary for most federal contractors. The final rule, however, requires that federal contractors use the system to confirm the eligibility of (i) persons whom they hire to work within the U.S. during the terms of their federal contracts, and (ii) previously hired employees whom they assign to perform work within the U.S. on federal contracts.

The final rule does not require federal contractors to use E-Verify to confirm the employment eligibility of employees who do not fall within the above two categories (though a contractor may voluntarily choose to do so). Nor does the final rule alter the obligation of a federal contractor, like every other employer, to complete an I-9 form for each new employee.

Employers should be aware that a few states (including Arizona and Mississippi) already require *all* employers to participate in the E-Verify program, regardless of an employer's size or whether it is a federal contractor. Additionally, several other states, such as Colorado, Georgia and Rhode Island, require public employers and/or state contractors to use E-Verify.

Future Implementation Of The Final Rule

It is difficult to predict whether the E-Verify final rule ultimately will take effect on June 30, 2009. Conceivably, once the Obama Administration has completed its review of the final rule, it may decide to revise the final rule substantially, or even withdraw it entirely. If the Administration decides to leave the final rule in place, then the pending lawsuit could still result in a court injunction further delaying its implementation or enjoining it altogether.

Nonetheless, until these questions have been resolved, employers that are (or anticipate becoming) federal contractors are advised to continue to prepare for compliance with the E-Verify final rule. In particular, employers should examine their current verification practices to ensure that I-9 forms are correctly completed for new employees, and audit I-9 forms maintained for current employees to ensure that all employees are appropriately documented.

Should you have any questions about the requirements that are to be imposed by the E-Verify final rule, please do not hesitate to contact us. ◆

The Fair Pay Act May Not Be So Fair To Employers

continued from page 1

on prior decisions that may be viewed as discriminatory by today's standards. By making any necessary adjustments, employers may reduce, and perhaps ultimately eliminate, their exposure to liability for ongoing pay disparities under the Act.

For a more detailed discussion of the Fair Pay Act, see *President Obama Signs The Ledbetter Fair Pay Act Reversing The U.S. Supreme Court*, which appeared in the February 2009 edition of our *Labor and Employment Law Update*, and is available on the Firm's website.

If you are confronted with litigation seeking to revive stale discrimination claims by application of the Fair Pay Act, or if you need assistance in auditing your compensation policies and practices, please do not hesitate to contact us for assistance. ◆

Recent Litigation Successes

Cancellieri v. Northeast Hospital Corporation et al.

March 20, 2009: No. 07-1659C (Essex County Superior Court). The Firm represented Northeast Hospital Corporation and an individual defendant in successfully obtaining summary judgment on all of plaintiff's claims (promissory estoppel and intentional interference with business relations). Sara Goldsmith Schwartz and Jessica L. Herbster represented the defendants.

New England Health Care Employees Union v. Westport Health Care Center

April 17, 2009: No. 11-300-452-08 (American Arbitration Association). The Firm represented Westport Health Care Center in successfully upholding the termination of employment of a certified nursing assistant for inappropriate patient care. Todd A. Newman and Brian D. Carlson were attorneys for the employer.

New Law Increases Litigation Risk For New York Employers Undertaking Plant Closings, Mass Layoffs, And Relocations

continued from page 1

Key features of the notice requirement include:

- affected employees and their union representatives must be given information about unemployment insurance, job training and re-employment services;
- the New York Department of Labor must be given the names of all affected employees and their job titles;
- none of the notices may be given by email; and
- the notice given to employees "must be provided in a language understandable to the employee."

Plant Closings, Mass Layoffs – And Mass Confusion

The NY WARN Act defines a "plant closing" as the permanent or temporary shutdown of a single site of employment, or the shutdown of one or more facilities or operating units within a single site, if the shutdown results in an employment loss at the single site during any 30-day period for at least 25 employees, excluding part-time employees.

A "mass lay-off" is defined as a reduction in force resulting in an employment loss at a single site of employment during any 30-day period for (1) at least 33% of the employees (but at least 25 employees) at the site, other than part-time employees, or (2) at least 250 employees, other than part-time employees, regardless of whether they comprise 33% of the employees at the site.

Oddly, the New York statute inexplicably fails to identify a plant closing as an event that triggers the 90-day notice requirement, stating only that an employer "may not order a mass layoff, relocation, or *employment loss*" unless notice is given. Adding to the confusion, the New York statute defines "employment loss" to include the termination of a *single employee*. We suspect that these oddities resulted from a drafting error, and most commentators agree.

Relocations

If an employer relocates all or substantially all of its operations to a location at least 50 miles from the current location, then the 90-day notice requirement applies. However, if the employer offers to transfer the employees to a different work site within a "reasonable commuting distance," then the 90-day notice requirement does *not* apply.

The statute's definition of "reasonable commuting distance" further adds to the confusion – and to the risk of noncompliance. Specifically, a "reasonable commuting distance" cannot "exceed that which can be reasonably traveled in one and one-half hours when the site of employment is being moved to a location within the City of New York or on Long Island, or one hour when the site of employment is being moved to any other location in the state."

Exceptions And Remedies

Like the Federal WARN Act, the New York statute provides certain exceptions to the 90-day notice requirement, including in the instance of (1) a faltering company, (2) unforeseeable business circumstances, (3) a natural disaster, (4) a strike or lockout, and/or (5) the closure of a temporary facility or project.

Violations of the NY WARN Act are enforced by the New York Commissioner of Labor. Remedies include civil penalties of $500 per day, as well as back wages and lost benefits for the time period in which notice should have been given to affected employees.

Departures From The Federal WARN Act

The NY WARN Act departs from the Federal WARN Act in numerous significant ways. The key distinctions include:

- The Federal WARN Act requires 60 days' advance written notice of a qualifying event, but the New York statute extends the notice period to 90 days;
- The Federal WARN Act applies to employers with 100 or more full-time employees or their equivalent, but the New York statute lowers this threshold to 50;
- The Federal WARN Act defines "plant closing" to require an employment loss for at least 50 full-time employees, but the New York statute lowers this threshold to 25; and
- The Federal WARN Act defines "mass layoff" to require an employment loss at a single site for either (a) 33% (but at least 50) of the employees, or (b) at least 500 employees, but the New York statute lowers these thresholds to (a) 33% (but at least 25) of the employees, and (b) at least 250 employees, respectively.

The Firm is available to assist employers both in planning reductions in force that comply with the new law, and in defending lawsuits alleging violations of this new law. Please do not hesitate to contact us with any questions. ◆

UPCOMING SEMINARS

Labor Relations Boot Camp

June 30, 2009

8:30 a.m. to 4:30 p.m.

Schwartz Hannum PC has developed a one-day program for human resources professionals, labor relations professionals, in-house counsel, and managers—at both unionized and non-union employers—who want to better understand and manage the big-picture and day-to-day operations of their businesses' labor-management relationships.

Lively and knowledgeable attorney instructors will discuss the following topics in an interactive seminar format:

- Strategies For Avoiding Unionization (And Deterring Additional Unionization)
- Effectively Preparing For Collective Bargaining
- Hot Topics In Negotiations
- Good Faith Negotiations And Impasse
- Job Actions, Strikes And Lockouts
- Decertification: What Is It And When Is It Possible?
- Drafting Collective Bargaining Agreements And Side Letters
- How To Successfully Handle Grievances And Arbitrations

Tuition is $500. Registration is limited to 12 participants.

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

President Obama Issues Three Executive Orders Regarding The Labor Obligations Of Federal Contractors

By Paul Dubois

President Obama recently issued three executive orders aimed at creating a strong labor movement among workers employed by federal contractors. These executive orders, which became effective immediately, impose new obligations on federal contractors and reverse certain directives of President Bush.

Executive Order 13494—Economy In Government Contracting

Executive Order 13494 prohibits federal contractors from passing on to contracting departments and agencies the costs of attempting to persuade employees to exercise – or to refrain from exercising – their rights to organize or engage in collective bargaining.

Importantly, the executive order does not preclude federal contractors from trying to persuade their employees not to exercise these rights. It merely prevents them from seeking reimbursement for these costs under their federal contracts.

In the words of Executive Order 13494, federal departments and agencies "shall treat as unallowable the costs of any activities undertaken to persuade employees … to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing."

Executive Order 13494 designates as "unallowable" the costs of the following activities when undertaken to persuade employees to exercise, or not to exercise, their rights under federal labor law: (a) preparing and distributing materials; (b) hiring or consulting legal counsel or consultants; (c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and (d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

Notwithstanding the foregoing, Executive Order 13494 designates as "allowable" any costs incurred in maintaining satisfactory employee relations. Such costs include "costs of labor-management committees, employee publications (other than those undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively), and other related activities."

The Federal Acquisition Regulatory Council is expected to issue implementing rules, regulations, and/or orders for Executive Order 13494 this summer.

Executive Order 13495—Nondisplacement Of Qualified Workers Under Service Contracts

Executive Order 13495 requires certain successor contractors and their subcontractors to offer a right of first refusal of employment to qualified nonmanagerial and nonsupervisory employees of the predecessor contractor whose employment was terminated as a result of the award of the successor contract. Executive Order 13495 revokes Executive Order 13204, which was issued by President Bush in 2001.

Specifically, Executive Order 13495 applies when an employer obtains a federal service contract of $100,000 or more "that succeeds a contract for performance of the same or similar services at the same location," subject to limited exceptions. Each required right of first refusal must remain open for at least ten days, and the successor contractor will be deemed to have no employment openings under the contract until all such offers have been made.

Nonetheless, under this directive, the successor contractor has the rights: (1) to employ fewer employees than the predecessor contractor; (2) to employ under the federal service contract any employee who has worked for the successor contractor for at least three months immediately preceding the commencement of the federal service contract and who would otherwise face layoff or discharge; (3) not to offer a right of first refusal to any employee of the predecessor employer who is not a service employee within the meaning of the Service Contract Act of 1965; and (4) not to offer a right of first refusal to any employee of the predecessor contractor who has failed to perform suitably on the job (as the successor contractor or any of its subcontractors reasonably believes, based on the employee's past performance).

As a result of Executive Order 13495, it is likely that many successor contractors will have to recognize and bargain with the labor unions that represented their employees when they were employed by the predecessor contractor. This is by operation of the National Labor Relations Board's ("NLRB") successorship doctrine, which generally requires such recognition and bargaining when a majority of a successor employer's employees had been unionized at the predecessor employer.

Noncompliance with Executive Order 13495 may result in "orders requiring employment and payment of wages lost," as well as federal-contract debarment for up to three years. The Secretary of Labor, in consultation with the Federal Acquisition Regulatory Council, is expected to issue implementing regulations this summer.

Executive Order 13496—Notification Of Employee Rights Under Federal Labor Laws

Executive Order 13496 requires most federal contractors to post a soon-to-be-released notice informing employees of their rights to bargain collectively and to associate, self-organize and designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. Prime federal contractors will be required to include this notice in all subcontracts.

Executive Order 13496 also revokes Executive Order 13201, which required federal contractors to notify employees of their rights not to join a union and to "opt out" of paying union fees unrelated to the administration of the collective bargaining agreement. These rights were determined by the United States Supreme Court in *Communication Workers of America v. Beck*, 487 U.S. 735 (1988). Executive Order 13201 had been issued by President Bush in 2001.

Noncompliance with Executive Order 13496 may result in the cancellation, termination, or suspension of existing federal contracts, as well as in the employer's debarment from additional federal contracts. The Secretary of Labor is expected to promulgate the required notice by May 30, 2009.

Taken together, these executive orders are expected to have a profound effect on federal contractors relative to their labor costs and activities. For instance, the requirement of Executive Order 13496 to notify employees of their rights under federal labor law will likely result in more – and more intense – union

continued on page 5

continued from page 4

organizing campaigns. While this is expected to lead to more union-avoidance activity and communications campaigns by federal contractors, the costs of these efforts will no longer be reimbursable under the applicable federal contracts by operation of Executive Order 13494. Similarly, we expect that significant numbers of federal contractors that are presently union-free will be forced to assume their predecessors' collective-bargaining obligations by operation of Executive Order 13495 and the NLRB successorship doctrine.

In light of these anticipated changes, we urge federal contractors and subcontractors to act now to (a) implement lawful policies and procedures geared toward minimizing the likelihood and effectiveness of union organizing campaigns, (b) develop plans for effectively communicating with employees, key constituents, and the general public about their positions on labor organizations, collective bargaining, and related matters, and (c) determine how best to marshal their internal and external resources to achieve these goals as cost-effectively as possible.

As always, the Firm is available to assist employers in determining and complying with their obligations – *and in determining and exercising their rights* – as federal contractors and subcontractors. Please do not hesitate to contact us with any questions. ◆

SAVE THE DATE
Employment Law Boot Camp
October 6 and October 7, 2009
8:30 a.m. to 4:30 p.m.

Schwartz Hannum PC has developed a fourteen-hour intensive human resources skills development program in response to the growing challenges confronting our clients. Presented in an interactive seminar format, Employment Law Boot Camp reinforces participants' existing knowledge of fundamental employment laws and personnel practices by exploring major risk areas and problem-solving strategies. Expert attorney instructors will provide extensive written resources, engaging real-life role-plays, and valuable networking opportunities for participants. Participants will receive a comprehensive Tool Kit containing essential compliance forms, checklists and guidance.

Topics will include:

- Hiring Traps And Strategies
- Background Checks And Substance Abuse Testing For The Uninitiated
- Managing And Documenting Employee Performance: Discipline And Discharge
- Limiting Exposure To A Wage And Hour Complaint
- Mastering An Effective Investigation Of Alleged Workplace Misconduct
- Risk Factors That Cause Discrimination Claims
- Harassment – It's Not Just About Sex Anymore
- Critical Employment Policies – Limit Liability And Exposure While Serving Your Business Needs
- Employee Rights And Responsibilities Related To Family, Medical And Other Leaves Of Absence
- Employment, Severance, Non-Competition And Non-Disclosure Agreement Basics

Early Bird Tuition is $850 ($950 after Labor Day). Registration is limited to 12 participants.

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

Iowa, Vermont And Maine Now Permit Same-Gender Marriage, And The New Hampshire Legislature Has Approved A Bill To Do The Same

By Todd A. Newman

In Iowa, same-gender marriage became legal on April 24, 2009. In Vermont and Maine, laws permitting same-gender marriage are set to become effective in September. And in New Hampshire, the legislature has approved a bill to legalize same-gender marriage in the Granite State.

Iowa

In Iowa, this development resulted from a unanimous ruling of the Iowa Supreme Court that Iowa's same-gender marriage ban violated the state constitution. The ban had been contained in a statute limiting marriage to between a man and a woman. As a result of this decision, Iowa joined Massachusetts, Connecticut, and Vermont as the only states to permit same-gender marriage (with Maine soon to follow). Iowa is the first mid-Western state to allow same-gender couples to marry.

Vermont

In Vermont, the legislature voted to override a veto by Governor Jim Douglas of legislation legalizing same-gender marriage, making Vermont the first state to allow same-gender marriage by legislative vote. This new law is set to become effective on September 1, 2009. Vermont's legislature has been a pioneer regarding this issue. In 2000, the Vermont legislature created the "civil union," a legal status that conferred on same-gender couples the same basic rights and obligations that applied to traditional marriages, except for the right to actually marry.

Maine

In Maine, the legislature followed Vermont's lead, passing a bill authorizing marriage between any two people, rather than between one man and one woman, as previously provided by state law. Governor John Baldacci, who had publicly opposed same-gender marriage in the past, signed the bill into law on May 6, 2009. The Maine law is set to become effective in mid-September.

continued on page 7

EEOC Addresses Employer Best Practices For Avoiding "Caregiver Litigation"

By Paul Dubois

The United States Equal Employment Opportunity Commission ("EEOC") has issued Employer Best Practices for Workers with Caregiving Responsibilities ("Best Practices"), which makes recommendations for avoiding discrimination claims by employees who have caregiving responsibilities, in response to the increasing litigation being filed by pregnant women, parents of young children and employees caring for sick relatives.

Specifically, many employees contend that they have been subjected to gender-based stereotyping and disparate treatment based on caregiver roles. The EEOC recognizes this theory of discrimination and has provided numerous examples of prohibited conduct, including:

- Asking female, but not male, applicants/employees about their child-care responsibilities;
- Treating females who are not caregivers more favorably than female caregivers; and
- Denying male workers', but not female workers', requests for leave related to caregiving responsibilities.

Such conduct, depending on the circumstances, may be unlawful gender discrimination under Title VII to the Civil Rights Act of 1964 ("Title VII") or "association" discrimination under the Americans with Disabilities Act ("ADA").

In Best Practices, the EEOC makes several recommendations. Key recommendations are highlighted below.

General Employment Best Practices

- Train managers about the legal obligations that impact decisions about workers with caregiving responsibilities;
- Develop and enforce a strong EEO policy that specifically addresses caregiver protections; and
- Ensure that *all* managers are aware of, and comply with, the organization's work-life policies, such as leave approvals and flexible work arrangements.

Recruitment, Hiring and Promotion Best Practices

- Develop qualification standards for each position that reflect job duties, functions, and competencies and minimize the potential for gender stereotyping and other unlawful discrimination against caregivers;
- Ensure that job openings, promotions, etc. are communicated to all eligible employees regardless of caregiving responsibilities; and
- Identify and remove barriers to re-entry for individuals who have taken leaves of absence due to caregiving responsibilities.

Terms, Conditions and Privileges Best Practices

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination against caregivers, ensuring that decisions are based on actual job performance and not caregiver stereotypes;
- Review workplace policies that limit employee flexibility, such as fixed hours of work and mandatory overtime, to ensure that they are necessary to business operations; and
- Post employee schedules as early as possible for positions that have changing work schedules so that employees can arrange for child care or address other personal responsibilities, thereby enabling them to more readily fulfill work responsibilities.

Per the EEOC, "Employers adopting flexible workplace policies that help employees achieve a satisfactory work-life balance may not only experience decreased complaints of unlawful discrimination, but may also benefit their workers, their customer base, and their bottom line."

The EEOC has not created a new protected class of "caregivers," and its recommendations are not mandatory. However, implementing these recommendations should help protect employers in the emerging area of "caregiver litigation."

In sum, we recommend that employers: (1) update policies as noted above; (2) train managers to be aware of the risks of caregiver discrimination; and (3) audit personnel practices to identify and remedy any discriminatory practices.

Please feel free to contact us for assistance in implementing any recommended best practices or in responding to caregiver litigation. ◆

Massachusetts' New Data Security Regulations Breakfast Seminars

June 11 and June 24, 2009
(June 8, 16 and 23 Sold Out)
8:30 a.m. to 10:00 a.m.

In an effort to minimize the risks of identity theft and safeguard sensitive personal information, Massachusetts has enacted one of the most onerous data protection laws in the country. Now, after a number of extensions, the regulations implementing this law go into effect on January 1, 2010. The regulations apply to all individuals and entities, including those outside Massachusetts, that maintain personal information regarding Massachusetts residents, regardless of whether the information is stored in paper or electronic form. To be in compliance, covered entities must ensure that such data is maintained securely, and develop a Comprehensive Written Information Security Program.

Each Breakfast Seminar will address:

- Compliance Measures Covered Entities Must Take By January 1, 2010
- Conducting A Preliminary Audit: Identifying The Sources, Locations And Flow Of Personal Information Through Your Organization
- How To Develop A Comprehensive Written Information Security Program
- Overview of Encryption Requirements
- Vendor Compliance Issues
- Employee Handbooks And Employment Contracts

Registration is $25.

To register, please contact Kathie Duffy at (978) 623-0900 or kduffy@shpclaw.com.

Title VII Now Protects Activity Opposing Harassment And Discrimination In Internal Workplace Investigations

By Paul Dubois

Employees who allege that they were discharged for opposing harassment or discrimination in internal workplace investigations may now sue the employer for retaliation under Title VII, the Supreme Court of the United States has ruled.

Case Background

In 2002, in *Crawford v. Metropolitan Government of Nashville*, the Metropolitan Government of Nashville & Davidson County, Tennessee ("Metro") conducted an internal investigation of alleged sexual harassment by employee-relations director Gene Hughes. As part of its investigation, Metro met with Vicky Crawford, a coworker of the employee who had raised the allegations. In response to questioning by Metro, Crawford disclosed that she had been subjected to several sexually harassing advances by Hughes.

After completing its investigation, Metro took no action against Hughes but discharged Crawford and two other accusers, asserting that its discharge of Crawford was for embezzlement. Crawford filed a charge with the Equal Employment Opportunity Commission ("EEOC"), followed by a suit in the United States District Court for the Middle District of Tennessee. She claimed that Metro had terminated her employment for reporting Hughes's inappropriate behavior and that the termination, therefore, was unlawful retaliation under Title VII.

As Crawford pointed out, Title VII has two clauses protecting employees from retaliation: (i) the "opposition clause," which protects employees who have opposed an unlawful employment practice, and (ii) the "participation clause," which protects employees who have participated in an investigation, proceeding, or hearing under Title VII. Crawford claimed that Metro had violated both clauses. Metro defended the charge by asserting that Crawford had not engaged in protected activity because she merely answered questions that were posed to her during its internal investigation.

The court sided with Metro, holding that (a) Crawford was not protected by the opposition clause because she had not "instigated or initiated" a complaint resulting in her discharge, and (b) Crawford was not protected by the participation clause because Metro's internal investigation was not "pursuant to a pending EEOC charge." After the United States Court of Appeals for the Sixth Circuit affirmed this decision, Crawford successfully petitioned the Supreme Court for review.

The Supreme Court's Decision

The Supreme Court focused its attention on the opposition clause. Noting that Title VII does not define "oppose," the Court turned to the dictionary to determine the ordinary meaning of this word, adopting the following definition: "to resist or antagonize…; to contend against; to confront; resist; withstand." Based on this definition, a unanimous Court found that Crawford's conduct constituted "opposition" and, as such, was protected by the opposition clause. (The Court declined to address whether Crawford's conduct was also protected by the participation clause.)

The Court explained that "[t]here is…no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in [Title VII] requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

Were it to hold otherwise, explained the Court, employees would have no incentive to voice their concerns about bias and discrimination during internal investigations because employers would be free to discharge them without penalty.

In a concurring opinion joined by Justice Thomas, Justice Alito opined that the majority's opinion does not extend to employees who offer only "silent opposition" to an employer's discriminatory practices. According to Justice Alito, an employee must engage in "active and purposive" conduct in order to gain protection under the opposition clause.

Implications For Employers

Crawford has significant and immediate implications for employers. In light of this decision, employers should now precede any discharge with a review of whether the employee recently participated in an internal investigation and, if so, whether the employee said anything to "oppose" workplace harassment or discrimination. If the discharge would be in close temporal proximity to the investigation, and if the employee had actively spoken out, then the employer might consider whether the reasons for the discharge could withstand a legal challenge, or perhaps consider alternatives to discharge. By proceeding in this manner, employers may develop strategies for effectively dealing with such situations without stepping into the crosshairs of a *Crawford* lawsuit.

If you are faced with an actual or threatened lawsuit alleging retaliation under Title VII, or if you have questions about the implications of *Crawford*, please feel free to contact us for assistance. ◆

Iowa, Vermont And Maine Now Permit Same-Gender Marriage, And The New Hampshire Legislature Has Approved A Bill To Do The Same

continued from page 5

New Hampshire

In New Hampshire, the legislature voted to legalize same-gender marriage on May 6, 2009, the same day that the Maine governor signed his state's corresponding bill into law. The New Hampshire bill is now before Governor John Lynch, who may sign it into law, let it become law without his signature, or veto it.

Ramifications

These developments have significant ramifications for employers, especially those with employees in multiple states. Generally speaking, because federal law does not recognize same-gender marriages, employees who enter into them in states that permit them become entitled to state spousal benefits but not federal spousal benefits. This poses complex challenges for employers. We provided a detailed discussion of this topic in our March 24, 2009 e-alert regarding similar developments in California and Connecticut. (A copy is available on our website, or by contacting Kathie Duffy at (978) 623-0900.)

We advise employers, especially multi-state employers, to monitor such developments regularly and to address them promptly and carefully. This should help to ensure compliance with this complex and dynamic area of the law and to avoid discrimination claims.

Please contact us if you have questions about the developments in Iowa, Vermont, Maine, and New Hampshire, or if you need assistance in complying with the same-gender benefits laws in these or other states. ◆

ARRA Legislation Expands Businesses' Obligations Under HIPAA

By Brian D. Carlson

Included in the economic stimulus legislation that was recently enacted as the American Recovery and Reinvestment Act of 2009 ("ARRA") are a number of provisions that broaden businesses' privacy and security obligations under the Health Insurance Portability and Accountability Act ("HIPAA"). Although these measures have not garnered the level of public attention given to many other provisions of ARRA, employers need to be aware of them, as these measures will almost certainly require employers to make important operational changes.

A number of the most significant HIPAA-related provisions included in ARRA are summarized below.

Expansion Of "Business Associate" Requirements

Before the passage of ARRA, the HIPAA Privacy and Security Rules (the "HIPAA Rules"), which set forth numerous requirements relating to the handling of protected health information ("PHI"), applied only to "covered entities" such as health plans and health-care providers. Covered entities were required to ensure that outside "business associates" (such as accounting, consulting and data-management firms) that received access to PHI in the course of performing services for covered entities agreed to take appropriate steps to protect such information, but the business associates themselves were not directly subject to the HIPAA Rules.

Now, under ARRA, business associates of covered entities will likewise be covered by the HIPAA Rules. As a result, such businesses will be required to adopt privacy and security policies that are compliant with the statute.

Notably, while most of the amendments to HIPAA imposed by ARRA took effect immediately upon enactment of the legislation, the provisions extending coverage of the HIPAA Rules to business associates do not take effect until February 17, 2010.

Notifications Of Security Breaches

Following in the paths of a number of states (including Massachusetts) that recently have enacted data-security laws, ARRA provides that HIPAA-covered entities must notify affected individuals in the event of any security breach with respect to unsecured PHI. In general, "unsecured" PHI refers to information that is not encrypted or otherwise secured in such a manner that an unauthorized person could not read it.

Affected individuals must be notified of such a security breach "without unreasonable delay" and, in any event, within 60 days after discovery of the breach. In addition, a covered entity is required to maintain a log of such breaches for annual submission to the U.S. Department of Health and Human Services ("HHS"). If, however, a breach involves data concerning more than 500 individuals, the covered entity must notify HHS – as well as "prominent media outlets" in the area – at the time the breach is discovered.

Pursuant to a directive set forth in ARRA, HHS is expected to issue regulations later this year implementing and clarifying these notification requirements.

Individual Rights

ARRA also contains provisions expanding individuals' rights with respect to PHI. In particular, where an individual has fully paid a health-care provider for services on an out-of-pocket basis, the individual is entitled to require that the health-care provider not share PHI concerning the individual with his or her health plan. Previously, while an individual was permitted to make such a request, a health-care provider was not obligated to comply with it.

The new legislation also specifies that individuals may ask to have access to their PHI in electronic form and may direct that it be sent to another person or entity. Further, ARRA provides that a HIPAA-covered entity or business associate may not sell PHI without the specific consent of the person to whom it relates.

Enforcement

Up to now, HHS has taken little action to enforce the civil-penalties provisions of HIPAA, instead focusing its efforts on achieving voluntary compliance with the statute. Under ARRA, however, HHS may begin pursuing such sanctions more aggressively. In particular, the statute provides that beginning two years following enactment of ARRA (*i.e.*, February 17, 2011), HHS will be *required* to assess a civil penalty if a business is found to have willfully neglected its HIPAA obligations. Moreover, if a preliminary investigation gives HHS reason to believe that a violation may have occurred due to willful neglect, HHS will be obligated to conduct a formal investigation of the matter.

Additionally, ARRA specifically authorizes individual state attorneys general to bring civil actions in federal court to enforce the requirements of HIPAA.

Implications For Businesses

As a result of the amendments to HIPAA enacted through ARRA, covered entities will need to revise their HIPAA privacy and security policies and related documents to comply with the new provisions. In addition, covered entities will need to amend their business-associate agreements to take account of the fact that business associates will now be directly subject to the HIPAA Rules.

Similarly, business associates of covered entities will need to determine whether they are required to adopt new policies and related documents in light of these amendments to HIPAA.

Finally, both covered entities and business associates are advised to train all employees whose job duties involve contact with PHI as to the new requirements imposed by ARRA.

The Firm is available to assist employers in determining and complying with their obligations under HIPAA and the amendments made to it by ARRA. Please do not hesitate to contact us with any questions. ◆

If you prefer to receive a copy of the Firm's Labor and Employment Law Update by e-mail in pdf (portable document format), please contact Kathie Duffy at kduffy@shpclaw.com or (978) 623-0900 to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf.)

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