Barley Snyder

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OSHA Enforcement and Regulatory Changes Underway

By: Richard L. Hackman

Unlike the previous administration's willingness to work with employers to resolve Occupational Safety and Health Administration (OSHA) complaints, under the Obama administration, OSHA intends to become more active in regulation promulgation and enforcement. Specifically, a pronouncement by President Obama's new Secretary of Labor, Hilda Solis, encapsulates the new focus: "[A]s I have said since my first day on the job, the U.S. Department of Labor is back in the enforcement business," Solis said. "There will be no excuses for negligence. As long as I am the Secretary, the Department will go after anyone who negligently puts workers at risk."

To that end, the new administration has earmarked significant additional funds for the enforcement of current OSHA regulations, the implementation of new OSHA regulations, and the hiring of additional investigators to increase enforcement. In June 2009, a House panel approved a $13.2 billion fiscal year 2010 appropriations package to fund the Department of Labor (DOL), which would represent an increase of $846 million from FY 2009 spending levels. This budget includes funding for OSHA at $554.6 million, which is a $41.6 million increase over FY 2009, yet $9 million lower than the President's request. In light of the above, OSHA has a number of initiatives going forward, including, but not limited to:

A special emphasis on oversight of construction projects funded by the recently enacted economic stimulus package, including safety issues involving fall protection, contractor liability and electrocution hazards. Stimulus-funded construction projects will be subject to random inspections, and OSHA inspectors would still have the authority to inspect construction sites if they observe any violations of OSHA rules.

Regulation of new "green" technologies involving solar and wind power.

A planned increase in the number of OSHA inspectors. Specifically, the fiscal year 2010 budget request was in part designed to fund the hiring of 130 new inspectors. OSHA intends to further supplement its

inspectors with "partnerships with businesses and nongovernmental organizations."

Addressing ergonomics "in some way, shape, or form."

Reviewing OSHA's penalty structure. Specifically, OSHA's Acting Administrator, Jordan Barab, has remarked that "the average serious penalty is now below $1,000" and "that doesn't provide much of a disincentive."

Increasing the speed of the standard-setting process, which has been described by Barab as "way too slow."

Significant revisions to the Voluntary Protection Program in light of a recent Government Accountability Office report that concluded that the agency failed to sufficiently oversee the program.

Making unannounced inspections of up to 4,500 of the "most dangerous workplaces" in the country. The inspections will be conducted under OSHA's 2009 site-specific targeting program, which includes sites that had injury and illness rates considerably higher than the national average.

Continuing the enforcement of combustible dust standards. In June 2009, OSHA announced that it had issued a total of 667 citations against companies in several Southern states for alleged worker safety violations during inspections for unsafe hazardous dust conditions. The most frequently cited were for violations of housekeeping, hazard communication, personal protective equipment, electrical standards, and the general duty clause. OSHA intends to begin regulatory action on combustible dust, with an advance notice of proposed rulemaking scheduled to be issued by August 2009.

Monitoring and supporting legislation in furtherance of OSHA's goals. Specifically, the proposed "Protecting America's Workers Act" (H.R. 2067) would give the agency the authority to press criminal charges against negligent employers. Further, the proposed "Nurse and Health Care Worker Protection Act" (H.R. 2381) would require OSHA to promulgate a standard mandating the use of mechanical lifts by health care workers when moving patients. This legislation would require health care facilities to develop safe patient handling and injury prevention plans, establish data systems to track injury trends, establish systems for reporting instances in which patient handling equipment is not used, train nurses on safe patient handling, allow nurses to refuse work, and require the Secretary of Labor to conduct audits.

Ultimately, as noted above, employers should be aware of, and expect, an increase in regulatory and enforcement action by OSHA. To that end, it is more important than ever to remain vigilant with respect to workplace safety issues. Establishing strict safety guidelines, increased training, the formation of safety committees and awards to safety-conscious employees are only a few ways employers can minimize workplace injuries, and hopefully avoid a knock on the door from OSHA.

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EEOC Sets Path for Adoption of Much Awaited Regulations Under the ADA Amendments Act

By: Jennifer Craighead Carey

On June 17, 2009, the Equal Employment Opportunity Commission (EEOC) approved a notice of proposed rulemaking under the ADA Amendments Act of 2008 (ADAAA), allowing proposed regulations to be sent to the White House Office of Management and Budget (OMB). Once the proposed regulations are cleared by OMB, the regulations would be published in the Federal Register for public review and comment before they become final.

Although awaiting clearance from OMB, the proposed regulations are already spurring discussion and debate within the human resources community. Among the areas covered in the proposed regulations are the following:

1. **Addition of Major Life Activities**: The proposed regulations would add the major life activities listed in the ADAAA, plus three additional ones not specifically mentioned in the ADAAA: bending, reading, and communicating. The proposed regulations also would add to the ADAAA's listing of major bodily functions, those functions involving the hemic, lymphatic, and musculoskeletal systems.

2. **Treatment of "Substantially Limits"**: Congress instructed the EEOC to remove the requirement that a condition "significantly restricts" a major life activity because it imposed too high a standard under the Americans With Disabilities Act (ADA). As such, this phrase does not appear in the proposed regulations. Further, under the proposed regulations, an individual need only show that his/her condition "substantially limits" him/her in one major life activity. However, the proposed regulations do note that temporary, non-chronic impairments such as colds, seasonal influenza, or a sprained joint or broken bone that is expected to soon heal would not be considered substantially limiting.

3. **Presumptive Coverage of Certain Conditions**: The proposed regulations have generated controversy in that they identify impairments that are presumptively disabilities. Among the list of impairments presumed to be covered disabilities under the ADA would be cancer, diabetes, HIV/AIDS, major depression, post-traumatic stress disorder, blindness, deafness, intellectual and developmental disabilities, partially or completely missing limbs, autism, cerebral palsy, multiple sclerosis, and schizophrenia. The proposed regulations also identify other types of impairments that may be covered disabilities under the ADA, including asthma, high blood pressure, coronary artery disease, learning disabilities, back and leg impairments, carpal tunnel syndrome, hyperthyroidism, panic attacks, anxiety disorder, and mild depression.

4. **Working as a Major Life Activity**: The proposed regulations also revise the standard for determining when an individual is substantially limited in the major life activity of working. The proposed regulations would no longer look to a class or broad range of jobs in making this determination, but instead would analyze the types of jobs at issue, e.g. assembly line jobs.

As noted, the proposed regulations are subject to public comment when they are published in the Federal Register. As such, they may undergo changes from the current format. However, in their current form they foreshadow what awaits employers in the future, which is a shift in focus from a painstaking analysis of disability coverage (because the definition of disability under the ADAAA and the proposed regulations has significantly expanded and provides for broader coverage) to an emphasis on the reasonable accommodation of disabled individuals and the good faith interactive process.

The attorneys in our Employment Law Group regularly assist employers in developing ADA policies, provide

advice and counseling on ADA coverage and accommodation issues, and provide representation in disability discrimination lawsuits. We will continue to keep our clients apprised of the proposed regulations as they move to final adoption. Stay tuned

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U.S. Supreme Court Roundup: Three Employment Decisions Provide Mixed Results for Employers

By: Jill Sebest Welch

***AT&T Corp. v. Hulteen*: Testing the Outer Time Limits of the Lilly Ledbetter Fair Pay Act**

In January, President Obama signed into law the Lilly Ledbetter Fair Pay Act, which amended Title VII, the ADEA, ADA, and the Rehabilitation Act, to allow plaintiffs to reach back to the first instance of pay discrimination and restart the statute of limitations clock every time they received a paycheck that reflects that earlier discrimination.

Faced with this new law, the question for employers that remains is how far back in time can "Lilly Ledbetter liability" go? Can it go back to the point in time before the enactment of the anti-discrimination laws themselves? The U.S. Supreme Court recently considered this question in *AT&T v. Hulteen*, and answered no.

Prior to the passage of the Pregnancy Discrimination Act (PDA) in 1979, which amended Title VII to make pregnancy discrimination unlawful, AT&T maintained a seniority system limiting the service credits given to female employees who took pregnancy leave, thereby permanently reducing their pension benefits. While the system was subsequently modified to eliminate this disadvantage, AT&T never recalculated the pension benefits lost by women subjected to the old policy. In May of this year, the Supreme Court decided the case of four AT&T employees who had sued the company to recover these lost benefits under the Lilly Ledbetter Fair Pay Act.

Ruling in favor of AT&T, the Supreme Court asserted that an employer is not in violation of the Act when the discriminatory decision -- reflected in part in the pension plan of an employee -- was made *prior* to the passage of the Act. **Essentially, an employer cannot be held liable for discrimination if the discriminatory act was legal at the time it was executed.** While an employer is prospectively obligated to comply with the anti-discrimination laws, it has no apparent duty to retroactively recalculate the benefits and other payments made to employees prior to the passage of these Acts.

A victory of sorts for employers, the decision was not a particularly difficult one for the Supreme Court to make. The Supreme Court did not address the more troubling question for employers, however, of the conditions under which liability *could* be found for employers' decades-old pay decisions that occurred *after* the passage of Title VII, but for which employees or former employees waited decades to file suit. Thus, the Lilly Ledbetter Fair Pay Act remains very broad, essentially providing for an indefinite period of time for an employee to bring a suit based on alleged discriminatory pay decisions dating back to 1964 when Title VII

was passed.

***Gross v. FLB Financial Services, Inc*: Employees Have Higher Burden of Proof in Age Discrimination Claims**

Considered a victory for employers, a sharply divided Supreme Court ruled in June that employees bringing disparate treatment claims of age discrimination must prove that age was the "but-for" or determinative factor in an adverse employment decision. Thus, the burden of persuasion does not shift to the employer in mixed-motive cases, where other reasons in addition to age may have factored into the decision. This standard is more strict than that under Title VII, where an employee may prove discrimination by establishing simply that the protected characteristic was a "motivating" factor in the decision.

Writing for the 5-4 majority, Justice Clarence Thomas held that the Title VII "motivating factor" standard and burden-shifting framework found in the Supreme Court's 1989 *Price Waterhouse* decision simply does not apply to age discrimination claims under the ADEA, because Congress "neglected to add such a provision to the ADEA" when it amended Title VII in 1991 to include the provision.

It remains to be seen whether Congress will have a similar reaction to the Supreme Court's *Gross* decision as it did to the Court's *Ledbetter* decision, taking swift action to reject the Supreme Court's ruling and amend the statute. The same five Justices who joined in the *Ledbetter* decision again joined in the *Gross* ruling. At this point, however, the burden of proof remains with the plaintiff/employee to prove that age discrimination was the actual cause of the employment decision in question.

***Ricci v. DeStefano*: City of New Haven Was Wrong to Throw Out Promotional Exams That Favored White and Hispanic Test-Takers Based on Fear of Lawsuit**

At the end of June, the Supreme Court held that the City of New Haven engaged in unlawful discrimination when it discarded the results of firefighter promotional exams that favored white and Hispanic candidates, because it feared a potential lawsuit by African-American applicants. The decision is front and center in the confirmation hearings for Supreme Court nominee Judge Sonia Sotomayor, who participated in the Appeals Court ruling in favor of the City of New Haven which was reversed by the Supreme Court in its 5-4 decision.

The City of New Haven was faced with the fact that African-American firefighters were less successful on the promotional exams given to city firefighters. After the City refused to certify the promotional exam results because it feared a discrimination lawsuit by the African-American test-takers, white and Hispanic firefighters filed suit, asserting claims under Title VII and the 14th Amendment's Equal Protection Clause. A panel of the Second Circuit Court of Appeals, including Judge Sotomayor, initially found in favor of the City of New Haven because the City "was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact."

The Supreme Court disagreed. Under its ruling, employers cannot simply cite a fear of litigation by racial minorities to justify discrimination against white employees. Employers must prove a "strong basis in evidence" for believing that racial minorities could prevail on their discrimination claims before they may engage in discriminatory treatment of non-minority employees. Because the City of New Haven had strong arguments that the tests were job related and consistent with business necessity, and that minority candidates could not show a less discriminatory alternative that the City refused to adopt -- both defenses to

the minority firefighters' claims -- the Supreme Court found that it acted too hastily in throwing out the results. In other words, the City did not meet the "strong basis in evidence" standard.

In the wake of this decision, employers are well-advised to carefully scrutinize and establish the job-relatedness of tests before they are administered to employees and to validate tests and other selection tools before being used. If confronted with a potential disparate impact on minorities, employers should consider less discriminatory alternatives.

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The Employment Law attorneys of Barley Snyder LLC routinely assist employers in the area of employment litigation and provide clients with the counseling and tools necessary to manage the risk of their companies, affiliates, and employees. For assistance in the area of employment litigation, or any other issue surrounding your company's employment practices, please contact any member of the Employment Law Group.

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New Jersey Employers Now Required to Offer Paid Family Leave

As of July 1, 2009, the New Jersey Family Leave Insurance Law requires covered employers to provide their covered New Jersey employees with up to six weeks of paid family leave to care for sick family members, including a child, spouse, domestic partner, civil union partner, or parent suffering from a serious health condition, or to care for a newborn or newly adopted child within the first year after the birth or adoption.

The law applies to all employers covered under New Jersey's Unemployment Compensation Law, and entitles covered employees taking paid leave to receive two-thirds of the employee's weekly pay, or a maximum of $524 per week, whichever is smaller. An employee is covered by the law if he or she works at least 20 calendar weeks and earns at least $143 per week, or earned at least $7,200 in the prior year.

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ICE Commences Nationwide Form I-9 Enforcement Initiative

By: Silas M. Ruiz-Steele

U.S. Immigration and Customs Enforcement (ICE) recently announced a new initiative to audit Form I-9 Employment Eligibility Verification forms completed by businesses nationwide. ICE has begun issuing Notices of Inspection (NOI) to 652 businesses nationwide in order to audit I-9 records that contain information regarding an employee's right to work legally in the U.S. The notices alert business owners that ICE will be inspecting their hiring records to determine whether or not they are complying with employment eligibility verification laws and regulations. According to ICE, businesses in every state and industry are being audited, "from agriculture-related businesses, to service businesses, to high-tech industry and everything in between."

ICE stated that the 652 businesses that are being audited have been selected for inspection as a result of leads and information obtained through investigative means. Investigative leads come from a variety of sources including: disgruntled employees who complain about the company's perceived disregard for immigration laws; employer filings of government labor certification applications to legalize the status of undocumented workers while continuing to employ them illegally; and consumer complaints that one's identity is being used by an employee.

ICE's new, bold enforcement initiative has only just begun. "ICE is committed to establishing a meaningful I-9 inspection program to promote compliance with the law. This nationwide effort is a first step in ICE's long-term strategy to address and deter illegal employment," according to Department of Homeland Security Assistant Secretary for ICE, John Morton. Federal law requires employers to complete and keep records of an I-9 Form for all employees hired to work in the U.S. after November 6, 1986. During an I-9 audit, ICE demands the surrender of I-9s within three days. Because this is a very short timeframe in which to correct all I-9 deficiencies, the smart employer will be proactive and conduct internal audits to ensure that a meaningful immigration compliance policy is in place and to uncover potential liability such as identity theft, use of fraudulent documents, careless completion of I-9 forms, and evidence of the knowing hire or the continued employment of unauthorized workers. Possible fines and penalties for errors and/or noncompliance are significant.

The current edition of Form I-9 (dated February 2, 2009) has been in effect since April 3, 2009. U.S. Citizenship and Immigration Services intends to replace this form in the near future. Employers should periodically check the www.uscis.gov website for updates on this form.

For further information on the I-9 process/audits and immigration corporate risk management, please contact Silas Ruiz-Steele, chair of the firm's Immigration Group at (610) 898-7153; sruizsteele @barley.com.

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