

Employment Law Update June 2008

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Homeland Security Establishes REAL ID Standards

By: Silas M. Ruiz-Steele

REAL ID is a nationwide effort to improve the integrity and security of state-issued drivers' licenses and identification cards. On January 11, 2008, the Department of Homeland Security (DHS) announced a final rule establishing minimum security standards for state-issued drivers' licenses and identification cards. The regulations set forth uniform standards that states must meet to comply with the REAL ID Act, including those pertaining to the security features that must be included on state-issued drivers' licenses and identity cards, the verification of applicants' identity and lawful immigration status, and physical security standards for the card-issuing facilities.

Effective May 11, 2008, federal agencies cannot accept drivers' licenses or state-issued identification cards unless they are compliant with the REAL ID Act. However, under the new regulations a state may request an extension from DHS if more time is needed to ensure that its drivers' licenses and identification cards are compliant. Initially, any state may request an extension until December 31, 2009. By then, states must upgrade the security of their license systems to include a check for lawful immigration status and Social Security numbers of all applicants to ensure that illegal aliens cannot obtain REAL ID licenses. Compliance will be necessary for access into federal facilities, boarding commercial aircraft, and entering nuclear power plants. All newly issued drivers' licenses and identification cards must comply with REAL ID by May 11, 2011, and by 2017, all existing drivers' licenses and identification cards must be replaced by documents that meet the Act's requirements in order for a state's documents to be deemed REAL ID compliant.

Under the REAL ID regulations, a foreign national with nonimmigrant visa status will receive a temporary driver's license or temporary identification card that is valid only for the duration of his/her authorized stay in the U.S. and notes the card's date of expiration. Foreign nationals who are applying for a driver's license and who are not subject to a definite end of their period of authorized stay (for example F students and J exchange visitors) will be issued drivers' licenses/identification cards that are valid for a maximum of one year. Renewal of these documents will be possible upon presentation of evidence that the applicant's status in the U.S. has been extended.

The REAL ID Act was included as part of the Emergency Supplemental Appropriations Act for Defense, the Global

War on Terror and Tsunami Relief of 2005, signed into law by President Bush on May 11, 2005. More information on the REAL ID Act is available at www.dhs.gov and will soon be published in the Federal Register.

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U.S. Supreme Court Attempts to Clarify What Constitutes a "Charge" of Discrimination Under the ADEA

By: Richard L. Hackman

On February 27, 2008, the U.S. Supreme Court ruled that a document filed with the Equal Employment Opportunity Commission (EEOC) that can reasonably be construed as a request for action to protect the employee's rights or otherwise settle a dispute with the employer constitutes a discrimination "charge" within the meaning of the Age Discrimination in Employment Act (ADEA). In *Federal Express Corp. v. Holowecki*, the Supreme Court affirmed the U.S. Court of Appeals for the Second Circuit's decision, reviving a potential ADEA class action brought by current and former couriers over the age of 40, who alleged that Federal Express disparately applied its performance standards in an effort to force out older couriers before they qualified for retirement benefits.

Under the ADEA, an employee is required to file a "charge" of discrimination with the EEOC within 300 days of the discriminatory conduct prior to filing a lawsuit. However, because the term "charge" is not defined in the ADEA, federal courts have adopted numerous definitions of that term, which, in turn, has led to a variety of interpretations as to whether an employee is entitled to pursue his or her ADEA claim in a court of law.

In *Holowecki*, the Court addressed the long-standing question of whether an employee alleging discrimination initiates a claim (and stops the statute of limitations) by filing what the EEOC refers to as an "Intake Questionnaire." In that case, the plaintiff submitted to the EEOC a completed intake questionnaire and an affidavit alleging that the company discriminated against older couriers. Although the EEOC did not initiate administrative proceedings in response to the filing of the intake questionnaire, the employee subsequently filed suit. The U.S. District Court for the Southern District of New York dismissed the lawsuit on the basis that the employee failed to satisfy the ADEA charge filing requirement. However, on appeal, the U.S. Circuit Court of Appeals for the Second Circuit, which covers New York, Vermont, and Connecticut, concluded that the intake questionnaire did, in fact, serve as a "charge."

In its argument to the U.S. Supreme Court, Federal Express argued that courts should not treat an EEOC intake questionnaire as a "charge" because the EEOC itself had failed to do so and failed to initiate the administrative process. However, in a 7-2 decision, the Supreme Court disagreed, noting that the ADEA only requires the employee to file a charge before filing suit, and the employee's right to sue does not depend on the EEOC actually taking action. Despite its recognition that the EEOC's internal directives failed to provide a thorough and consistent definition for the term "charge," the Supreme Court adopted the EEOC's position that the proper test in such instances is whether the filing at issue should be construed as a request by the employee for the EEOC to take action to protect the employee's rights or otherwise settle a dispute between the employer and the employee. Therefore, in applying this test in *Holowecki*, the Supreme Court held that the intake questionnaire, when combined with the affidavit, constituted a "charge" for purposes of the ADEA.

Ultimately, this case's outcome is a victory for employment discrimination plaintiffs. After the decision in *Holowecki*, employers will have a more difficult time getting an ADEA case dismissed because of a technical or procedural deficiency, such as the failure to meet the charge-filing requirement.

One possible beneficial result to employers from this decision is that the EEOC may revise its internal directives to more clearly define the concept of what constitutes a "charge" for purposes of the ADEA. Notably, Justice Kennedy, who was writing for the majority, urged the EEOC to consider revisions to its forms and procedures to "reduce the risk of further misunderstandings."

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Court Changes Requirements for Non-Automatic Reduction of Benefits Following an IRE

The Act 57 changes to the Workers' Compensation Act added a mechanism for adjusting benefits from total to partial disability. This mechanism is the Impairment Rating Evaluation, commonly referred to as an "IRE."

The IRE determines the degree of a claimant's impairment under the most recent edition of the American Medical Association's "Guide to the Evaluation of Permanent Impairment." If the impairment rating is found to be equal to or greater than 50%, the claimant's benefits will remain unchanged and the claimant will continue to receive total disability benefits. However, if the impairment rating is less than 50%, the employee's status will be changed to partial disability and benefits will be capped at 500 weeks.

The changes to the Act that permit use of an IRE and the recent case law interpreting that provision have mandated that for the automatic reduction from total disability to partial disability benefits to occur, the IRE must be requested within the 60-day period following 104 weeks of benefits received by the claimant. If the request is made before the expiration of the 104 weeks, the IRE will be dismissed as untimely.

If the IRE is performed after the expiration of the 60-day window, the Act permits reduction of benefits from total disability to partial disability, but an employer can no longer take advantage of the automatic reduction feature and must submit to the "traditional administrative process." Practitioners have long believed that this simply meant the filing of a modification petition and submission of the IRE Determination into evidence in order to receive a reduction of benefits from total to partial disability.

However, on April 28, 2008, the Commonwealth Court of Pennsylvania in *Diehl v. WCAB (IA Construction)* ruled that in order to seek a reduction of benefits based on an IRE performed after the 60-day window, the employer must follow all the requirements for seeking a modification of benefits. This includes requiring the employer to show either work availability with the employer or that the claimant has an earning power through presentation of a labor market survey.

Essentially, this "new" requirement by the Commonwealth Court has destroyed the effectiveness and usefulness of an IRE performed after the expiration of the 60-day window as a mechanism for reducing benefit costs. An IRE performed after the 60-day window is now no different than any other request for modification of benefits.

As such, we recommend that, where applicable, an IRE always be performed within the 60-day period following the expiration of 104 weeks of benefits. Based on the Court's decision in *Diehl*, it is imperative that everyone responsible for the monitoring of workers' compensation benefits be aware of the limited opportunity to use an IRE as a tool to reduce benefit costs.

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