

Labor and Employment Law

MAY 2005

VOLUME XII, ISSUE 3

HEADLINES

- ◆ High Court OK's Use Of Disparate Impact Theory In Age Discrimination Cases
- ◆ EEOC Blocked From Implementing Rule On Retiree Health Plans
- ◆ Gargantuan Award In Sex Discrimination And Retaliation Suit
- ◆ Chicago Employee Moves To Georgia—Knocking Out Non-Compete Clause
- ◆ Michigan Enacts Social Security Number Security Statute
- ◆ Hollywood Casting Directors Seek Unionization
- ◆ Wal-Mart Pays \$11 Million To Settle Illegal Worker Suit

Insert

- ◆ Designing An E-Hr Process

Labor & Employment Law is prepared by the members of Lord, Bissell & Brook LLP's Labor and Employment Law Group. It is intended for general information purposes only and does not constitute legal advice. This information is not intended to create, and it does not create an attorney-client relationship. Readers should not act upon this information without first consulting a lawyer.

Labor & Employment Law is published six times annually. If you would like to be removed from our mailing list, please contact us at either unsubscribe@lordbissell.com or Lord, Bissell & Brook LLP, 115 S. LaSalle St., Chicago, Illinois 60603, Attention: Marketing. If we are not so advised, you will continue to receive this newsletter.

© 2005 Lord, Bissell & Brook LLP.

High Court OK's Use Of Disparate Impact Theory In Age Discrimination Cases

In *Azel P. Smith v. City of Jackson, Mississippi*, the United States Supreme Court finally put an end to the dispute between the lower courts on whether an employee or job applicant can claim discrimination based on age due to the “disparate impact” of a policy that appears neutral on its face. Now, by a 5-3 vote (Justice Rehnquist did not participate), the Supreme Court has concluded that the Age Discrimination in Employment Act (“ADEA”) does authorize lawsuits attacking neutral employment practices that have a disparate impact on employees who are at least 40 years old.

The case arose out of the City of Jackson, Mississippi's pay plan, which granted raises to all City employees. When the plan was adopted in 1998, its stated purposes were as follows: to “attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies

and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.” In 1999, the plan was revised because the City wanted to bring the starting salaries of police officers up to the regional average. All police officers and dispatchers received raises, but those who had been working for the City for less than five years got proportionately greater raises than those with more seniority. Some of the officers who were 40 or older had less than five years of service, but most of them had more.

A group of older officers sued the City, claiming that: (1) the City deliberately discriminated against them because of their age (a disparate treatment claim); and (2) they were “adversely affected” by the plan because of their age (a disparate impact claim). The District Court granted summary judgment to the City on both claims. The Court of Appeals ruled that the disparate treatment claim should not have been dismissed, but it affirmed the dismissal of the disparate impact claim.

The Supreme Court considered only the disparate impact claim. In concluding that the ADEA does allow disparate impact claims, the five-member majority based its decision primarily on the parallel provision found in Title VII of the Civil Rights Act of 1964 (“Title VII”) and guidances published by the U.S. Department of Labor (“DOL”) and Equal Employment Opportunity Commission (“EEOC”). The Court found that the language of the ADEA and Title VII is identical in its broad prohibition on discriminatory actions based on a protected characteristic. According to the Court, when Congress uses the same language in two statutes having similar purposes, it is appropriate to presume that Congress

intended that text to have the same meaning in both statutes. As such, the ADEA supports a disparate impact claim that is comparable to the disparate impact claim available under Title VII.

Many commentators and attorneys were surprised by the result. But the Court may have protected employers from most disparate impact cases by holding that this type of claim is subject to a more rigorous standard under the ADEA than the standard under Title VII. The Court explained there are important differences between the two statutes. In Title VII, “business necessity” is needed to justify disparate impact on women or minorities, and the employer must show that it has no alternative means to achieve its business goals. In contrast, the ADEA permits any “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age.” Accordingly, if “reasonable factors other than age” account for the disparate impact, the action will not be unlawful.

The Court further noted that, for ADEA cases, it will apply the interpretation of disparate impact claims announced in *Wards Cove v. Antonio*,

If “reasonable factors other than age” account for the disparate impact, the action will not be unlawful.

Disparate Impact Theory - continued on page 2

EEOC Blocked From Implementing Rule On Retiree Health Plans

In 2000, the Third Circuit Court of Appeals held that it is a violation of the Age Discrimination in Employment Act to provide health benefits to retirees age 65 or older that are different than the benefits provided to retirees younger than 65—unless the employer can satisfy the “equal benefit or cost” defense specifically set forth in the statute. *Erie County Retiree Association v. County of Erie*, 220 F.3d 193. Initially, the EEOC followed the ruling in the Erie County case. But it soon became apparent that employers were choosing not to provide any retiree health benefits, rather than paying the same for retirees age 65 or over (who were covered by Medicare and Medicaid) as they were paying for retirees under age 65. As a result, around this time last year, the EEOC adopted a rule allowing employers to coordinate retiree health benefit programs with eligibility for Medicare or a comparable state health

benefits program, even if the coordination does not satisfy the “equal benefit or cost” defenses.

Just prior to the EEOC publishing its final rule allowing coordination of benefits with Medicare, the American Association of Retired Persons (“AARP”) filed suit in Philadelphia to block the rule. A district court judge has agreed with AARP, issuing an injunction blocking the EEOC from implementing its rule permitting employers to coordinate the provision of retiree health benefits with eligibility for Medicare. The EEOC is expected to appeal. We will closely follow this unusual battle between AARP and the EEOC, and will provide updates as the smoke begins to clear. *AARP v. EEOC*, Case No. 2:05 CV 00509.

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

Gargantuan Award In Sex Discrimination And Retaliation Suit

In what may be one of the largest verdicts ever in an employment discrimination suit, a federal court jury in New York awarded \$29.2 million in damages to a former securities salesperson for UBS. *Zubulake v. UBS Warburg LLC*, No. 02-1243. The verdict consisted of \$2.24 million in back pay, \$6.86 million in front pay, and over \$20 million in punitive damages. The back pay and front pay verdicts were high because Zubulake earned \$650,000 per year in compensation from UBS. Also, the case involved claims under state and city human rights laws, and so Title VII’s \$300,000 cap on punitive and compensatory damages did not apply.

Zubulake claimed in her lawsuit that, while working in an equities sales position,

she was passed over for promotion, subjected to sexist remarks, and excluded from work-related activities. She filed a charge of sex discrimination with the EEOC. Two months later, UBS terminated her employment. Zubulake then sued for sex discrimination and also claimed that UBS terminated her in retaliation for filing the EEOC charge. In support of her retaliation claim, Zubulake pointed to e-mails—sent by UBS management within several days of receiving her EEOC charge—that implied UBS wanted to get rid of her.

Huge punitive damage awards such as this highlight the importance of effective workplace policies and procedures to prevent and correct harassment and discrimi-

nation. Employers who neglect such issues now may imperil their bottom line later. Additionally, this case underscores the importance of responding appropriately to claims of harassment—investigation is critical and, as shown in this case, e-mails expressing outrage at the complaining party are likely to become “Exhibit A” in a lawsuit if something happens to the complainant and he or she sues.

Kevin D. Kelly | 312.443.0217 | kkelly@lordbissell.com

Disparate Impact Theory - continued from page 1

490 U.S. 642 (1989). According to *Wards Cove* (which no longer applies to Title VII because of 1991 amendments to the Civil Rights Act), plaintiffs are responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. This places an additional burden on plaintiffs who bring disparate impact claims under the ADEA.

Further indication that there may be little practical effect of what has been touted as a significant expansion of the law is the fact that the Court *unanimously* held that Plaintiffs’ disparate impact claim failed. As the Court noted, the fact that the City’s pay plan was intended to make them competitive with other police departments was clearly a reasonable factor other than age.

Therefore, while disparate impact claims under the ADEA can now be brought in the states where such claims had not been permitted, the result is not likely to be a flood of litigation. Even when such cases are filed, the burden on the plaintiff will be heavy. Nevertheless, employees should ensure that their policies, procedures and practices—in hiring, testing, reductions in force, etc.—either do not have an adverse impact on older workers or are clearly supported by “reasonable factors other than age.”

Kathryn Montgomery Moran | 312.443.1749 | kmoran@lordbissell.com

Jolen V. Anderson | 312.443.0362 | janderson@lordbissell.com

Chicago Employee Moves To Georgia—Knocking Out Non-Compete Clause

It is now relatively common for employers to require high level (and sometimes not so high level) employees to sign covenants not to compete in return for the employer disclosing its trade secrets and confidential information. Although most courts dislike broad covenants not to compete, a carefully tailored restrictive covenant can often be enforced. However, the law on covenants not to compete differs from state to state. California, for example, prohibits all restrictive covenants (except in very limited situations) as a violation of public policy. Perhaps more surprisingly, as a former executive with Marsh & McLennan in Chicago found, Georgia might have been a better place for him to attack a non-compete clause than if he had sued in Cook County. *Palmer & Cay v. Marsh & McLennan Companies, Inc.*, Case No. 03-16248 (11th Circuit).

In this case, the employee left Marsh & McLennan to go to Palmer & Cay, an insurance brokerage firm in Savannah, Georgia. The employee, James Meathe, had signed a broad non-compete agreement with Marsh & McLennan. One of the many restrictions was that Meathe could not accept *unsolicited* business from former clients. In Georgia, this type of restriction is unenforceable. About six

months after Meathe left the company, Marsh & McLennan, knowing this enforceability problem in Georgia, informed Meathe that it would not attempt to enforce the provision that barred Meathe from accepting business from clients who switched to Palmer & Cay on their own. Nevertheless, Meathe and Palmer & Cay filed a lawsuit seeking

No matter how cautious an employer may be...there is no guarantee the restriction will be enforceable.

a declaratory judgment that all post-employment restrictions on Meathe were unenforceable and enjoining Marsh & McLennan from trying to enforce any part of the agreements that Meathe had signed.

As expected, the trial court found that the restriction on accepting unsolicited business was too broad. But instead of “blue penciling” the agreement to eliminate that clause—which Marsh & McLennan had already promised not to enforce—and to preserve those aspects of the non-compete that were valid, the court held that the entire agreement was invalid.

On appeal, the 11th Circuit Court of Appeals agreed with the lower court’s decision to strike down the agreement. According to the 11th Circuit, the Georgia courts will not revise covenants not to compete to make them enforceable, since that would encourage employers to include overly broad statements in otherwise enforceable agreements in the hope that its former employees will not have the resources or the courage to initiate litigation. Therefore, the Court of Appeals affirmed the lower court’s ruling—and even extended it by saying that the declaratory judgment would have a nationwide effect.

This case shows that no matter how cautious an employer may be in tailoring a restrictive covenant to conform to the law of the jurisdiction in which the employee works, there is no guarantee the restriction will be enforceable. If the employer does business in other states, the enforceability of the covenant may be subject to the vagaries of the law in each of those other states—which may vary widely on this highly sensitive issue.

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

Michigan Enacts Social Security Number Security Statute

In a possible foreshadowing of future legislation in other states to protect against identity theft, Michigan recently passed a Social Security Number Privacy Act (effective January 1, 2006). This new Act requires employers to establish an internal policy that “ensures to the extent practicable the confidentiality of SSN’s.” The Act prohibits unlawful disclosure of SSN’s, limits who can have access to documents containing SSN’s, and requires that employees who violate the policy be penalized.

A number of other states, including Illinois, have also enacted SSN-security statutes, but they generally do not “target” employers. For example, on July 14, 2004, Illinois Governor Blagojevich signed Senate Bill 2545 which amended the (Illinois) Consumer Fraud and Deceptive Business Practices Act (“CFDB-PA”) to prohibit the use of SSN’s on insurance cards by January 1, 2006. The CFDBPA was also amended to make it illegal to:

- Publicly post or display an individual’s SSN;
- Print an individual’s SSN on any card required to access products or services;
- Require an individual to transmit his or her SSN over the Internet;
- Require an individual to use his or her SSN to access an Internet web site; and
- Print an individual’s SSN on materials that are mailed to the individual, subject to various exceptions.

More laws protecting against disclosure of SSN’s is undoubtedly on the way, and Michigan has probably opened the door to such legislation covering the workplace—where obtaining SSN’s is an absolute necessity.

R. Clay Bennett | 213.687.0595 | cbennett@lordbissell.com

Editors

Steven H. Adelman
sadelman@lordbissell.com
312.443.0405

Kathryn Montgomery Moran
kmoran@lordbissell.com
312.443.1749

*This material may constitute advertising
under certain codes.*

Office Locations

ATLANTA

CHICAGO

LONDON

LOS ANGELES

NEW YORK

WASHINGTON

www.lordbissell.com

© 2005 Lord, Bissell & Brook LLP.

Hollywood Casting Directors Seek Unionization

Virtually all of the crafts that make up the crew of a film or television show are members of a union, including the Directors Guild of America, Writers Guild of America, Screen Actors Guild, or the International Association of Theatrical and Stage Employees. One of the few remaining groups that may soon unionize are the Hollywood casting directors. Who are they? About 500 or so casting directors pick the talent that appears in most of the Hollywood film and television shows we see. The casting directors currently operate as independent contractors and regularly complain that they are routinely hired for eight-week periods and then required to work two extra weeks without compensation.

The casting directors seek representation by the International Brotherhood of Teamsters Local 399 in Los Angeles and Local 817 in New York. The Alliance of Motion Picture & Television Producers (“AMPTP”) has refused to recognize casting directors as a collective bargaining unit because it believes that most of them are independent contractors who, as a rule, can’t legally unionize. The AMPTP is the bargaining arm for studios and networks with Hollywood unions.

The casting directors’ organizing campaign obtained endorsements from the major Hollywood unions and many of their A-list members, including Tim Allen, Woody Allen, Drew Barrymore, Warren Beatty, Annette Bening, George Clooney, Danny DeVito, Cameron Diaz, Samuel L. Jackson, Martin

Scorsese, Kevin Spacey, Meryl Streep, Hilary Swank, and Denzel Washington, among others.

On February 1, 2005, the AMPTP agreed to a National Labor Relations Board (“NLRB”) sanctioned election occurring within 90 days. The compromise ends threats that the casting directors would walk off the job, and have their picket lines respected by Teamsters.

The crux of the debate between the casting directors and the producers has been whether the casting directors are employees or independent contractors. The AMPTP asserts that it is illegal for the casting directors to unionize since most casting directors are independent contractors rather than employees. The election takes this contentious issue and puts it in the hands of the NLRB. The NLRB will determine which of the 500 casting directors qualify as employees and which ones are ineligible to vote because they are independent contractors.

If a majority of eligible casting directors vote to join the Teamsters, they will still need to negotiate a contract. But, by agreeing to allow an election, the AMPTP has spared the casting directors the several years delay in determining whether the union has majority support that would have occurred if the parties litigated the independent contractor issue in the “normal” way.

Tom K. Ara | 213.687.6701 | tara@lordbissell.com

Wal-Mart Pays \$11 Million To Settle Illegal Worker Suit

Wal-Mart Stores, Inc. has agreed to pay \$11 million and institute a specific corporate-wide program to insure future compliance to settle a suit by the U.S. Immigration and Customs Enforcement (“ICE”) office (a part of the Department of Homeland Security) accusing Wal-Mart of knowingly using illegal workers as contractor-employee janitors. *United States v. Wal-Mart Stores, Inc.*, No. 05-052 (M.D. Pa.). The lawsuit stemmed from an October, 2003 raid by ICE on 60 Wal-Mart stores in 21 states, which had resulted in the arrests of approximately 250 illegal immigrants working as night janitors for 12 cleaning contract companies. The 12 cleaning contractors agreed to

plead guilty to criminal charges concerning hiring undocumented workers from 1998 to 2002 and to pay a combined \$4 million. Wal-Mart has characterized its \$11 million payment as a “donation” to law enforcement efforts.

To make matters even worse for Wal-Mart, a federal class-action suit by undocumented workers alleging Fair Labor Standards Act, RICO and Civil Rights Act of 1871 violations, was certified by the New Jersey District Court in December 2004. The suit alleges wage and hour violations and that the workers were “locked in” the store overnight to do cleaning.

R. Clay Bennett | 312.443.0595 | cbennett@lordbissell.com

DESIGNING AN E-HR PROCESS

The laws of every state now permit HR departments to complete and deliver the full range of HR/benefits documents using e-signatures and e-delivery. This article provides an overview of the applicable law, outlines the risks of such an e-HR process and describes a possible framework for designing and implementing an effective e-HR process, whether that process is via an intranet, an extranet, the Internet or in a face-to-face setting.

WHAT IS ESIGN?

The Electronic Signatures in Global and National Commerce Act (“ESIGN”) became effective in October 2000, but employers have been slow to seize the opportunities created by this federal law, as well as the state enactments of the Uniform Electronic Transactions Act (“UETA”) now adopted in at least 46 states, for the use of e-signatures and records in human resources functions. ESIGN is particularly significant due to its broad pre-emption provisions and its interplay with UETA, allowing employers to develop a national e-signature strategy. E-signatures are only one important element of the federal ESIGN law. The law:

- ◆ Permits delivering documents exclusively through electronic means; and
- ◆ Permits companies to satisfy statutory record retention and retrieval requirements exclusively through electronic means.

Summarized below are key aspects of the e-signature laws relating to developing and implementing an effective e-HR process. References in this article to ESIGN apply equally to the various state enactments of UETA which would not be preempted by the federal law.

Federal and State Law Interplay ESIGN does not entirely preempt state laws dealing with e-signatures. States have limited flexibility in adopting their own versions of e-signature laws. Understanding the interplay between the federal ESIGN and the various states’ versions of UETA can be an overwhelming task, if not done in the context of a particular issue. The substantive differences between the state and federal law on most commercial issues is generally insignificant in designing and implementing an effective e-signature process.

BASICS OF ESIGN LAWS

What is an “e-signature?” Under ESIGN and UETA, an e-signature can be as simple as:

- ◆ Clicking “I Agree;”
- ◆ Saying into a recording device, “I Agree;”
- ◆ Using a peripheral device that records an image of the signature; or
- ◆ Using an electronic sound, symbol, or process attached to or logically associated with the document or record, which is executed or adopted by a person with the intent to sign.

Selecting the method of electronically signing a document or record is a relatively simple element of an effective e-signature process.

Categories of Signatures There are many opportunities for employers to use e-sign and e-delivery in the HR area. For example, the e-process could include:

- ◆ New Employee Processing
- ◆ Employment and Confidentiality Agreements
- ◆ Benefits Enrollment and Status Changes
- ◆ Expense Reports and Other Internal Reports
- ◆ Performance Evaluations

UNDERSTANDING THE RISKS

Below is a summary of the potential risks of using an e-HR process.

Authentication Risk - “That’s not my signature!” If the employee or applicant using an e-signature is not face-to-face with someone from HR, there is a risk of not being able to prove the actual identity of the person using the signature.

There are ways to authenticate the identity of a person on the other side of an e-process. Using PIN’s or other shared secrets (such as employee ID number and SSN) are two simple ways that are sufficient in particular scenarios. The degree to which a person is authenticated should be calibrated to the risk of the signature failing. For example, the authentication risk associated with authorizing a payroll deduction to participate in the company’s 401(k) Plan is significantly less than the risk associated with authorizing the company to complete a background check on the person.

Repudiation Risk - “That’s not what I signed!” The employee or applicant who signed a record using an e-process may claim that although the signature appearing on the record is his or hers, the particular record in question bearing his/her e-signature is: (i) not the record he or she signed; and/or (ii) that record was altered after it was signed. There are ways to secure e-records after they have been signed to reduce

employees' and applicants' ability to repudiate the contents of a record bearing his or her e-signature.

The records can be electronically sealed after the documents have been signed and the session ends using well-established technology, so that the records cannot be altered without detection. The process should also include an audit trail or record of each step in the transaction, indicating time and date of each critical step in the process. Providing the signed documents to the employee or applicant and requesting him or her to examine them carefully and to alert the company immediately if it is not exactly what he or she signed can also reduce the repudiation risk.

Compliance Risk - "I never saw that!" Employees or applicants may claim to have never received certain documents relating to compliance matters, such as summary plan descriptions, employee handbooks, or reminders of other company policies. Regulators may make the same claim regarding disclosures and acknowledgments required by law. There are ways to record the delivery of specific records to employees and applicants.

By having an audit trail in the e-process, which includes all significant steps, including where the employee was provided and acknowledged receipt of certain documents, proof of delivery can be established. Further, if this audit trail is part of a sealed process, it will be difficult for an employee or applicant to challenge receipt.

ESIGN requires certain steps if consumer disclosures required to be provided in writing are to be provided exclusively via e-delivery. Because this is in the federal law and none of the states have declared otherwise, this requirement applies to all states. The requirements are relatively simple to satisfy, except in certain scenarios involving call centers.

Adoption Risk - "Am I done yet?" If the e-process is not user-friendly and is not faster or more convenient for employees and applicants to use compared to traditional methods, employees and applicants may resist using the e-process or complain about the inconvenience. By involving a range of personnel from the company, conducting a number of tests, monitoring feedback and other results, and making adjustments to the e-process, a company can increase the adoption rate of the new process.

Relative Risk - "How do the e-risks compare to the risks in the traditional process?" The authentication, repudiation and compliance risks exist in conducting business the traditional way, i.e., hard copies and blue ink. Most of us have not considered how much of these risks are inherent in the current methods of completing most HR forms. In designing and implementing effective e-signature and e-delivery processes, focusing on the risks relative to the traditional methods is essential. The

standard for an e-signature and e-delivery process is not whether there is any risk. Rather, the goal is to have these risks be no greater than the risks using the traditional approach, unless there is a counterbalancing benefit to the company for assuming the greater risk, such as significantly lower costs.

DESIGNING THE PROCESS

Experience tells us that a multi-disciplinary team (IT, HR, compliance/legal) familiar with existing technologies relating to e-signature and e-delivery can design an effective e-process, where the authentication, repudiation and compliance risks are at or below the levels of such risks using traditional methods and that it is possible to achieve this in a user-friendly way. Experience also tells us that focusing on just a few business processes first to work through the details of how the various pieces work together is best, rather than attempting to design a single process intended to cover all HR processes in a single step. Once the basics are resolved for a given process (such as completing the initial application for employment), it will be easier to consider how such a process could be changed to accommodate other HR functions, such as enrollment into benefit plans.

If you have questions regarding ESIGN Compliance, please contact your Lord, Bissell & Brook attorney or one of the following members of our ESIGN team:

Patrick J. Hatfield | 404.870.4643 | phatfield@lordbissell.com

Mark C. McDermott | 404.870.4686 | mmcdermott@lordbissell.com