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2009 EMPLOYMENT LAW UPDATE: WHAT ALL HR PROFESSIONALS SHOULD KNOW

By Lisa Stahl

Will an outbreak of swine flu cause total chaos in the work place?

What are the latest court rulings on age discrimination and affirmative action?

Are DNA profiles secretly being used by management to make hiring and firing decisions?

Can emails be used as evidence in a court case?

These hot-button topics aren't just sci-fi fantasies or tabloid headlines – they were also among the many highlights of the September HR Roundtable, presented at The TemPositions Group of Companies.

Richard Greenberg and Linda Carozzi – partners at Jackson Lewis LLP and specialists in labor, benefit and employment law – focused on the practical impact of recent legislation.

Greenberg began his presentation explaining his approach: “Our goal is to avoid litigation, to make sure we protect your organizations. We're very much focused on the practical – rather than the per se legal – angle.”

Nevertheless, the presentation centered on an analysis of key judicial decisions and legislation, starting with four recent Supreme Court decisions that are pertinent to workplace issues. The main topics of discussion included:

- Age discrimination, racial discrimination, affirmative action, harassment and retaliation claims.
- Rights of employees: genetic testing, family leave.
- Rights of employees: overtime pay for non-profits, extended COBRA.
- Email and independent contractors: how can they potentially cause trouble for employers?
- Swine flu – how management can cope with it at the workplace.

Case I – Age Discrimination (ADEA) Decisions

Age discrimination is very much on the mind of employers and employees these days – and a focus of this discussion (and several recent Supreme Court rulings). Federal law prohibits discrimination against employees over the age of 40 “based on this very arbitrary concept that 40 is old.” Says Greenberg, “very, very scary since people these days work until their mid-70s!”

But how this is interpreted in a lawsuit is open to interpretation.

Recently, the Supreme Court ruled that under the federal Age Discrimination in Employment Act (“ADEA”) employees alleging age discrimination must prove that this was the “but-for” (only) cause of an adverse employment action in order to prevail.

resource professionals either, according to Greenberg.

To recap: After the City of New Haven administered a promotional exam for firefighters, Caucasian firefighters were passed over for promotion in favor of African American firefighters whose exam scores were lower. The rationale: The New Haven Fire Department ignored the test results – out of fear of being sued.

Instead they were sued by the Caucasian firefighters passed over for promotion.

Two lower courts ruled in favor of the fire department. But the Supreme Court in *Ricci v. DeStefano* overturned those decisions recently, ruling in favor of the Caucasian firemen. The case was controversial for Sonia Sotomayor – since she sat on one of those courts.

“Affirmative action was called into question,” says Greenberg.

“The Continued expansion of the New York City Human Rights Law is frustrating...it hurts employers directly or indirectly...”

“The court took it upon itself to limit protections under federal law... Employees [suing] have to show that [age is] the only reason they were terminated,” says Greenberg.

It should be noted that this is not likely to have that much of an effect on human resource matters in New York City which is protected under the New York City Human Rights Law.

Case II – The Ricci Case: Affirmative Action

The highly publicized Ricci case, a stumbling block for Sonia Sotomayor's bid for the Supreme Court, is not likely to have as much impact for human

The current court ruling, though, is ambiguous and open to interpretation. The court ruled an employer can only make a decision overruling the results of a promotional exam if there's a strong basis in evidence for invalidating the results of the test. But, as Greenberg points out, “does the court tell you what a strong basis in evidence means?! No!”

Nevertheless, it's not that important in our day-to-day lives. “I think it has little practical effect except if companies do large-scale employment exams, “says Greenberg, “or if there's a reduction in workforce.”

Case III – Harassment and Retaliation Cases... Relevant Rulings

In *Crawford v. Metropolitan Government of Nashville*, the Supreme Court ruled to protect employees who participate in harassment investigations from retaliation by employers.

But, says Greenberg, “I can’t imagine an employer terminating someone who’s cooperating with an investigation.” Again – you should be aware of this.

Case IV – Age Discrimination Claims: Arbitration in Union Work Environments

The Supreme Court dealt specifically with the question of whether a union member can sue for age discrimination in a union work environment when union rules specify that these claims must be arbitrated.

A recent court decision upheld a unionized employee’s right to initiate a court action alleging age discrimination, even through union rules stipulated the claim had to be heard by an arbitrator. Additionally, such a claim would likely be heard in a court action even if

negative implications, according to Greenberg:

“The continued expansion of the New York City Human Rights Law is frustrating...it hurts employers directly or indirectly...as the case may ultimately be tried in New York State court – and bottled up in litigation at a great cost to all parties involved.”

You could be in state court litigating for two years before you ever get to see a judge. Which is why, says Greenberg, employers always want their case to be heard in federal court where judges are more sympathetic.

Discrimination, Retaliation, Harassment Claims: Employers Must Investigate All Claims!

Several New York State court cases relate to claims of harassment, discrimination, and retaliation.

The significance to employers is clear. The court basically said that employers have to investigate everything. If the employer doesn’t investigate, the person’s rights may have been violated.

the chief considerations for awarding money in harassment and discrimination claims.

Legally, adverse employment actions are larger things affecting employees: like not being hired, not getting a raise or a promotion.

Little things – you’re suddenly not invited to a meeting, you didn’t get the laptop you were promised, etc. – are not “adverse employment actions” and cannot be used to prove discrimination, harassment and the like.

Any policy that sets forth a per se limitation on medical leaves is illegal.

Independent Contractors: Watch out How You Classify

Employers are getting into more and more trouble with the independent contractor classification. For example, since they’re not covered under workers’ comp you can be sued if they trip and fall. They don’t have disability or health insurance. Yet, quite often, they are common law employees. The courts are taking a closer look at this.

Contractors should be trained on company protocol and expectations. You’re liable for their conduct – “and this can come back and bite you at the end of the day,” according to Greenberg.

“Be very, very careful about independent contractors. Try, if possible, to classify them as employees...”

Disability Accommodations and Medical Leave

The ADA has expanded its definition of disability. “Under New York State and New York City law, everything is a disability...” says Greenberg.

What that means practically speaking is this: often time employers have policies that say a leave of absence can be no longer than three months, six months, nine months, etc. Any policy that sets forth a per se limitation on medical leaves is illegal.

The court stipulated in *Phillips v. City of New York* that employers must conduct an individual analysis to assess an employee’s request for a medical leave.

“The golden rule about email: if you don’t want to see it in the New York Times, don’t send it!”

the union refused to advocate for that employee by bringing the employee’s grievances to arbitration.

New York State and City: Pertinent Judicial decisions/legislation

New York State courts recognized earlier Supreme Court decisions providing a legitimate defense for employers against employees alleging harassment.

Federal law ruled it is an employee’s responsibility to complain of harassment and to follow a company’s complaint procedures.

If an employee does not take reasonable measures to complain, doesn’t use the company’s complaint procedures, and has not suffered an adverse employment action, an employer has a legitimate defense.

New York City will also follow federal guidelines for pre-2005 claims. Post-2005 claims are a murky matter yet to be resolved.

Speaking of New York City, its pro-plaintiff, liberal laws have

Spaghetti (um!) and Cyber Warning: Email is a Potential Liability!

In claims of harassment and/or discrimination, Greenberg, said, “we use the spaghetti theory. That is – the more pieces of spaghetti the plaintiff’s lawyer can throw against the wall, the more trouble you have.”

Email is potentially a big problem. Linda Carozzi explained why: “The golden rule about email: if you don’t want to see it in the New York Times, don’t send it!”

Bottom line: Managers have to be trained not to express any opinion to anyone – unless it’s to the human resources people involved in the investigation. In today’s world, you can’t assume that what’s said casually (or written in an email) is not going to come out some time.

What actions by employers constitute harassment and/or discrimination?

The court clarified the legal definition of “adverse employment action,” one of

Non-profits / Overtime Compensation

In a recent ruling, a non-profit employer was exempt from paying overtime to employees (under FLSA) but this is subject to a case-by-case and fact-specific analysis.

Trial or Arbitration: Arbitration is Costly for Employers

“The longer I’m in law, the less I want to arbitrate,” says Greenberg.

While it may seem less expensive to arbitrate than try a case in court, arbitration may be a very costly matter for employers. Employers may be compelled to pay the entire cost of arbitration.

In New York, if someone was arrested but not convicted, it’s as if the arrest never happened.

“Arbitrators charge significant fees,” says Greenberg.

And that may not be the only reason why arbitration is not so desirable. They also want to be rehired.

“How do you get rehired? By making both sides happy. If you constantly rule in favor of the employer, you won’t get rehired.”

Retroactive Settlements for Discrimination

The Lilly Ledbetter Fair Pay Act (2007) makes it easier for employees to sue employers for past pay discrimination.

Practically speaking, that means plaintiffs can sue retroactively. Some tips for employers:

- Take a closer look at your current pay practices.
- Implement specific criteria for compensation and pay increases.
- Implement complaint procedures so that an employee can come forward and your company can address specific issues on pay.
- Evaluations should be in writing.
- Revise document retention practices to memorialize pay decisions and periodically subject them to statistical analysis.
- Train managers and supervisors.

- Protect yourself against potential age discrimination claims by putting any extra benefits you provide for terminated employees in writing – in a release document. Ask them to waive, in writing, their right to bring future claims against you in exchange.

COBRA: New Employer Obligations

The recently passed America Recovery and Reinvestment Act of 2009 applies to individuals involuntarily terminated (except for gross misconduct) between September 1, 2008 and December 31, 2009. Federal law provides a temporary federal subsidy to help pay for COBRA benefits.

But that stimulus bill will increase employers’ COBRA responsibilities.

Employers will be paying part (65%) of that subsidy; employees 35% for nine months.

Says Greenberg, “I doubt that this act will be extended after January 1, 2010,” says Greenberg. “If it does, Obama will be in political trouble.”

Greater Employee Protections

Family Leave Act

The EEOC defended and clarified protection given to employees taking family leave. Says Greenberg, “it’s the concept of not providing single parents with certain considerations. The EEOC took the position that that’s a form of gender discrimination.”

Legally and practically speaking, if your employees are coming to work ill, can you send them home? “Yes,” says Greenberg, “and you should send them home.”

Employers must guarantee that employees will be reinstated after taking leave and also provide health insurance coverage while they are on leave.

Criminal Record? Discrimination?

The courts found that the use of conviction records in making hiring decisions may be discriminatory.

The EEOC is now investigating whether policies related to not hiring individuals with criminal records unjustly affects a certain protected classification. New York City now requires that employers make a job-related analysis before disqualifying someone solely based on a criminal record.

“You are obligated to talk to the person, determine whether they have undergone rehabilitation, determine how serious that conviction was,” says Greenberg.

But, says Greenberg, if someone’s arrested while he or she is an employee, you have a right to take action. “We recommend that you have a conversation with them. Suspend the employee. Think twice before you fire them.”

FYI, in New York, if someone was arrested but not convicted, it’s as if the arrest never happened.

GINA – Genetic Testing at the Workplace...legal?

“GINA,” or the Genetic Information Nondiscrimination Act, regulates how and if employers may use genetic information obtained on employees.

Effective November 21, 2009, employers will be prohibited from discharging, refusing to hire or otherwise discriminating against employees on the basis of genetic information.

“But the interesting part about GINA is that it permits employers to acquire genetic information if it’s part of their employee wellness program. The EEOC has stated that employee participation in a wellness program is voluntary,” says Greenberg.

Also, the American Disabilities Act (ADA) has been more strictly enforced by the EEOC. The ADA severely limits

an employer’s ability to ask employees about their medical conditions.

Swine flu panic? Legal regulations and practical advice

There is a continued H1-N1 virus concern.

“You could have up to 40% of your employees out sick. How is your business going to run? We recommend that you put together a plan for dealing with H1-N1,” says Greenberg.

The CDC urges employers to work with your employees, to come up with a plan, to try to prevent and reduce the spread of the flu.

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Legally and practically speaking, if your employees are coming to work ill, can you send them home?

“Yes,” says Greenberg, “and you should send them home.”

EEOC advises employers:

- You may require your employees to undergo medical tests after you extend an employment offer.
- You may adopt infection-control practices.
- You can compel employees to wear protective clothing.
- You can compel employees to work from home.

Also, managers need to be trained not to overreact and to think before speaking out. You don't want to cause panic in the workplace!

EEOC Guidance on Waivers of Discrimination Claims: What You Should Do to Protect Yourself

Age discrimination – and potential lawsuits – seems to be very much a topic of concern for management. The EEOC gives tips on avoiding future lawsuits.

- Any waiver of the right to sue for age

discrimination an employee signs must be voluntary.

- Such an agreement must provide an employee with a consideration period.
- Include language advising the employee of his or her right to consult with legal counsel.
- In a group-termination scenario, you might also want to have terminated employees specifically list the ADEA as a claim being waived.

Lisa Stahl in a New York-based writer.

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