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I. Recent and Imminent Developments

II. Practical Steps to Defend These New Claims
Recent and Imminent Developments

Proposed Arbitration Fairness Act of 2009
Proposed Arbitration Fairness Act of 2009

- No pre-dispute arbitration agreement shall be enforceable if it requires arbitration.
- Enforceability of an agreement shall be determined by a court, rather than an arbitrator.
- The AFA amendments would apply retroactively to "re-write" existing contracts.
What Supporters Say…

- Mandatory arbitration undermines development of civil and consumer rights.
- There is no meaningful judicial review of arbitrators' decisions.
- Employees do not understand the meaning of a binding arbitration agreement.
Proposed Arbitration Fairness Act of 2009

What Opponents Say...

- "Mandatory litigation bill"
- Would impose the death penalty on ADR as an employment practice.
- ADR is both pro-employer and pro-employee.
- Provides timely, effective, and cost-effective tool for solving disputes.

**Holding:** Employers and unions may agree to require employees to arbitrate their statutory employment discrimination or retaliation claims under a collective bargaining agreement.

We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*
Proposed Civil Rights Act of 2008

The “Let’s Make It Easier to Sue Employers Act”
Proposed Civil Rights Act of 2008

Summary

• Proposed in January 2008 by 20 Democratic Senators, including Obama and Clinton
• Not yet enacted, but could be reintroduced in 2009
• Includes pro-employee changes in various federal employment related statutes
• Restricts mandatory arbitration clauses.
• Eliminates damage caps in gender and religious discrimination cases.
• Rewards successful plaintiffs with expert witness fees.
• Allows state employees to seek damages for age discrimination and FLSA violations.
Proposed Civil Rights Act of 2008

- Employment Litigation Made Easy
  - Increases opportunities for employees to recover attorneys fees and expert costs.
  - Allow private actions under USERRA, ADEA and FLSA for state programs or activities that received federal funds.
  - ADEA disparate impact claims analyzed the same as Title VII claims
  - Allows undocumented workers to recover back pay for labor and employment law violations.
  - Repeals provisions limiting compensatory and punitive damages in intentional discrimination claims.
Proposed Civil Rights Act of 2008

Proposed Gender Discrimination Provisions

• Eliminate the damages cap under Title VII and ADA. ($50,000 to $300,000 cap removed)

• Provide for compensatory and punitive damages under Equal Pay Act (part of FLSA).

• Make it more difficult for employers sued under Equal Pay Act to show pay disparity was due to "bona fide factor other than sex."
Proposed Civil Rights Act of 2008

What it could mean for employers...

- Could expose employers to potential infinite liability.
- Good news...given the bill's scope, most commentators believe it is unlikely to pass this year.
- However...combined with the other bills proposed this year, it suggests Congress' agenda for the rest of the term.
Family and Medical Leave Act Amendments
Family and Medical Leave Act

Passed...

- Tucked into NDAA are modifications to FMLA.
- Employers with 50 or more employees must now provide two additional types of “military family leave.”
1) “Qualifying Exigency” Leave

- Employee with spouse, son, daughter, or parent on active duty in the National Guard or Reserves is entitled to 12 weeks of FMLA leave to address “qualifying exigencies.”

Qualifying Exigencies include:

- Attending Military Events and Related Activities
- Arranging Childcare and Attending School Activities
- Addressing Financial and Legal Arrangements
- Attending Counseling Sessions
- Spending time with covered military member on short-term temporary rest and recuperation
- Attending Post Deployment Activities
- Addressing issues arising from Short Notice Deployment
2) “Military Caregiver Leave”

- An employee who is the spouse, son, daughter, parent, or next of kin of a covered service member with a serious injury or illness may take up to 26 weeks of leave in a single 12-month period to care for the covered service member.
- This is more than double the normal amount of leave available under FMLA.
Family and Medical Leave Act

Final Department of Labor Regulations

- **Serious health condition** – must involve inpatient care or continuing treatment by a health care provider, which includes a period of incapacity combined with medical treatment (definition is clarified).

- **Employee Notice of FMLA Eligibility** – employer has 5 business days to provide notice (increased from 2 days).

- **Medical certification** – if an employee provides incomplete or insufficient medical certification, employer must provide 7 days to cure deficiency.

- **Substitution of paid leave** – permit an employer and employee to agree to substitution of paid leave during FMLA leave if employee would not otherwise receive a regular salary.
Genetic Information Nondiscrimination Act
Genetic Information Nondiscrimination Act

Summary

• Purpose: Employees can participate in genetic testing without fear of losing health care or jobs
• Prohibit workplace discrimination on the basis of genetic information through the establishment of new law and amendment of existing statutes, including Title VII of the Civil Rights Act.
• Add provisions applying to health insurance issuers and health plans concerning genetic information.
• Passed by Congress November 2008; becomes effective November 21, 2009.
• “A solution in search of a problem”
Genetic Information Defined

- Includes information concerning an individual's or family member's genetic tests.
  - “An analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations or chromosomal changes.”
- Includes information concerning "the manifestation of a disease or disorder in family members."
- Does not include information about sex or age.
- There must be a genetic basis to the information, as opposed to just a genetic cause of the disease.
- Employer is not prohibited from using, acquiring, or disclosing medical information concerning a disease that may be genetically caused. This could get tricky!
Rights and Remedies

• GINA = unfair employment practice for employer to discriminate based on "genetic information" in hiring, firing, and other terms and conditions of employment.

• Attorney fees and costs are recoverable by prevailing party at court's discretion.
Rights and Remedies

- *May* be a prohibition against back pay awards.
- *May* be an upper limit on compensatory and punitive damages, depending on the number of individuals employed by employer (e.g., damages for employer with more than 500 employees is capped at $300,000).
Genetic Information Nondiscrimination Act

Exceptions

• Inadvertently requesting or requiring family medical history.

• Requesting or requiring family medical history for purposes of complying with certification for FMLA.

• Genetic monitoring of the biological effects of toxic substances in workplace (when required to do so by law).

• DNA analysis for law enforcement (e.g. CSI)
Genetic Information Nondiscrimination Act

Exceptions

- Employers offering health or genetic services (e.g., wellness programs) remember:
  - Employees must authorize any request for genetic information in writing.
  - Results can only be released to the employee and a licensed health care provider.
  - Note: employers can receive aggregate data that does not disclose employees' identities.
Genetic Information
Nondiscrimination Act

Recordkeeping

• Employers required to keep records containing genetic information on separate forms and medical files (similar to ADA).

• Information covered by GINA should be treated as confidential medical records.

• Records can only be released in certain clearly defined circumstances, such as upon an employee request or court order.
Summary

- Recognizes a “Continuous Violation” Theory of Discrimination that effectively circumvents the Statute of Limitations.
Lilly Ledbetter v. Goodyear Tire (2007)

• Facts:
  – Production supervisor at Alabama Goodyear plant. After 19 years on the job, took early retirement in 1998 after being involuntarily transferred to a less-desirable job on production floor. First filed charge with EEOC 6 mos. prior to retirement.
  – Salary was determined annually based on performance reviews by supervisors. Her reviews placed her near bottom of rankings with coworker, so she received small salary increases.
  – By end of 1997, Ledbetter was only woman working as area manager, and the pay discrepancy was stark. Ledbetter was paid $3727/month; lowest paid male area manager was paid $4,286/month; highest was paid $5,236/month.
Lilly Ledbetter v. Goodyear Tire (2007)

- **Facts continued:**
  - She alleged she received discriminatory evaluations based on her gender that affected her eligibility for pay increases.

- **Holding:**
  - The statute of limitations on pay discrimination claims runs from the date of the alleged discriminatory pay-setting decisions, not the dates on which the employee received checks from her employer.
  - The Act rejects this holding and reverses this case to allow the statute of limitations to reset on receipt of each paycheck.
The Proposed Paycheck "Trigger"
- An employee is affected by a discriminatory compensation practice each time the employee receives payment of wages or benefits.
- The 180- or 300-day time period for filing an EEOC charge would begin to run anew with the receipt of each paycheck or benefit reimbursement.
- Damages, however, are limited to two years of back pay.

Adds provision to Title VII, which provides:
- “unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual is affected by application of a discriminatory compensation decision or other practice, including, each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”
The New Definition of Compensation

- The definition of “discriminatory compensation decision or other practice” will be heavily litigated and could be stretched to cover almost any employment decision (e.g., transfers, failure-to-promote, or demotion decision).
- The Act conceivably applies to any employment decision that tangentially involves or impacts any type of compensation (e.g. pensions, bonuses, severance pay).
Lilly Ledbetter Fair Pay Act

Broad Definition of Coverage

- A “person” affected by the decision is not defined and the broad language could include charges filed by non-employees, such as spouses of deceased workers.
  - In fact, House expressly rejected amendment restricting application to employees only

Retroactive Application

- Applies retroactively as of May 28, 2007, the day before the Supreme Court decision in *Ledbetter v. Goodyear Tire*.
- The legislation would apply to all suits pending on that date and all discrimination suits brought after that date.
What it could mean for employers...

- Plaintiffs could have an easier time litigating stale discrimination claims.
- The "compensation" definition could be stretched to cover almost any employment decision (e.g., a transfer, failure-to-promote, or demotion decision).
- Employers could be exposed to liability for allegedly discriminatory acts that occurred years, and even decades, earlier.
The ADA Amendments Act of 2008 (“ADAAA”)

- Went into effect on January 1, 2009.
- Significantly broadens scope of the ADA, expanding definition of “disabled” and expanding employers’ obligations.
How has the ADAAA broadened the Definition of “Disability?”

- Changes way in which the definition of “disability” should be interpreted. Although the statutory definition remains unchanged that for an individual to be “disabled” he or she must be “substantially limited” in a major life activity, the statute directs the EEOC to revise its regulations pertaining to the meaning of “substantially limits” to impose a less stringent standard.
  - Congress believed the standard set forth in *Toyota Motor Manufacturing, Kentucky, inc. v. Williams* was too stringent.
  - By contrast, in *Williams* the Supreme Court had stated: “…[A]n individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. *The impairment’s impact must also be permanent or long-term.*”
How has the ADAAA broadened the Definition of “Disability?”

- Clarifies that “substantially limited” only need apply to a single life activity.
- Broadens the definition of major life activity to include concentrating, bending, reading, working, learning, and “major bodily functions,” such as “functions of the immune system,” “normal cell growth,” and “reproductive functions.”
- Considers temporary or episodic illnesses to be disabilities if they substantially limit a major life activity when they are active.
- Does not allow for consideration of mitigating measures when evaluating whether someone is disabled (even if the disability is treatable, the Act considers the person’s condition in its untreated form) with the exception of corrective lenses.
Expansion of “Regarded As” Disability

- ADA Amendments Act broadens the “regarded as” provision of the ADA to include a larger class of people.
- ADAAA now states: “An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”
  - Example: An individual who has sleep apnea may have a “disability” under the Act if she is perceived to have an impairment and is not hired as a result, whether or not she mitigates the effects of the sleep apnea and has no trouble sleeping.
What can we expect as a result of the ADAAA?

- An Increase in:
  - Impairments Categorized as Disabilities,
  - Demands for Accommodations,
  - The Number of Cases Brought by Individuals With Impairments,
  - The Success Rate of Lawsuits Brought Under the ADA,
  - Easing the Burden for Establishing Disabilities Based on the EEOC’s Redefinition of “Substantially Limits,” and
  - Litigation Over Undue Hardship Defense.
The Paycheck Fairness Act ("PFA") was introduced in January 2009 (passed by the House) to strengthen the Equal Pay Act of 1963. The PFA amends the Equal Pay Act ("EPA") to revise remedies for, enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages.
The Paycheck Fairness Act

- The Act allows an EPA lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure. Currently, the EPA, which was adopted prior to the current federal class action rule, requires plaintiffs to opt-in to a suit. Under the federal rule, class members are automatically considered part of the class until they choose to opt-out of the class.
Further, the PFA does the following:

- Revises the exception to the prohibition for a wage rate differential based on any other factor other than sex. Limits such factors to bona fide factors, such as education, training, or experience.
The Paycheck Fairness Act

- States that the bona fide factor defense shall apply only if the employer demonstrates that such factor: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. The defense shall not apply where the employee demonstrates that: (1) an alternative employment practice exists that would serve the same business purpose without producing such differential; and (2) the employer has refused to adopt such alternative practice.
The Paycheck Fairness Act

- Revises the prohibition against employer retaliation. The Act generally prohibits employers from punishing employees for sharing salary information with their coworkers.
- Makes employers who violate sex discrimination prohibitions liable in civil action for either compensatory or punitive damages. The Secretary of Labor is also authorized to seek additional compensatory or punitive damages.
The Paycheck Fairness Act

• Amends the Civil Rights Act of 1964 to require the EEOC to collect from employers pay information data regarding sex, race, and national origin.

• Directs the Secretary of Labor to conduct studies and provide information to employers, labor organizations, and the general public regarding the means available to eliminate pay disparities between men and women.
The Paycheck Fairness Act

- The PFA raises several considerations if enacted into law:
  - Potential plaintiff attorney windfalls:
    - The elimination of any limits on punitive and compensatory damage, without requiring any proof of intent to discriminate, and
    - The fact that workers are automatically made members of a class action suit, unless they opt out.
  - Employers will need to be affirmatively vigilant about compliance (e.g. conducting regular salary equity studies).
The Employment Non-Discrimination Act ("ENDA") would provide federal protections against workplace discrimination on the basis of sexual orientation or gender identity. The Act is closely modeled on existing civil rights laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. The bill explicitly prohibits preferential treatment and quotas and does not permit disparate impact suits. In addition, it exempts small businesses, religious organizations and the military, and does not require that domestic partner benefits be provided to the same-sex partners of employees.
In the 110th Congress, ENDA was introduced in the House and the House Education and Labor Committee's Health, Employment, Labor and Pensions Subcommittee held a hearing on the legislation. A version of ENDA that did not include protections based on gender identity passed the House. The ENDA would do the following:
• Apply to Congress and the federal government, as well as employees of state and local governments.
• Provides for the same procedures, and similar, but somewhat more limited, remedies as are permitted under Title VII and the Americans with Disabilities Act.
• Prohibit public and private employers, employment agencies and labor unions from using an individual's sexual orientation or gender identity as the basis for employment decisions, such as hiring, firing, promotion or compensation.
• Extend federal employment discrimination protections currently provided based on race, religion, sex, national origin, age and disability to sexual orientation and gender identity.

- The ENDA would *not*:
  • Cover businesses with fewer than 15 employees.
  • Apply to religious organizations.
  • Apply to the uniformed members of the armed forces (the bill doesn't affect the "Don't Ask, Don't Tell" policy).
  • Allow for quotas or preferential treatment based on sexual orientation or gender identity.
The Employment Non-Discrimination Act

- Allow a "disparate impact" claim similar to the one available under Title VII of the Civil Rights Act of 1964. Therefore, an employer is not required to justify a neutral practice that may have a statistically disparate impact on individuals because of their sexual orientation or gender identity.
- Allow the imposition of affirmative action for a violation of ENDA.
- Allow the Equal Employment Opportunity Commission to collect statistics on sexual orientation or gender identity or compel employers to collect such statistics.
- Apply retroactively.
The ENDA raises the following considerations:

- Employers should be aware of the specific gender identity definition, as well as the exemptions for employer dress codes and locker rooms. These provisions have been removed but may be included.
  - By way of example, the dress and grooming standards provide that an employer permit any employee who has undergone gender transition prior to the time of employment to adhere to the same dress and grooming standards for the gender to which the employee has transitioned or is transitioning. (The employee must have notified the employer of the transition)
If you would like a copy of the powerpoint or need a certificate of attendance for HRCI credit, please send an email to seminars@leclairryan.com.

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