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Labor and Employment Law Notes

Equal Pay, Genetics and Waivers are Areas of Employment Law Soon to Affect Employers and Their EPLI Carriers

Employers and insurers must become aware of the Paycheck Fairness Act, Genetic Information Non-Discrimination Act and jury trial/class action waivers in deciding whether to procure EPLI coverage. In writing EPLI coverage, employers must also prepare their employees to deal with these employment law issues to avoid and handle claims related therein.

A. GENETIC INFORMATION NON-DISCRIMINATION ACT OF 2008 AND GENETIC INFORMATION PRIVACY ACT

The Act is scheduled to go into effect in 2009. The U.S. Chamber of Commerce and the Society for Human Resource Management said the law was unnecessary and that the Americans with Disabilities Act and the Health Insurance Portability and Accountability Act provide the same protections. Attorneys for employers claim that it will create another cause of action for unhappy workers or job applicants.

The National Society of Genetics Counselors, The American Society of Human Genetics, The American Heart Association, The American Academy of Pediatrics, The National Partnership for Women and Families and dozens of organizations that exist to educate and support people with genetic-influenced diseases delighted in the bill's passage. Those groups claim it is a case of law keeping up with medical advances rather than waiting for individual court cases to make peace meal policy when workers or insurance applicants allege discrimination. Proponents say that the law may help save lives and provide early diagnosis and treatment. Doctors have reported that patients forego such testing for many reasons, others including fear the information will be used against them by employers or insurance firms.

As of November 2009 it will be illegal for employers, agencies or labor unions to buy or ask applicants or employees for genetic testing results.

Also, currently working its way through the Illinois legislature is a proposed statute entitled "The Genetic Information Privacy Act." The act essentially holds that genetic information properly obtained by an employer may not be disclosed for any purposes other than a criminal investigation or prosecution. Evidence of genetic testing shall not be admissible as evidence nor discoverable, in any action of any kind in any court, or before any tribunal, board, agency or person other than specifically mentioned. Finally, despite lawful acquisition of genetic testing or

genetic information, an employer, employment agency, labor organization and licensing agency may not use or disclose the genetic test or genetic information in violation of the Act. The Act will be effective January 1, 2009.

In light of impending federal and state law, employers and their insurers must be aware that the issue of genetics and discrimination on the basis of genetics is an area that will be expanded by legislators and the courts. EPLI carriers will need to adjust policies in anticipation of claims for violation of state and federal acts prohibiting discrimination on the basis of genetic tests, as well as for the improper use or disclosure of the genetic test or genetic information. Employers need to be aware of this new category of discrimination. This area of the law is evolving and it will affect employers and their EPLI carriers particularly in the area of new discrimination claims.

B. EQUAL-PAY BILL

In a fortunate turn of events for employers in general and for the EPLI carriers, the Equal Pay bill moving through the House of Representatives has stalled in light of employer's organizations such as The Society for Human Resource Management inundating congressional offices with form letters opposing the Paycheck Fairness Act. Opposition to the bill is out pacing any support from organizations such as The National Women's Law Center. The bill is an attempt to remedy pay discrimination against women. The Act is in response to the recent United State Supreme Court case entitled *Ledbetter v. Goodyear Tire and Rubber Co.* In *Ledbetter*, Lillian Ledbetter learned she was paid substantially less than her male counterparts during her 20-year employment. She waited until after she retired to sue. The Supreme Court determined that she was beyond the time frame to sue for the "discrete act of discrimination," presumably the first discriminatory paycheck, and could no longer claim back pay as a measure of damages.

The proponents of the Act argue that pay discrimination is typically not overt or victims are quickly not made aware of wage disparities. A similar bill passed the House last year but died in the Senate. This year when proponents launched the Paycheck Fairness Act, the opposition from employers was fierce. The bill would require that compensation be more transparent and employers be held more accountable for pay discrimination. The two main components of the proposed bill sparked employer opposition:

- The Act could expose employers to more class action lawsuits and liability for unlimited punitive and compensatory damages in pay discrimination cases.
- The bill proposes more government supervision of private-sector pay practices, including assigning more information gathering and training duties to the Equal Employment Opportunity Commission and the U.S. Department of Labor. They would not only collect more information about women's and men's wages at places of employment, but provide training to girls and women to improve their pay negotiation skills.

Amendments to the bill have been offered that would cap damage awards, require the worker to show proof of malice or indifference by the employer and cap attorney fees. As is customary, the bill is saddled with amendments unrelated to equal pay. The bill will also prohibit employers from retaliating against employees who disclose their own or co-worker's pay information.

Although it does not appear this current version of the Equal Pay bill will pass, employers and their EPLI carriers should keep this on their radars as at some point in the near future some form of this bill will most likely pass. If it does, claims involving equal pay discrimination and retaliation against employees who disclose pay information would be two new forms of discrimination that would flood the courts and the desks of employers and their EPLI causes.

C. MEDIATION IS BECOMING THE NEW EMPLOYER'S FRIEND IN AVOIDING EMPLOYMENT LAWSUITS

Arbitration agreements are waning in popularity and many defense lawyers are now urging employers to have employees sign class action and jury trial waivers. This is being done despite the fact that there are multiple state supreme courts who ruled against waivers calling them unconscionable because they rob citizens of their basic rights. Although the waivers may not be enforceable, they may deter plaintiffs' lawyers from taking up certain lawsuits.

In the past two years many lawyers have begun pushing mediation as the best message for resolving employment-related lawsuits, including the ever increasing overtime lawsuits. The EEOC is also pressing its alternative dispute resolution program as a means of avoiding federal court employment lawsuits. The EEOC touts mediation as a no-cost, voluntary, and confidential opportunity to work with a third-party neutral and the charging party to discuss and resolve the EEOC charge before the EEOC investigates the charge. If the matter is resolved through mediation, no EEOC investigation will occur. Mediation is being pressed in the private sector and through the EEOC in employment law cases because it is non-binding and recaptures the simplicity that arbitration used to have. Defense lawyers have been attempting to get the employers to agree to mediation and get their employees to sign agreements to mediate a case rather than submit it to a jury trial. This will be a positive development for employers as it would lessen the likelihood of a runaway jury verdict and attorneys fees by resolving the matter informally and likely much more quickly. This may be a very attractive alternative to employers whose EPLI limits are lower as employment cases traditionally tend to be very costly and attorney's fees are recoverable in federal court in some states.

Democratic leaders in congress are pushing a ban on arbitration in both employment and consumer credit card disputes claiming they rob citizens of their right of access to the courts. In recent years employment discrimination lawsuits have increased and overtime lawsuits have become the most common form of employment lawsuit. During these troubled economic times, employment lawsuits have grown exponentially. Judges have complained that the overtime and Fair Labor Standards Act cases have clogged the federal courts. Employers have traditionally preferred arbitration because it was thought to be quicker, cheaper, not subject to discovery and confidential. A recent U.S. Supreme Court ruling upheld arbitration in employment disputes leaving the issues up to individual states. Many employers have become disenchanted with arbitration and now prefer bench trials or mediation. Many employers are now seeking jury trial waivers from employees. These waivers are controversial and have been challenged by plaintiff's lawyers.

California and Georgia have ruled jury trial waivers unconscionable. Class action waivers and arbitration agreements have been held unconscionable and invalidated in multiple states. The court rulings and potential legislative changes may rule jury trial waivers and class action

waivers a thing of the past. Employers and their EPLI carriers; however, may press for an agreement that requires a mediation prior to filing suit in state or federal court. Mediation is an option that should always be considered by employers and their EPLI carriers, not only as a way to save money, but may potentially resolve the matter early in the process. It is also a means of obtaining information regarding the employees' claims, and the evidence in support of these claims, should the matter not resolve prior to filing suit.

Genetic discrimination, equal pay and mediation are three areas of the law that are evolving and could potentially have an impact on employers and their EPLI carriers. These situations must not only be monitored by employers but also by EPLI carriers as it may expose the employers to additional employment discrimination cases as well as challenge the parameters of the coverage under EPLI policies. We shall keep you informed.

ALERT: Congress unanimously passed a bill (the ADA Amendments Act) that would overturn a series of Supreme Court decisions and expand what conditions are considered disabilities under the ADA. President Bush signed the bill on September 26, 2008. The bill will become effective January 1, 2009 and result in an increased number of disability discrimination lawsuits. Employers must now be much more diligent in managing their employment processes, including what statements are included in performance reviews and discipline reports. Many consider the bill to be about the merger of day-to-day human resources with the management of risks of litigation under the ADA. Also, the bill authorizes the EEOC, the Attorney General and the Secretary of Transportation to issue new ADA regulations.