

HIRE Institute
1320 Nineteenth Street, N.W., Suite 300
Washington, DC 20036
Tel: 202-296-4516
Fax: 202-296-8205
hireinst@aol.com

“Employee Briefs”
September 2008

Pending Legislation

While it is unlikely that any legislation will pass until after the November election, a number of bills have already been introduced relating to employment law which will be considered by the newly elected congress. What follows is a brief summary of these bills.

Employee Free Choice Act – One of the more important bills to be introduced, this bill provides that:

1. A union must be recognized by the employer as the representative of the employees once the union has authorization cards signed by a majority of employees and the NLRB verifies the majority. This would eliminate secret ballot elections.
2. Within ten (10) days of recognition, bargaining must begin. If the parties fail to agree to the terms of a contract within ninety (90) days, either party may notify the FMCS to mediate. Should mediation be unsuccessful, within thirty (30) days the terms of the contract must be submitted to arbitration through the FMCS. The arbitrator's decision is binding on the parties for two (2) years.
3. The NLRB must investigate violations of this proposed act and may issue injunctions. If employees are adjudged the victims of unfair labor practices, they are entitled to **triple back pay**. If employers are adjudged guilty of willful or repetitive unfair labor practices, they may be fined up to \$20,000 for each violation.

ADA Restoration Fairness Act – Employers could no longer contend that employees are not disabled if their condition is corrected by eye glasses, hearing aids or medication.

Arbitration Fairness Act – Would make pre-dispute arbitration agreements unenforceable. This bill has already been approved by the House.

Employment Non-Discrimination Act – Would prohibit discrimination based on sexual orientation and gender identity.

Equal Remedies Act – Would eliminate caps on damages in Title VII litigation.

FMLA Expansion Act – Would extend coverage to employers with twenty five (25) or more employees and authorizes additional reasons for mandatory FMLA leave to include (among other things) parent-teacher conferences and school related functions.

Healthy Families Act – Would require employers with fifteen (15) or more employees to provide up to seven (7) days of paid sick leave for employees working thirty (30) or more hours per week.

Ledbetter Fair Pay Act – Intended to reverse a 5-4 decision of the U. S. Supreme Court and provides that each pay check constitutes discrimination if women are paid less than men for the same job rather than limiting the cause of action to a fixed period of time after the unequal pay is first implemented, whether or not the female employees find out about the inequality within the fixed time.

Accommodation

The Seventh Circuit held in Dargis v Sheahan that the interactive process required by the ADA to enable employers and employees to discuss accommodations may end once the employer ascertains that no matter what the accommodations, the employee could not perform the essential functions of the job.

Insurance

The Second Circuit in Westec Marina Management v Arrowhead held that employers who do not report potential claims by employees to their insurer as soon as possible face denial of coverage by the insurance company. The court found that the employer was obligated to report a possible claim by an employee to their insurance company when they received a letter from the employee's attorney advising that a lawsuit would be filed unless a settlement of the grievance could be arrived at. The employee subsequently received a right to sue letter from the EEOC and filed a lawsuit. The employer subsequently filed a claim with their insurance company and it was denied. The insurance policy required that the insurance company immediately be advised of any "claim" by an employee. By not immediately advising the insurance company, the employer forfeited the right to receive coverage under his policy.

Editor's Note: As an insured with United Insurance Company Ltd., you should contact UIC as soon as possible once you have any knowledge that an employment related practices claim might arise. Refer to Article XI, Section A (Claims Notification and Participation) of your policy.

Awards and Settlements

The EEOC settled a claim of disability discrimination with Wal-Mart in which the employer will pay \$250,000 to a pharmacy technician who suffered a disability from a gunshot wound resulting in permanent damage to her spinal cord requiring the employee to use a cane. Wal-Mart denied the employee's request for reasonable accommodation and then fired her because of what the employer contended was a willful refusal to do her job. In a previous settlement, Wal-Mart agreed to pay \$300,000 to an applicant who they refused to hire because the employee had cerebral palsy.

Ineffective Release

A Federal District Court in Minnesota in Petterson v Seagate held that an age discrimination release signed by 152 laid off over age 40 employees in exchange for enhanced severance pay was invalid. The employees, therefore, kept the enhanced severance pay **and** retained the right to sue. The court continued the pattern of Federal Courts in prior decisions holding that age related releases are invalid unless strictly in compliance with the law.

Sanctions

The Third Circuit held in Brubaker Kitchens v Baker that the granting of the employer's motion for summary judgment was proper and that the plaintiff's counsel be sanctioned because non-connected allegations against the employer lacked "reasonable foundation" and because the claim was "frivolous."

Retaliation

The First Circuit overturned a decision by a District Court to grant the employer's motion for summary judgment. DeClare v Mukasey. The employer – the U.S. Department of Justice – supported the decision by a supervisor of a female U.S. marshal to demote her and to reassign her to another location. The employee filed an EEO complaint and the supervisor then took the subsequent actions because he considered the employee "disloyal." The Circuit court, in overturning the District court decision, held that

“. . . as a matter of law, the filing of an EEO complaint cannot be an act of disloyalty . . . which would justify taking an adverse employment action . . .” The court noted the short time between the filing of the complaint and the adverse employment action as supporting a causal connection.

Mixed Motive

The Sixth Circuit held in White v Baxter Health Care Corp that the burden shifting requirements in McDonnell-Douglas do not apply in cases involving a mixed-motive. The Sixth Circuit decided that in order to survive a motion for summary judgment a plaintiff must only produce evidence that: 1. the defendant took adverse employment actions against the plaintiff, and 2. race, color, religion, sex or national origin was a motivating factor leading to the adverse employment decision, even if other factors also motivated the adverse employment action. This can be proven through either direct or circumstantial evidence.

Racial Discrimination

A Teamster shop steward alleged that he was terminated because of racial discrimination. The employee was discharged after he got into a heated argument with a supervisor. Previously, the employee had been discharged for being in a gym when he was supposed to be making deliveries and was subsequently reinstated. Six months later he was discharged because he screamed at a supervisor and called him “a coward.” He again was reinstated and his discharge was converted to a suspension. The Seventh Circuit affirmed the decision of a District court in granting the employer’s motion for summary judgment. The court relied on the fact that the employee presented no evidence that other employees, white employees, were disciplined less severely.

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“Employee Briefs” is written by Malcolm L. Pritzker, Esq., Attorney-at-Law, Washington, DC. Any questions concerning content should be addressed to the HIRE Institute, 1320 Nineteenth Street, N.W., Suite, 300, Washington, DC 20036, tel: 202-296-4516, fax: 202-296-8205, e-mail: hireinst@aol.com.