

Major Developments and Trends in Employment Law

By Steven Moore and Roger Trim

Within the last twelve months, there have been major developments and trends in employment law that all employers—including accounting firms—need to be aware of to avoid liability. Some of these changes are responses to the present economic crisis. Others emanate from congressional action aimed at undoing decisions from the conservative bloc of justices on the U.S. Supreme Court. Still others originate from the Department of Labor campaign to expand employee rights. Whatever the source of the development, accounting firms should review and modify their existing policies, employee handbooks and related practices to ensure compliance with new legislation and trends in employment law.

Reductions in force

America is presently experiencing the worst economic crisis since the Great Depression. In recent months, many businesses, including accounting firms, have had to search for ways to cut expenses, often reaching the choice of last resort—a reduction in force or layoff of employees. As expected, these layoffs have created an avalanche of employment litigation, with employees crying foul over their firm's decision to select them for separation from employment.

Continued on page 9

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Employment Law

Continued from page 5

While some level of litigation may be inevitable when mass layoffs occur, there are some strategies that can be employed to lessen such liability.

As a starting point, a firm needs to first review whether the employee under consideration for termination has an employment contract that has a provision guaranteeing employment for a specified period of time. If so, depending on how the employment agreement is written, terminating that employee may result in a breach of contract.

Even if no such contractual obstacle exists, the firm still needs to be careful not to run afoul of any federal or state anti-discrimination laws. While a firm may have a legitimate basis for reducing its workforce due to the need to cut expenses, an employee selected for layoff may claim that he or she experienced illegal discrimination in the selection process for termination and that some other employee should have been terminated before him or her, usually a younger, less-qualified employee.

Consequently, the firm's financial condition should not be a ruse or pretext to select a particular employee for termination for subjective reasons, such as the firm simply does not like the employee. Before selecting an employee for termination, the firm must be able to clearly articulate a legitimate reason as to why *that particular employee* was selected for the reduction in force. Such reasons may include, but are not limited to, the employee's relative performance to those who were retained, the employee's lack of seniority or the fact that the employee's job function will be elim-

inated. Indeed, if an employer cannot come up with a legitimate reason for selecting the employee for termination, the terminated employee may claim the selection was made on the basis of age, race, color, sex, religion, disability status or some other protected basis and sue under the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (the ADA) or state laws that afford the same or similar protections. In addition, larger firms (that is, firms with 100 or more full-time employees or their equivalent) need to be careful of the WARN Act and similar state laws if they are considering laying off a large number of employees. The WARN Act defines a "mass layoff" as a layoff involving either 500 or more employees at a single site or 50 or more employees at a single site when such employees comprise a third of the site's workforce. WARN requires employers to give 60 calendar days of advance notice of plant closings and mass layoffs. Failure to provide such notice can expose an employer to liability for up to 60 days of back pay and benefits for each laid-off employee as well as civil fines of \$500 per day. In addition, 17 states have enacted state law versions of the WARN Act whose requirements vary markedly from the federal act. (The following states have enacted their own WARN acts: California, Connecticut, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Carolina, Tennessee and Wisconsin.)

Once a firm decides to select an employee (or group of employees) for layoff, consideration

should be given to offering severance agreements (commonly referred to as severance packages) to the affected employees. Severance agreements have traditionally offered a lump sum payment, or salary and benefits continuation for a short period of time, in exchange for the employee(s) agreeing to waive and release all employment-related claims, including any claims related to the separation from employment.

The federal Older Workers Benefits Protection Act (OWBPA) has special requirements that the agreement be written in easy-to-understand language, ensuring that the affected employee(s) is advised that federal age discrimination claims are being released. The OWBPA also requires that the employee(s) receive written notice that that he or she has a specified period of time to review the agreement before signing it, either 21 or 45 days depending on the size of the layoff, and that there is a seven-day revocation period after the agreement is signed.

Any firm thinking about rolling out such an agreement should have its legal counsel draft or review the document(s). A poorly worded severance agreement may be ineffective to obtain a release of federal age discrimination claims under OWBPA and may negate the release of other federal and state claims as well.

The Lily Ledbetter Fair Pay Act

The Lily Ledbetter Fair Pay Act (the Ledbetter Act) is one of most significant developments in employment law in recent years. The Ledbetter Act makes it easier for employees to sue for pay discrim-

ination, even in situations where the original pay decisions were made years ago.

By way of background, this piece of legislation was first introduced in Congress soon after the Supreme Court's controversial decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 US 618 (2007). Lilly Ledbetter was employed by Goodyear in Alabama and sued her employer six months before her retirement under Title VII alleging that she had experienced gender discrimination in the amount of compensation she was earning as a result of discriminatory decisions made earlier in her career. In other words, she alleged that the discriminatory decision-making with her pay had a residual effect that continued each time she was paid. The Supreme Court, however, found that her pay discrimination claims were time-barred under Title VII's 180-day statute of limitations.

The Ledbetter Act, which is the first act of Congress that President Barack Obama signed into law, amended Title VII by stating that the statute of limitations for pay discrimination is reset each time that an employer issues a paycheck, even if the challenged decision-making occurred years ago.

Note that while Ledbetter's case against Goodyear involved only allegations of sex discrimination, the Ledbetter Act expands the statute of limitations under Title VII for pay discrimination also on the basis of race, color, religion and national origin. Moreover, the Ledbetter Act also expands the limitations period for pay discrimination claims brought under the Age Discrimination in Employment Act and the ADA.

Because the Ledbetter Act expands Title VII's statute of limitations, in essence re-triggering it each time a paycheck is issued, employees are now able to challenge discriminatory pay decisions made years ago. This may make it difficult for an employer to defend itself if supervisors have retired or died, documents have been lost or people's memories simply have faded regarding why someone's pay was set at a certain level years ago. As a result, all businesses, including accounting firms, should review their pay administration practices to make sure that there are not any situations where similarly qualified, skilled and experienced employees are being paid unequally for the same position as a result of long-ago pay decisions that have lingering effects today. If there are any unexplained disparities in pay, adjustments should be made. Going forward, firms should document the rationale behind each pay decision in case an employee brings a pay discrimination claim under the Ledbetter Act in the future.

The ADA Amendments Act of 2008

Accounting firms need to be aware that the ADA was recently amended, effective January 1, 2009, and has greatly expanded the scope of the individuals it covers. The primary purpose of the change of law is to emphasize that the definition of disability should be construed broadly. Like the Ledbetter Act, the ADA Amendments are designed to undo prior Supreme Court precedent. To fully understand the change in the law, a brief review of the ADA's history is helpful. As a general rule, under the ADA, an individual with a disability is a person who has a physical or

mental impairment that substantially limits one or more "major life activities," has a record of such an impairment or is regarded as having such an impairment. The prior version of the ADA did not contain a statutory definition of major life activities. However, interpretative case law across various federal jurisdictions enumerated a fairly cohesive list of what constituted major life activities under the ADA. The amendments now codify much of this case law. Notably, the amendments introduce a new definition of major life activities by clarifying that they include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Major life activities, under the amendments, are also expanded to include "major bodily functions," including but not limited to "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Under the ADA Amendments Act, mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability. Also, the ADA Amendments Act clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Under the new, expanded definition of major life activities, employers will be faced with difficult determinations of deciding whether to grant accommodation requests to employees with not-so-obvious physical or men-

tal impairments, but who now qualify for disabled status under the ADA. Depending on the circumstances, the new definition may require that employers reasonably accommodate employees with insomnia, dyslexia, stuttering, attention deficit disorder and digestive diseases.

New Family and Medical Leave Act regulations

The Family and Medical Leave Act (FMLA) regulations were recently updated to implement new military family leave entitlements enacted under the National Defense Authorization Act for fiscal year 2008. The FMLA, which applies to employers with 50 or more employees, provides certain employees with up to 12 weeks of unpaid, job-protected leave per year. The FMLA also requires that their group health benefits be maintained during the leave. The reasons for such leave include: the birth and care of the newborn child of an employee, for placement with the employee of a child for adoption or foster care, to care for an immediate family member (spouse, child or parent) with a serious health condition or to take medical leave when the employee is unable to work because of a serious health condition. Employees are eligible for FMLA leave if they have worked for their employer

at least 12 months, at least 1,250 hours over the past 12 months and work at a location where the company employs 50 or more employees within 75 miles.

Effective January 16, 2009, the new FMLA regulations, which were created in response to the National Defense Authorization Act for fiscal year 2008, create two types of additional leave: (1) qualifying exigency leave and (2) military caregiver leave. Eligible employees with a spouse, child or parent on active duty or called to active duty in the National Guard or Reserves in support of a contingency operation may take up to the normal 12 weeks of leave because of any "Qualifying Exigency." Qualifying exigencies are: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities and (8) additional activities agreed to by the employer and the employee.

In regard to military caregiver leave, an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member (includes a current member of the regular armed forces, as well as the National Guard or Reserves) may take up to 26 weeks of leave to care for such service mem-

ber with a serious injury or illness incurred in the line of duty on active duty. This leave may be taken where a covered service member is undergoing medical treatment, recuperation, therapy, outpatient status or is otherwise on the temporary disability retired list.

Conclusion

Within the last twelve months, there have been sweeping changes in employment law that may result in liability to unsuspecting employers—including accounting firms—that fail to revise their existing policies, employee handbooks and related practices. A firm wishing to minimize its exposure to employment-related claims should have a comprehensive review of its existing policies, handbooks and practices performed by legal counsel who regularly represent employers. The firm should also require its human resources personnel or management to obtain periodic training regarding employment law, particularly as more sweeping changes to employment law are expected with the present agendas of Congress and President Obama.

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