

EMPLOYMENT LAW

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U.S. Supreme Court Allows Arbitration of Most Employment Disputes

By the narrowest of margins, the United States Supreme Court has solidified the right of employers to enforce valid arbitration agreements with their employees. In *Circuit City Stores, Inc. v. Adams*, decided on March 21, 2001, the Court held that arbitration agreements included in employment contracts are generally enforceable under the Federal Arbitration Act. Specifically, the Court reversed the Ninth Circuit Court of Appeals and held that Mr. Adams' discrimination and wrongful discharge claims against Circuit City were subject to the arbitration provision contained in Mr. Adams' employment application, and that such provision was enforceable under the Federal Arbitration Act. The Ninth Circuit Court of Appeals had been the sole circuit to conclude that arbitration agreements contained in all employment contracts were not subject to the Federal Arbitration Act, and therefore unenforceable.

Court Promotes Utility of Arbitration

The five-to-four majority decision, delivered by Justice Kennedy, stressed the utility of arbitration in resolving disputes between employers and their employees, and continued the Court's promotion of arbitration as an alternative forum

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New Minimum Distribution Rules

The Internal Revenue Service (IRS) issued new proposed regulations which simplify the required minimum distribution rules under Internal Revenue Code ("Code") Section 401(a)(9). Code Section 401(a)(9) was designed to prevent individuals from avoiding taxation of their retirement benefits by requiring that beginning no later than the April 1 of the calendar year following the later of the year in which the individual retires or the year in which the individual attains age 70 1/2, the individual must begin taking a "minimum distribution" from his retirement account (both his Individual Retirement Account [IRA] and his qualified retirement plan). This article will briefly discuss the new regulations which seek to simplify the often complicated rules underlying the Code's simple words, and will provide a sample model amendment which can be adopted by qualified plan sponsors who wish to have the new regulations be effective retroactive to January 1, 2001. Otherwise, the new regulations are proposed to be effective for distributions beginning on or after January 1, 2002.

Lifetime Minimum Distributions

The old regulations require that a participant choose a beneficiary at the time that minimum distributions are to begin (April 1 of the calendar year following the later of the year in which the participant attains age 70 1/2 or the year in which the participant retires). The minimum distribution is calculated based upon the life expectancy

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Arbitration

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for resolving disputes. In stressing the benefits of enforcing valid arbitration agreements, Justice Kennedy wrote, “[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts” (emphasis added).

Justice Kennedy continued by acknowledging the dispute resolution programs already implemented by employers nationwide and the continuing reliance of such employers on the enforceability of their programs: “[t]he considerable complexity and uncertainty that [the position urged by Mr. Adams] would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternate dispute resolution procedures adopted by many of the Nation’s employers, in the process undermining the [Federal Arbitration Act]’s pro-arbitration purposes.”

Employment Contracts for Transportation Workers Exempted

While the Court’s decision represents good news for most employers, the decision also emphasized that arbitration agreements with “transportation workers” could not be enforced under the Federal Arbitration Act. Pursuant to Section 1 of the statute, the Federal Arbitration Act does not apply to “contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce.” The Court limited this provision to transportation workers. Consequently, employers who seek to enter into or enforce arbitration agreements with employees who are transportation workers will do so fruitlessly. While it is clear that seamen and certain railroad and air carrier workers are considered “transportation

workers,” the scope of such term will undoubtedly produce further litigation.

Arbitration Agreements Must Be Otherwise Valid and Reasonable

Notwithstanding the Court’s blessing in the *Circuit City* decision, past decisions have demonstrated that not all arbitration agreements are created equal, and consequently, poorly drafted agreements may be unenforceable if a court determines that the agreement is unconscionable. The most important of these drafting principles requires that employees retain their legal rights and remedies in the arbitral forum. In his majority decision, Justice Kennedy re-emphasized this very point: “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

Other important drafting principles, each of which could determine the enforceability of an arbitration agreement, include: (i) a reasonable allocation of the cost of arbitration between the employer and the employee; (ii) requiring neutral arbitrators; (iii) providing sufficient discovery for an employee to adequately explore his or her claim; (iv) making available all remedies otherwise available in a judicial forum; (v) requiring a written decision by the arbitrator; and (vi) a commitment by both parties to be bound by the arbitration agreement.

The Circuit City Dissents


The *Circuit City* decision produced not one, but two, dissenting opinions—one written by Justice Stevens and the other by Justice Souter. Both Justices, relying on the Federal Arbitration Act’s legislative history, took issue with the majority decision’s interpretation of the exemption for certain employment contracts contained in Section 1 of the Act. Justice Stevens wrote,

“[h]istory amply supports the proposition that [Section 1] was an uncontroversial provision that merely confirmed the fact that no one interested in the enactment of the [Federal Arbitration Act] ever intended or expected that Section 2 would apply to employment contracts.”

Gray Areas After *Circuit City*

As with most Supreme Court decisions, for every issue resolved by the High Court, a handful more will be raised by the decision. The *Circuit City* decision is no exception.

Questions still abound as to how far states can go in regulating “unfair” arbitration clauses covered by the Federal Arbitration Act. Traditionally, such questions have been considered under state contract principles, specifically, the doctrines of unconscionability and reasonableness. For example, to what extent can an arbitration agreement limit discovery? Can an arbitration agreement cap recoverable punitive damages? What about attorneys’ fees? What is a reasonable allocation of the costs of arbitration? And is such a determination affected by the relative wealth of individual employers and employees? The answers to these questions are not altogether clear, and consequently, advance care and thought should be given to these issues when drafting arbitration provisions.

On the heels of its *Circuit City* decision, the Supreme Court has agreed to review a case which raises the following question: can the EEOC commence a judicial action against an employer on behalf of an employee when that employee is a party to an arbitration agreement with the employer? The case is titled *EEOC v. Waffle House*, and the Fourth Circuit Court of Appeals has previously held that the EEOC’s judicial action was precluded by the employee’s arbitration agreement. The Supreme Court will hear arguments in this case during its next term, which begins in October 2001. 

What Should An Employer Desiring Arbitration Do Now?

Employers desiring to institute an arbitration program, or to revise an already existing program, should take the following precautions:

- ◆ Determine whether a new arbitration program can be instituted for all incumbent employees, company-wide, or only for new hires; this is generally a matter of state law.
- ◆ Provide that all disputes related to an individual’s employment, and termination of employment, including discrimination and wrongful discharge claims, be resolved through arbitration.
- ◆ Ensure that the cost of arbitration is not an unreasonable burden which would have the effect of precluding employees from pursuing their claims.
- ◆ Provide for the selection of neutral arbitrators, or require that the arbitration be conducted pursuant to the rules of a respected ADR organization, such as the American Arbitration Association.
- ◆ Require that the arbitration be kept confidential, unless agreed otherwise by the parties, and that the arbitrator’s decision is final and binding.
- ◆ Allow for sufficient discovery; the failure to do so may preclude an individual from effectively vindicating his or her statutory rights in the arbitral forum.
- ◆ Do not limit any statutory remedies provided to individuals pursuant to federal, state, or local law; the Supreme Court has repeatedly indicated that the purpose of arbitration is to provide an alternate forum and not a change in substantive law.
- ◆ Employers that have employment practices liability insurance coverage should confer with their carrier on any planned adoption of arbitration clauses.
- ◆ Bind both parties to the arbitration agreement; an arbitration program which can be unilaterally changed by the employer may not be enforceable if it is determined to be a “unilateral contract.”

Minimum Distribution Rules

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of the participant and the life expectancy of the beneficiary using several different IRS life expectancy tables to determine the applicable divisor. The account balance/accrued benefit as of the end of the prior plan year is then divided by the applicable divisor. The participant has the choice of recalculating life expectancies for both the participant and the beneficiary for each year or subtracting "1" from the prior year's divisor. The second method results in higher annual distributions but is administratively simpler.

The new regulations provide that the beneficiary need not be chosen at the time minimum distributions begin. Instead, a new IRS standard life expectancy table is used which is based only upon the participant's age at the time distributions begin. A beneficiary can be chosen later. This "new table" is based upon one of the old IRS life expectancy tables that was required to be used in cases where the beneficiary was at least 10 years younger than the participant. This new life expectancy table provides for larger divisors and thus smaller required minimum annual distributions. Upon the death of the participant, the designated beneficiary is now required to receive minimum distributions based upon that individual's birthday and life expectancy (using a second life expectancy table) in the calendar year following the participant's death (automatically subtracting "1" from the applicable divisor for every year thereafter). If there is no designated beneficiary at the participant's death, the participant's remaining life expectancy (disregarding the participant's death) is calculated using the new life expectancy table. Minimum distributions are paid out over that remaining life expectancy (automatically subtracting "1" from the applicable divisor for each year thereafter). However, despite these new rules, in cases where the beneficiary is known to be the spouse, and the spouse is younger than the participant by more than 10 years, the regulations permit the participant to use a third life expectancy

table which provides for even greater divisors and thus smaller minimum annual distributions.

Death Prior to the Start of Lifetime Distributions

Under old regulations, if the participant died prior to the start of minimum annual distributions, total distribution of the account was required to be completed within five years of the participant's death. The new regulations permit the distributions to be made over the life expectancy of the beneficiary, unless the five-year rule is specifically elected by the plan as the default rule. This permits smaller minimum annual distributions over a longer period of time. The five-year rule would only apply as a default if there was no designated beneficiary at the time of the participant's death.

IRAs

The same new minimum distribution calculation rules which apply to qualified plans also apply to IRAs. There are also new changes to the rules for pure IRAs.

First, the old regulations permit a surviving spouse to treat a deceased spouse's IRA as the surviving spouse's IRA after the death of the IRA owner. The surviving spouse is deemed to make the election for this type of treatment if the surviving spouse either contributes to the IRA on his or her own behalf or if no minimum distribution is made to the spouse as beneficiary of the IRA. New regulations maintain the right of the surviving spouse to treat the IRA as his or her own IRA. However, the minimum annual distribution relating to the year of the decedent's death for the decedent must be distributed prior to the spouse's election to adopt the decedent's IRA as his or her own IRA. In addition, the new proposed regulations clarify that the surviving spouse must be the sole beneficiary of the decedent's IRA and must have unlimited withdrawal rights. If a trust is designated as beneficiary (even if the spouse is the sole

beneficiary of the trust), the spouse is not permitted to treat the decedent's IRA as his or her own IRA. If the surviving spouse makes the election to treat the decedent's IRA as his or her own IRA, the surviving spouse must begin taking minimum distributions as if he or she were the IRA owner.


Second, currently, if an individual fails to take a distribution from his IRA in accordance with the rules, he pays a 50% excise tax on the excess of the amount that should have been distributed from the IRA and the amount that was actually distributed. It was difficult, however, for the IRS to monitor this failure and to catch individuals who did not pay the excise tax. However, now IRA sponsors (such as a bank) will be required to report the projected minimum annual distribution to the IRS. Therefore, if the minimum annual distribution is not paid, the IRS will be able to exact its excise tax penalty more easily.

Amendments to Plans and IRAs

Qualified plans may want to take advantage of the ability to make smaller minimum distributions prior to the January 1, 2002 proposed effective

date by amending the plan now to incorporate the new rule. Therefore, the IRS has issued this model amendment which can be adopted immediately to take advantage of the proposed regulations:

“With respect to distributions under the Plan made in calendar years beginning on or after January 1, 2001 (ALTERNATIVELY, SPECIFY A LATER CALENDAR YEAR FOR WHICH THE AMENDMENT IS TO BE INITIALLY EFFECTIVE), the Plan will apply the minimum distribution requirements of Section 401(a)(9) of the Code in accordance with the regulations under Section 401(a)(9) that were proposed in January 2001, notwithstanding any provision of the Plan to the contrary. This amendment shall continue in effect until the end of the calendar year beginning before the effective date of the final regulations under Section 401(a)(9) or such other date specified in guidance published by the Internal Revenue Service.”

The IRS has warned that amendments to IRA documents should not be made prior to the publication of final regulations, although IRA owners are permitted to follow the proposed regulations beginning in 2001. 

Government Contractors Alert **OFCCP Issues New AAP Rules, Extends Deadline for Filing New EO Survey**

On February 21, 2001, the Office of Federal Contract Compliance Programs (OFCCP) extended the deadline for government contractors to submit completed Equal Opportunity (EO) Surveys which were mailed to them in December 2000. The EO Survey, which is a new tool being used by the OFCCP, is a part of the recent regulations issued by the OFCCP

which became effective on December 13, 2000. The regulations were issued pursuant to Executive Order 11246, and apply to federal contractors and subcontractors, with fifty or more employees, that have contracts or subcontracts with the federal government in excess of \$50,000.

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New AAP Rules

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The OFCCP has stated that covered contractors will not be required to amend their affirmative action plans immediately. Rather, a contractor may continue with its current plan until it expires. At such time, the contractor will be expected to comply with the new regulations. However, because the vast majority of plans are one-year plans and because the new regulations went into effect in December 2000, most contractors should already have complied with the new regulations or should expect to do so shortly.

Requirements Under the Previous Regulations

Prior to the issuance of the recent regulations, covered contractors were required to develop and implement detailed workforce analyses and written affirmative action plans for each of their facilities. As a part of these affirmative action plans, contractors were also required to perform availability analyses to determine whether women or certain minority groups were under-represented in specific job groups. The availability analyses were required to consider eight various factors in reaching their conclusions.

Further, if an analysis reflected any difference between the composition of women and minorities in a particular job group versus the composition of women and minorities in the available job market, then the contractor was required to set and achieve certain affirmative action goals. Finally, each affirmative action plan was to contain a “narrative” which addressed ten various subject areas relating to the implementation of the affirmative action plan.

The New Requirements

Under the new regulations issued by the OFCCP, an “organizational chart” may be substituted for the detailed workforce analysis, and

covered contractors may be able to develop and implement affirmative action plans which cover more than one facility, provided that advance approval is received from the OFCCP.

Nonetheless, the OFCCP expressly retained its right to audit contractors by facility, regardless of the manner in which the contractor develops its affirmative action plan.

More importantly, the availability analyses conducted by contractors now need only consider two factors—the percentage of women and minorities with the requisite skills in the available workforce and the percentage of women and minorities within the contractor’s workforce—rather than the burdensome eight factors previously required. Additionally, affirmative action goals need only be established if the results of the availability analysis demonstrate a difference greater than 20% or two standard deviations. Simply any difference is no longer sufficient to trigger the establishment of affirmative action goals. Lastly, the number of subjects required to be addressed by the affirmative action plan “narrative” has been reduced to four.

In addition to the above revisions, the new regulations have created some new responsibilities for covered contractors. Contractors, selected at random, will be required to complete EO Surveys regarding the hiring, promotion, termination, and compensation of female and minority employees over the previous year. The OFCCP has stated that it has sent this year’s EO Surveys to about half of all non-construction contractors. It is likely that the remaining half of the non-construction contractors will receive EO Surveys in the next year of two. Further, whether or not a contractor receives an EO Survey, all covered contractors will be required to conduct an annual compensation analysis as a part of the contractor’s remaining “narrative” obligations. The OFCCP

has committed to keeping such information confidential.


The recent regulations have also expanded the OFCCP's ability to conduct a Corporate Management Review. Such reviews assist the OFCCP in determining whether there are hidden barriers preventing women and minorities from reaching higher level positions within a contractor's organization. Previously, such reviews were limited to contractors' main headquarters, but currently the OFCCP will be able to expand the scope of its reviews to other facilities if there is an indication that similar problems exist at such other facilities.

Clarification of Record Retention

The new regulations also clarify that covered contractors are required to maintain data and records regarding its employment practices (such as pay, hiring, promotion, and termination) and that such data and records should be analyzed to determine if there is a disparate impact on women or specific racial classes.

The new regulations do not purport to alter

the existing definition of "applicant," which itself remains somewhat elusive. What makes the record retention requirement particularly burdensome, however, is that contractors must also keep records regarding applicants, including those who may, unsolicited, apply for a position via mail or e-mail.

Further problems with OFCCP's latest pronouncement arise with determining the gender and/or race of an applicant who solely submits his or her resume. Also complicating matters is the fact that many contractors receive resumes on-line through services like Monster.com. There are indications, and other commentators have agreed, that the OFCCP will expect contractors to perform "follow-ups" with such applicants to determine their gender and/or race. We have had to strenuously negotiate this point with several OFCCP regional offices. It seems that the more resumes a contractor receives—through whatever means, desired or undesired—the more burdensome this requirement will be until OFCCP's practice faces judicial scrutiny. 

IRS Issues Final COBRA Rules

The Internal Revenue Service recently issued updated final COBRA regulations which both amended 1999 proposed COBRA regulations and clarified 1999 final COBRA regulations. The new regulations are summarized as follows:

Small Employer Plan Exception

The final regulations adopt the 1999 proposed regulations without change, affirming the rule that if the employer has fewer than 20 employees, a group health plan maintained by the employer will not be subject to COBRA. The number of employees is calculated using a full-time equivalence (or "FTE")

method. Employers may count their employees on either an aggregate basis (number of hours worked by all part-time employees divided by number of hours required for one employee to be considered full-time) or an individual basis (hours worked by one part-time employee divided by the hours required to be considered full-time, added together with the results of all other part-time employees), as the result for FTE purposes is the same.

Determination of Number of Plans

The final regulations modify the proposed regu-

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IRS Issues COBRA Rules

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lations with respect to how the number of plans maintained by an employer or employer organization is determined. The default rule under the final regulations is that all health care benefits provided by one entity or trade or business are treated as one plan. This rule applies unless it is clear from a plan's governing documents that the benefits are being provided under separate plans or arrangements. An important revision to the 1999 proposed regulations is that now, if an employer or employer organization wishes to avoid the default rule, in addition to the evidence contained in a plan's governing documents, there must also be evidence that the arrangements are actually operated as separate plans.

Health Flexible Spending Arrangements

The final regulations' rules regarding health flexible spending accounts ("health FSAs") are virtually identical to the 1999 proposed regulations, with two exceptions. The cross-reference in which a health FSA is defined has been changed from Section 125 to Section 106(c)(2) of the Internal Revenue Code. Also, to the extent that a health FSA is obligated to make COBRA continuation coverage available to qualified beneficiaries, the final regulations clarify that the general COBRA continuation coverage rules apply in the same way that they apply to coverage under other group health plans.

Increase in Premium is Loss of Coverage

With respect to what constitutes a "loss of coverage" for determining whether a qualifying event has occurred, the 1999 final regulations provide that, if there is any increase in the cost of the premium or the amount of the contribution as a result of a qualifying event, a loss of coverage is deemed to have occurred. The 2001

final regulations clarify this rule and explain that unless even slight increases in premiums are considered a loss in coverage, individuals whose premiums were increased would not otherwise be entitled to a 60-day election period or a 45-day post-election period in which to make their first premium payment.

Termination of Coverage in Anticipation of a Qualifying Event

Under the 1999 final regulations, if coverage is reduced or terminated in anticipation of a qualifying event, the reduction or termination is to be disregarded when determining whether the event itself caused a loss of coverage. While the 2001 final regulations do not amend the rule set forth in the 1999 final regulations, they do clarify that a determination by the administrator as to whether a reduction or termination of coverage has occurred in anticipation of a qualifying event cannot be based solely upon a precise formula, but can only be determined after all of the relevant facts and circumstances have been evaluated. The 2001 final regulations provide further clarification that the type of coverage a qualified beneficiary is entitled to receive is that coverage which he or she had received before the coverage was reduced or eliminated. However, if coverage is modified for similarly-situated non-COBRA beneficiaries sometime between the date of the coverage reduction/termination and the date of the qualifying event, then the modified coverage must be made available to the qualified beneficiary.

Moving Outside Region of Region-Specific Coverage

The final regulations clarify the rule under the 1999 final regulations that employers and employee organizations must ensure that alternative coverage is made available to qualified beneficiaries who move outside the service area

of a region-specific plan, and must be made available no later than (i) the date the qualifying beneficiary relocates or (ii) the first day of the month following the month in which the qualified beneficiary requests the alternative coverage. Employers and employee organizations are not, however, required to incur extraordinary costs in order to provide alternate coverage in areas where they have no employees. Rather, benefits must be offered to a qualified beneficiary who moves outside of the service area of the preferred provider network at the plan's standard rate.

When COBRA Continuation Coverage is Effective

The final regulations clarify the rule set forth in the 1999 final regulations that in the case of indemnity or reimbursement arrangements, claims incurred during the election period do not have to be paid before the election is made. The final regulations explain that if the indemnity or reimbursement arrangement so provides, terminated coverage for qualified beneficiaries can be retroactively reinstated when the election is made.

Insignificant Underpayments

As explained in the 1999 final regulations, if the employer receives a COBRA continuation coverage payment that is less than the required amount the employer is required to treat the partial payment as a full payment if the amount of underpayment is an "insignificant underpayment," unless (i) the employer notifies the qualified beneficiary of the underpayment and (ii) allows the qualified beneficiary a reasonable amount of time in which to make up the underpayment. The 2001 final regulations clarify that an insignificant underpayment is an underpayment which is no greater than the lesser of \$50 (subject to modification by the Commissioner) or 10% of the full payment due.

Business Reorganizations

The 2001 final regulations adopt the 1999 proposed regulations regarding group health benefits in business reorganizations with two clarifications. The proposed regulations provided that, in an asset sale, the purchaser is considered a successor employer if (i) the seller stops providing group health benefits to any employee in connection with the sale and (ii) the buyer continues the business operations associated with those assets without substantial change or interruption. The 2001 final regulations explain that a buyer (or buying group) does not escape the designation of "successor employer" merely because the asset sale takes place in connection with a bankruptcy proceeding. Further, the final regulations clarify that the term "asset sale" includes other asset transfers as well.

Employer Withdrawals from Multiemployer Plans

With respect to employer withdrawals from multiemployer plans, the final regulations have adopted the 1999 proposed regulations with two changes. The proposed regulations regarding which entity was responsible for COBRA continuation coverage for qualified beneficiaries who were associated with a withdrawing employer placed the COBRA burden on the withdrawing employer only if the withdrawing employer established a new plan to cover the active employees formerly covered under the multiemployer plan. Otherwise, the multiemployer plan would be responsible for COBRA continuation coverage. The 2001 final regulations return the COBRA continuation coverage obligation for qualified beneficiaries of the withdrawing employer back to the withdrawing employer, if it allows its employees to participate in another of its existing plans.

The final regulations have also been revised to

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IRS Issues COBRA Rules

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clarify a threshold condition set forth in the 1999 proposed regulations with respect to the obligation of a withdrawing employer or subsequent multiemployer plan to make COBRA coverage available to existing qualified beneficiaries associated with a withdrawing employer. The final regulations provide that a withdrawing employer plan or subsequent multiemployer plan is responsible for COBRA compliance once coverage under such plan becomes available to a class of employees who were formerly covered under the multiemployer plan. If an insignificant number of employees from the withdrawing employer are eligible for the withdrawing employer's new or existing plan, the COBRA burden is retained by the multiemployer plan. An additional clarification has been added to the final regulations regarding the allocation of the obligation to make COBRA continuation coverage available to existing qualified beneficiaries when

the covered employees stop being covered under a plan which is maintained by their single employer and start to be covered under a multiemployer plan. The final regulations specify that coverage for similarly situated non-COBRA beneficiaries is modified by switching from one plan to another; coverage for the qualified beneficiaries is also modified by switching to the other plan.

COBRA and FMLA

The 2001 final regulations have adopted the 1999 proposed regulations as they relate to the application of COBRA in connection with a leave taken pursuant to the Family and Medical Leave Act of 1993 (FMLA), with one minor change. The final regulations include in the text of the rules that the end of FMLA leave is to be determined under the regulations contained in 29 CFR part 825, and not under these revised COBRA regulations. 

Special Reduction-in-Force Considerations for Employers

EEOC Issues Final Regulations on ADEA Waivers

In December 2000, the Equal Employment Opportunity Commission (EEOC) issued final regulations addressing waivers of claims under the Age Discrimination in Employment Act (ADEA). The regulations were issued in response to the United States Supreme Court's 1998 decision in *Oubre v. Entergy Operations*, and require that individuals be free to challenge waivers of their ADEA claims. Further, the regulations provide that individuals need not return any consideration received prior to challenging the validity of their waivers in court. The EEOC's regulations became effective on January 10, 2001. The Older Workers Benefit Protection Act

(OWBPA) and its accompanying regulations have the effect of forcing employers to jump through certain procedural and substantive hoops in order to obtain an ADEA waiver which is "knowing and voluntary" and which will hold up in court if challenged. And while some of these requirements may interfere with the speed at which an employer would like to proceed in these matters, it is important that ADEA waivers be obtained properly and contain all necessary information. The last thing any employer wants—particularly in an economy where employment terminations have become more commonplace—is to face a situation where an

employee was previously given a sum of money in exchange for his or her release of ADEA claims, only to be informed that the employee is now taking the employer to court for age-based discrimination, and that the employee is entitled to keep the additional sum of money paid by the employer. If an employer determines that an ADEA waiver is worth obtaining, then it is worth obtaining the waiver properly.

The Older Workers Benefit Protection Act

In 1990, Congress passed the OWBPA, which in part amended the ADEA. The OWBPA sets forth certain minimum requirements for waivers of claims under the ADEA. In order for a waiver of ADEA claims to be enforceable, the OWBPA requires that the waiver be “knowing and voluntary.”

Among the requirements of a “knowing and voluntary” waiver are that the waiver be in writing, and written in plain language such that the individual party understands the waiver. The waiver must also specifically refer to claims under the ADEA, and advise the individual party to consult with an attorney prior to executing the waiver. The waiver may not encompass claims that arise following the execution of the waiver. Finally, the waiver must be supported by additional consideration, and the individual party must be afforded at least 21 days to consider the offer and seven days following the execution of the waiver to revoke his or her execution.

***Oubre* and the Tender Back Regulations**

One issue that the OWBPA, and the first set of regulations under the OWBPA, failed to address is the situation where an individual receives consideration for his or her execution of a waiver, and subsequently, without returning the exchanged consideration, that individual challenges the validity of his or her waiver as not being “know-

ing and voluntary,” and therefore, unenforceable. Naturally, employers contended that individuals should not be allowed to retain the benefits they received in exchange for their waivers, while at the same time being permitted to challenge the validity of their waivers by commencing a judicial action under the ADEA. Employers maintained that returning, or “tendering back,” the exchanged consideration was a condition precedent to challenging the validity of the waiver.

In 1998, in the *Oubre* decision, the Supreme Court held that traditional rules of contract interpretation, such as “tendering back” and ratification, did not apply to waivers under the OWBPA, and, more specifically, that an individual need not tender back any consideration received prior to commencing an action which has the effect of challenging his or her waiver.

In light of the *Oubre* decision, the EEOC recently issued regulations further clarifying the “tender back” issue. In addition to re-affirming the Supreme Court’s holding in *Oubre*, that an individual need not return consideration already received, the new regulations also preclude an employer from discontinuing any consideration which the individual has not yet or only partially received. For example, if, in conjunction with a separation agreement, an individual agrees to execute a waiver in exchange for a stream of monthly payments—and, prior to receiving all of the agreed upon payments, that individual brings an ADEA claim against the former employer—then that former employer would be prohibited from discontinuing the remaining payments to the individual, notwithstanding the commencement of the ADEA claim.

The regulations also prohibit an individual from contracting away these rights, *i.e.*, from specifically agreeing to tender back the consideration prior to filing a claim under the ADEA. This prohibition further precludes employers

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ADEA Waivers

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from requiring that individuals be responsible for attorneys' fees and/or damages arising out of the filing of an ADEA claim, except as may be otherwise authorized under federal law. Should the individual be successful, however, in his or her ADEA claim, then the employer would be entitled to a setoff against any award of damages in an amount up to the value of the consideration given in exchange for the invalid waiver or the amount of the damages awarded, whichever is less.

It should also be noted that the EEOC's latest regulations apply equally to waivers of ADEA claims and to covenants not to sue. While, in effect, both waivers and covenants not to sue prevent an individual from bringing an ADEA claim (assuming the waiver or covenant not to sue is valid and the claim arose prior to the execution of the waiver or the covenant not to sue), covenants not to sue must take care not to prevent an individual from bringing a suit challenging the validity of his or her waiver. Individuals always retain the right to challenge the validity of their waivers, and a covenant not to sue which interferes with that right, even unintentionally, presents the danger that the entire waiver will be invalidated.

Reductions-In-Force and the Use of Statistics

In addition to the requirements noted above, the OWBPA requires that specific information be included in waivers given to individuals in connection with an "exit incentive or other termination program offered to a group or class of employees." Questions have arisen, and will undoubtedly continue to arise, as to what precisely constitutes a "termination program" and how many employees constitute a "group or class." While judicial opinions tend to examine case-specific facts and circumstances to answer these questions, there is not much disagreement

that reductions-in force (RIFs) constitute the quintessential "termination program" under the OWBPA. In light of the growing number of RIFs caused by today's economy, compliance with the OWBPA has become increasingly more important.

Should a waiver implicate this section of the OWBPA, then the waiver must provide individuals with 45 days to consider the offer (as opposed to the 21 day period referenced above), and, more importantly, the waiver must contain information regarding (i) the class or group of employees covered by the termination program, (ii) any eligibility factors and time limits of the program, (iii) the job titles and ages of all individuals selected or eligible for the program, and (iv) the job titles and ages of all individuals within the same class or group of employees not selected or eligible for the program. As a result of these requirements, compliance with the OWBPA for RIFs is more burdensome than complying with the requirements for individual waivers. However, in an employer's effort to obtain an enforceable waiver, and in light of the recent "tender back" regulations, this is a situation where "an ounce of prevention is worth more than a pound of cure."


The RIF waiver provisions were intended to provide individuals with information which Congress felt was necessary for those individuals to make a determination as to whether their employers were targeting employees based upon age. Armed with this workplace/RIF demographic information, and the 45 day waiting period, Congress believed that this information would allow individuals to reach an informed decision as to whether or not to execute their ADEA waivers.

Prior to conducting a RIF and providing individuals with the above information, an employer should conduct a statistical analysis of its proposed reductions. Individuals should be

selected for the RIF based upon valid, legal reasons (such as poor job performance or redundancy in positions), and the subsequent statistical analysis should determine whether the RIF will have a disparate impact upon certain groups.

It also bears emphasis that disparate treatment and/or impact claims may be commenced after a RIF by ex-workers alleging discrimination based upon race, gender or other protected classifications, in addition to age. As such, the statistical analysis should by no means be limited to age. The analysis should ensure that the RIF will not

have an adverse impact on any protected group.

Questions frequently arise as to what constitutes a proper statistical analysis. For example, is the proper comparison group composed of an employer's entire workforce, or is it limited to the business group directly affected by or considered for the RIF? The answer (the latter, usually) to this question, and most others, will be fact-specific, but it goes without saying that the ideal RIF will not reflect an adverse impact on any protected class regardless of what comparison group is chosen. 

Personnel Alert: In View of Increasing Litigation, Best To Vet Your Current FLSA Exemptions Now

In light of the recent surge in “overtime lawsuits” commenced against many U.S. companies, employers should seize this opportunity to re-analyze the status of their “exempt” classified employees. Many prudent employers have already taken protective measures in the hope of eliminating any Fair Labor Standards Act (FLSA) violations which may have existed.

Employees classified as exempt under the FLSA, pursuant to the provision known as the “white-collar exemption,” are not required to be paid overtime by their employers. Rather, those employees receive a predetermined salary (usually weekly or bi-weekly) regardless of the number of hours they work in a given workweek. Recent opinions highlight the increasing willingness of courts to reclassify as non-exempt employees, subject to the overtime requirements of the FLSA, groups of employees considered “managers” by their employers, and therefore classified as exempt. The consequence of such a reclassification could cost an employer anywhere from thousands to millions of dollars

in damages, including lost wages, interest, fines, penalties and attorneys' fees.

While no legal change has occurred to prompt this recent rash of overtime claims, the economic downturn, including reduced bonuses and threats of job loss, has spurred employees to challenge their exempt classifications and seek past-due overtime payments. Also, some companies that have downsized hourly workers have asked for greater productivity, including non-exempt tasks, from their salaried, believed-to-be-exempt, workers. The result is increasing litigation, often successful for the employees. Compounding the peril for the employer is that these types of suits are prime pickings for class actions.

In reviewing the classifications of their exempt employees, the obvious goal is to ensure that such employees have not been misclassified. If a misclassification is discovered, employers are left with two options going forward—reclassifying such employees as non-exempt or assign-

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FLSA Exemptions

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ing new responsibilities to such employees in order to support their exempt status.


In order to qualify for the “white-collar exemption,” an employee must be employed in a “bona fide executive, administrative, or professional capacity.” Each of these categories require that an employee satisfy both the “salary test” and the “duties test” before being classified as exempt. It is the duties test which has been getting employers into trouble recently. If an employee’s primary duty does not satisfy the duties test (and there are different requirements for executives, administrators, and professionals), then that employee must be classified as non-exempt and paid time-and-a-half for any hours over forty worked in a given workweek.

Generally, an employee is an exempt *executive* if his or her *primary duty* is to *manage* an entire enterprise or a recognized subdivision, *and* he or she regularly *supervises* at least two other full-time employees.

An employee will generally qualify as an exempt *administrator* if his or her primary duty

requires the exercise of *discretion and independent judgment*, *and* consists of office or non-manual work which is *directly related* to the management or general business operations of the employer.

Finally, an employee will generally be classified as an exempt *professional* if his or her primary duty consists of work requiring *knowledge of an advanced type*, or requiring invention, imagination, or talent in a recognized artistic field.

The rules are many and this summary is only intended to be consciousness-raising. For example, there are other specific classifications under which an employee may qualify as exempt. Should an employer desire to accurately review its compensation classifications and structures, and, more importantly, should an employer desire to implement remedial measures in connection with prior misclassifications, we recommend this be done promptly, and with human resources and legal counsel working in tandem. Analyzed properly, the FLSA offers a “safe harbor” for an employer that can demonstrate it made what may turn out to be a misclassification in good faith and with knowledgeable input. 

Pro-Active Employers Can Limit Potential ADA Claims Substantially

Factual and Legal Analyses on a Case-by-Case Basis Are Key

The landscape of disability discrimination continues to be an evolving and complex area of employment law. Because the Americans with Disabilities Act (ADA) is only 10 years old, and the legal principles under the Act are still developing, federal courts have been kept busy interpreting the scope and coverage of the Act, and setting forth the responsibilities of both employers and employees.

Unfortunately for employers, the various requirements of the ADA and the lack of uniform interpretation across the country have spawned inconsistent judicial results. In 1999, the United States Supreme Court took another step towards establishing a uniform disability law when it decided *Sutton v. United Airlines, Inc.* and *Murphy v. United Parcel Service, Inc.* The *Sutton* and *Murphy*

decisions held that, in determining whether an individual is *disabled* under the ADA, *mitigating measures*, such as medication and corrective lenses, must be considered. It is no longer sufficient for an employee to demonstrate that he or she is disabled under some circumstances; rather, the employee must demonstrate that he or she remains disabled after making use of available mitigating measures.

Absent further Supreme Court guidance, employers are best-advised to use an abundance of caution when considering and taking adverse actions against applicants or employees with actual or perceived physical or mental impairments. As terms such as “essential functions” and “reasonable accommodations” become a part of employees’ everyday dialogue, employers must be knowledgeable of and sensitive to a host of ADA issues. Although one wrong step by an employer can lead to a costly ADA enforcement action, employers can avoid such missteps by conducting proper factual and legal analyses. In this area, very few cases are the same, and compliance must be thorough on a case-by-case basis.

The following represent just some of the questions that can confront an employer when determining its responsibilities under the ADA:

- ◆ Is the individual *disabled*, and therefore covered by the ADA?
 - ◆ An individual is “disabled” under the ADA if that person has an *actual* disability, a *record* of a disability, or is *regarded* as disabled by his or her employer.
 - ◆ In determining disability, does the individual have a physical or mental impairment that substantially limits a major life activity?
 - ◆ Courts have reached various conclusions as to what constitutes a “major life activity,” and as to when an impairment becomes “substantially limiting.”
 - ◆ Almost counter-intuitively, courts are split as to whether working constitutes a major life activity; examples of widely-recognized major life activities are seeing, walking and reproduction.
 - ◆ Employers must consider *mitigating measures* available to the individual to lessen the impact of his or her disability.
 - ◆ Even if an individual is *disabled*, can that individual perform the *essential functions* of his or her position, *with or without reasonable accommodations*?
 - ◆ Obvious questions which arise, but which defy generalizations, include: what functions constitute “essential functions” of a particular job, and what is a “reasonable accommodation?”
 - ◆ Most court decisions hold that allowing an employee to work from home is *not* a reasonable accommodation. But courts are more supportive of employees in determining whether a flexible working schedule, an extended leave of absence, or job re-assignment is a reasonable accommodation.
 - ◆ In determining whether an employer must make reasonable accommodations, is the individual *otherwise qualified* for the position?
 - ◆ If an individual is not otherwise qualified (*i.e.*, does not possess the requisite skills to perform the job in question or another vacant job), then an employer has no obligation to provide any type of accommodation.
 - ◆ An employer is not required to provide any accommodation which would create an “*undue hardship*” for that employer.
- A survey of decisions issued by the Courts of Appeals in the month of March alone demonstrates the often vexing nature of these questions:
- ◆ *Foore v. City of Richmond (4th Circuit)*—The court reversed a verdict for the plaintiff

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ADA Claims


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stating that, even though the plaintiff is legally blind in one eye, he is *not substantially limited in the major life activity of seeing*. The court rested its decision on the specific fact that the plaintiff has developed internal mechanisms (*i.e.*, mitigating measures) which overcome his visual impairment.

- ◆ *Tramill v. United Parcel Service (6th Circuit)*—The court affirmed a jury verdict in favor of the plaintiff because, among other violations, the defendant failed to provide the plaintiff, who had sustained a foot injury, with a truck containing an automatic transmission. That failure was held to be a violation of the employer's duty to reasonably accommodate an individual with a qualified disability.
- ◆ *Batish v. Cook County (7th Circuit)*—The court affirmed a summary judgment for the employer because plaintiff, who suffers from leg injuries, *could not perform the essential functions* of a pharmacy technician, *either with or without accommodations*. The plaintiff is limited in his ability to deliver and stock medications, which the court held were essential functions of the plaintiff's job.
- ◆ *Land v. Washington County (8th Circuit)*—The court affirmed a dismissal in the defendant's favor because plaintiff could not establish that he was otherwise qualified for the position of sergeant or field training officer. The Court noted that there was no dispute that plaintiff's organic brain and personality disorder constituted a disability under the ADA.
- ◆ *Hall v. Claussen (10th Circuit)*—The court affirmed a jury verdict in favor of the plaintiff who suffers from urological impairments. The court held that the

plaintiff's condition substantially limits him in the major life activity of working, and that the employer failed to satisfy its obligation to reasonably accommodate the plaintiff's condition by re-assigning him to a vacant position.

- ◆ *McKenzie v. Dovala (10th Circuit)*—The court reversed a summary judgment for the defendant because genuine issues of material fact existed as to whether plaintiff, who suffered from psychological illnesses in the past, has a record of a disability, or was regarded as disabled by the defendant, when she was denied employment by the sheriff's office.
- ◆ *Lowe v. Alabama Power Company (11th Circuit)*—The court reversed a summary judgment for the employer because questions of fact remained as to whether working at an unprotected height is an essential function of a mechanic position, and, if so, whether plaintiff, a double amputee below the knees, is capable of performing such function.
- ◆ *Duncan v. Washington Metropolitan Area Transit Authority (DC Circuit)*—The court reversed a jury verdict for the employee because the employee did not establish that his back condition substantially limits his ability to work. The court noted that the ability to perform a particular job is not sufficient to lead to the conclusion that an individual is substantially limited in the major life activity of working overall.

Further reminder: in addition to this ADA evaluation, employers must also be conscious of applicable state and local laws, which often provide employees with greater coverage and establish a broader definition of discrimination by employers. 

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