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counselors at law

CLIENT UPDATE
July 2005

EMPLOYMENT PRACTICES GROUP

Employment and Anti-Discrimination Law Update

Decision for Former Employee on Whistle-Blower Claim

In the first New England decision of the whistle-blower provision of the Sarbanes-Oxley Act, an Administrative Law Judge ("ALJ") found in favor of a former employee who claimed she was terminated for trying to ensure that her employer, a small start-up biotechnology company which is publicly traded on the over-the-counter market, was in compliance with federal securities laws. She claimed she refused to provide information to auditors or attend a meeting because she believed the company was dealing with an unregistered broker, in violation of securities laws.

The company responded by contending its actions were lawful and it fired her for insubordination. Without deciding whether the company's actions were in violation of the securities regulations, but finding that her activity was protected because she "reasonably believed" her employer was in violation of securities laws, the ALJ ruled that her protected activity contributed to her termination and the employer failed to support its allegations of insubordination as the true reason for her termination.

Employers subject to Sarbanes-Oxley, which applies to companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("SEA") and companies required to file reports under Section 15(d) of the SEA, should take note when considering taking adverse employment actions against employees who have brought up issues regarding securities laws, even if the company believes it has acted in compliance with those laws. ■

Sampling Period for FORM EEO-1 Opens July 1st!

If your company has 100 or more employees or is a federal government contractor or first-tier subcontractor with 50 or more employees and has a contract, subcontract or purchase order amounting to $50,000 or more, you must file Form EEO-1 with Equal Employment Opportunity Commission by September 30th each year. Employment figures from any pay period from July 1st though September 30th may be used.

Form EEO-1 requires that you report the gender and race/ethnic origin of each employee by job category. You may perform a visual inspection in order to determine an employee's race/ethnic origin or use information that has been volunteered by an employee as part of the company's equal opportunity efforts--however, you should not directly ask an employee his or her race/ethnic origin. Additionally, post-employment records which indicate an employee's race/ethnic origin should be kept separate from the employee's personnel file!

FORM EEO-1 may be filed online at eeoc.gov/eeoc/survey. ■

Inside this issue:

Supreme Court Expands Scope of Federal Age Discrimination in Employment Law

Recently, the U.S. Supreme Court expanded the scope of the federal law that protects older employees. In *Smith v. City of Jackson,* the Court ruled that the Age Discrimination in Employment Act (ADEA) protects employees 40 years and older from employment practices and policies that have a disproportionate impact on them, even if the employer has no discriminatory intent or motive. According to this decision, older employees can prevail on such "disparate impact" lawsuits as long as they can identify a specific employment practice or policy that is responsible for the disparity. Before this decision, employees had to prove that their employers actually intended to discriminate against them on the basis of age.

In *City of Jackson*, a group of police and public safety officers challenged the city's revised pay plan, adopted to bring salaries up to the regional average with the goal of improving employee retention. Under the plan, officers with less than five years of tenure received disproportionately greater raises on a percentage basis than did their colleagues with more seniority. The older workers claimed the plan violated the ADEA since it had a disparate impact on them as compared to younger workers. A majority of the Court ruled that the ADEA protects older employees from disproportionate impacts. However, the entire Court ruled that the city workers did not prove that the plan violated the ADEA, since the city's stated purpose to raise employee salaries to match those in surrounding communities was based on a "reasonable factor other than age."

This decision will likely spawn more employment discrimination lawsuits, including class action lawsuits, but those lawsuits will be difficult to win. Even if older employees can identify a specific practice or policy that has the effect of discrimination, employers can defend on the ground that the practice or policy was "based on reasonable factors other than age discrimination."

That is a lenient standard. Even so, with 72 million workers over the age of 40, employers should take care just to avoid claims. Employers are encouraged to analyze carefully their proposed practices or policies to determine whether they may have a disproportionate impact on older workers. Plus, applicable state anti-discrimination laws may not offer the same defense of reasonableness allowed in lawsuits filed under the federal law. ■

Tax Trap: Make Sure You Avoid Taxes on Amounts You Don't Receive

The American Jobs Creation Act of 2004 made significant changes to the federal tax rules for deferred compensation. For this Act, "deferred compensation" means the legally binding right to payment in the future that has not yet been actually or constructively received or included in income. This includes most salary and bonus deferral arrangements under nonqualified deferred compensation plans, SERPs, excess benefit plans, below market stock options and SARs. Under new §409A of the Internal Revenue Code, income that is earned but not paid until later years may be taxed in the year first earned, and a twenty percent penalty may be added!

The issue may become paramount if your shareholders' agreement or other buy-out arrangement includes a component of deferred compensation. Fortunately, stockholder arrangements that provide that payments of deferred compensation may be made only upon the happening of one or more of the following events are qualified under 409A and are not subject to the penalty provisions:

- Separation from service,
- Disability (as defined in §409A),
- Death,
- A specified time (for example, July 1, 2010, or at age 65) or pursuant to a fixed

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Tax Trap: Make Sure You Avoid Taxes on Amounts You Don't Receive *Cont'd*

schedule that is specified at the time the compensation is deferred,

- A change in ownership or control, or
- The occurrence of an unforeseeable emergency. This is narrowly defined as a severe financial hardship from illness, accident or the loss of the participant's property due to casualty, and similar extraordinary and unforeseeable circumstances.

If the above is the entire list in your Shareholder Agreement, you will not be subject to the penalties, unless the ***arrangement permits either the individual or the company to accelerate the time or schedule of any payment.*** There are exceptions, but if your plan ***allows*** the company to pay faster than the schedule set forth in the arrangement – it is not a qualified plan.

A plan adopted before December 31, 2005 is treated as meeting the requirements of §409A only if (i) the plan is operated in 2005 in accordance with a good faith compliance with the provisions of §409A and Notice 2005-1, and (ii) the plan is in fact amended to comply with §409A by December 31, 2005. ■

Why Have Anti-Discrimination and Sexual Harassment Training?

Chapter 151B of the Massachusetts General Law encourages employers to conduct education and training programs on discrimination and sexual harassment for all employees on a regular basis. Employers should also conduct additional training for supervisory and managerial employees, which should address their specific responsibilities as well as the steps that supervisory and managerial employees should take to ensure immediate and appropriate corrective action in addressing harassment complaints. This is significant because employers are liable for the conduct of those persons that they place in supervisory positions.

Furthermore, an *individual* may be held liable for discrimination or harassment as an employer. This may apply to principals, owners, presidents or partners in a business as well as supervisors and co-workers. The law even reaches the conduct of a third party, non-employee, such as a *vendor or client*, who sexually (or otherwise) harasses an employee (based on that employee's protected characteristics) or creates a hostile work environment. There is also liability for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under 151B or to attempt to do so. Aiding and abetting specifically includes inaction by an employer or supervisor, such as circumstances where the individual 1) had knowledge of ongoing harassment; 2) had an obligation and the authority to investigate and/or take remedial action; and 3) intentionally failed to take such action .

As a further incentive for employers to conduct such training, the MCAD has opined that in claims alleging harassment, an employer's commitment to providing anti-harassment training to its workforce may be a factor in determining liability or the appropriate remedy. ■

Employment Laws—Do They Apply to Your Company?

Massachusetts Anti-Discrimination Law ("151B") State statute. Prohibits discrimination/harassment on the basis of age, color, disability, gender, genetics, national origin, ancestry, race, religion, retaliation, sexual orientation.	✓ **6 or more employees**
Massachusetts Maternity Leave Act ("MMLA") State statute. Entitles eligible employees to 8 weeks of leave per birth or adoption of a child.	✓ **6 or more employees**
Americans with Disabilities Act ("ADA") Federal statute. Prohibits discrimination on the basis of disability.	✓ **15 or more employees**
Civil Rights Act of 1967 ("Title VII") Federal statute. Prohibits discrimination/harassment on the basis of race, color, national origin, religion or sex.	✓ **15 or more employees**
Age Discrimination in Employment Act ("ADEA") and the Older Worker's Benefit Protection Act ("OWBPA") Federal statute. Prohibits discrimination/harassment of people over the age of 40.	✓ **20 or more employees**
Family Medical Leave Act ("FMLA") State statute. Entitles an eligible employee to 12 weeks per year of leave for i) the birth, adoption or foster care placement of a child, ii) a serious health condition, or iii) to care for a spouse, parent or child with a serious health condition.	✓ **50 or more employees**
Massachusetts Small Necessities Leave Act ("MSNLA") State statute. Entitles an eligible employee to 24 hours per year of leave to accompany an elderly relative or a child to medical or dental visits; to attend school meetings for a child or meetings regarding an elderly relative's care.	✓ **50 or more employees**
Worker Adjustment and Re-Training Notification Act ("WARN") Federal Statute. Requires 60 days' notice before closing the company or a reduction-in-force.	✓ **100 or more employees**
Uniformed Services Employment and Re-employment Rights Act of 1994 ("USERRA") Federal statute. Guarantees re-employment to employees who have served on active duty or attended military training. Prohibits discrimination against veterans and reservists.	✓ **1 or more employee**

DONOVAN HATEM LLP EMPLOYMENT PRACTICES GROUP

Cheryl A. Waterhouse, Chair
cwaterhouse@donovanhatem.com

Andrew P. Botti
abotti@donovanhatem.com

John F. Bradley, II
jbradley@donovanhatem.com

Ross D. Ginsberg
rginsberg@donovanhatem.com

Damian R. LaPlaca
dlaplaca@donovanhatem.com

Darrell Mook
dmook@donovanhatem.com

Sarah K. Willey
swilley@donovanhatem.com

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