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LABOR & EMPLOYMENT OBSERVER

NEWS ON CONTEMPORARY ISSUES

CHANGES ARE FINALLY COMING TO THE EEO-1 REPORT

WHAT IS THE EEO-1 REPORT?

The Employer Information Report, also known as the EEO-1 Report, provides the federal government with workforce data, broken down by job category and then by race, ethnicity and gender within each job category. It is filed by an estimated 45,000 employers each year.

Two federal government agencies use the collected data: the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). The EEOC uses the data to support civil rights enforcement and to analyze employment trends, such as female and minority representation in companies, industries and/or geographic areas. The OFCCP uses the data to determine which employer facilities to select for compliance evaluations.

WHICH EMPLOYERS MUST FILE THE EEO-1 REPORT?

Generally private employers of 100 or more employees must file the EEO-1 Report each year, by September 30. In addition, federal government contractors and first-tier subcontractors with 50 or more employees that have a federal contract, subcontract or purchase order amounting to \$50,000 or more are required to file an EEO-1 Report. Finally, many financial institutions with 50 or more employees also are required to file this report.

WHAT'S NEW?

The EEO-1 Report has remained virtually unchanged for the last 40 years. Now however, multiple changes are being made. They are:

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Changes to ethnic and racial categories

- Adds a new category of “two or more races, not Hispanic or Latino”
- Divides the previous “Asian or Pacific Islander” category into two separate categories: “Asian, not Hispanic or Latino” and “Native Hawaiian or other Pacific Islander, not Hispanic or Latino”
- Renames “Hispanic” category to “Hispanic or Latino”
- Renames “Black” category to “Black or African American, not Hispanic or Latino”

Furthermore, employers now will be required to offer employees the opportunity to self-identify their ethnic and racial category and cannot rely on employment records or visual identification only. The rationale for this change, as set forth in the EEOC’s Final Notice of Submission of the new EEO-1 Report for the Office of Management and Budget review, is for the federal government to capture the increasing complexity of race in America.

Changes to job categories

- Divides the previous “Officials and Managers” category into two new categories based upon the employee’s level of responsibility and influence within the organization, into “Executive/Senior

Level Officials and Managers” and “First/Mid-Level Officials and Managers”

- Moves the non-managerial business and financial occupations from the “Officials and Managers” category to the “Professionals” category

The new “Executive/Senior Level Officials and Managers” category is limited to employees who plan, direct and formulate policy, set strategy and provide overall direction for the organization and is meant to include those employees who are at the highest levels of organizations, such as CEOs, COOs, CFOs, CIOs and presidents or executive vice presidents of functional areas. The “First/Mid-Level Officials and Managers” category, on the other hand, applies to employees who direct and execute the organization’s day-to-day operations. It includes middle level managers and those who report to them.

WHAT DO THE CHANGES MEAN FOR EMPLOYERS?

Employers will need to assess which jobs now belong in a different or new job category and resurvey their workforces to collect ethnic and racial information that comports with the new ethnic and racial categories.

WHAT CAN EMPLOYERS DO TO PREPARE FOR THE NEW REPORTING FORMAT?

Employers will need to redesign their human resources systems to properly track and account for the new job and

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ethnic and racial categories. Perhaps the most significant change for some employers, however, will be the method they employ to collect ethnic and racial data. Now employers will be required to offer employees the opportunity to self-identify their ethnic and racial category and cannot rely on employment records or visual observation unless the employee declines to make a self-identification. Accordingly, employers will need to create an appropriate form for this purpose.

WHEN WILL THE NEW EEO-1 REPORT TAKE EFFECT?

The new EEO-1 Report will be required for the first time in 2007 and must be filed by September 30, 2007. The current EEO-1 Report must be used for 2006 submissions.

WHERE CAN EMPLOYERS GET MORE INFORMATION ABOUT THE NEW EEO-1 REPORT?

The new EEO-1 Report format and the new Instruction Booklet (revised January 2006) may be found at <http://www.eeoc.gov/eeo1/index.html>.

Please contact Debra S. Friedman, Esquire for further information and assistance at dfriedman@cozen.com or (215) 665-3719.

EMPLOYEE LEAVES OF ABSENCE: OVERLAPPING AND CONFLICTING REQUIREMENTS

Your company may be liable for damages to an employee who requests a medical leave of absence even if you

comply fully with the federal Family and Medical Leave Act (FMLA). Your company also may be liable to an employee who requests a medical leave of absence even if you comply fully with the federal Americans with Disabilities Act (ADA). In other words, your company may be liable under one or more laws or regulations that govern an employee leave issue, even if you fully comply with another equally applicable law.

There are various federal, state and local laws that address employee leave situations. The two most significant sources, and in fact the two most confusing, are the FMLA and the ADA. The provisions of both of those statutes and the terms within the terms, have been the subject of numerous agency regulations and court decisions. However, it is important not only to understand the requirements and provisions of each statute separately; it is crucial that your company understands the interplay between these statutes, particularly when an employee's situation is potentially covered by both statutes.

While an analysis of each and every leave requirement is beyond the scope of the present discussion, this article summarizes the primary differences between the FMLA and the ADA.

EMPLOYERS COVERED AND EMPLOYEES PROTECTED

The FMLA is not an anti-discrimination statute per se. It identifies a specific amount of leave a covered employer must provide to an eligible employee under certain circumstances. In fact, if an employee and the circumstances are covered, the FMLA states that leave is the one

required accommodation. On the other hand, the ADA is a civil rights statute, prohibiting discrimination against covered individuals with a disability. Although the ADA contains certain general requirements involving disabled employees, it does not identify a specific amount of leave an employer must provide and does not even require that leave be provided in every situation.

The FMLA essentially covers employers who have 50 or more employees at a worksite for each working day during each of 20 or more workweeks in the current or preceding calendar year. Public agencies and public and private elementary and secondary schools are covered without regard to the number of employees. An employee is eligible for benefits under the FMLA if he or she has been employed for at least 12 months and for at least 1,250 hours during the prior 12-month period. While an employee must have worked for a total of 12 months, it is not necessary that those 12 months be consecutive. However, the 1,250 hours must have been worked in the preceding 12 months. Courts also have held that the 1,250-hour requirement must be computed from the date the leave commences (rather than when notice is given) and includes only hours that the employee actually worked.

The ADA essentially defines a covered employer as any “person” who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. An employee is protected under the Act if he or she is (1) a qualified individual; (2) with a covered disability; (3) and was excluded from a position or discriminated against because of that disability. The regulations governing the

ADA state that an individual is “qualified” if he or she can perform the essential functions of the employment position that the individual holds or desires with or without reasonable accommodation. Like the coverage provisions of the FMLA, these definitions contain separately defined “terms” that must be understood in order to properly determine whether and to what extent the statute is triggered. Unlike the FMLA, however, the ADA does not impose a minimum number of hours or months as a precondition to an employee obtaining the Act’s benefits. Thus, for example, a “probationary” employee who has been with a company only a few weeks may still be entitled to leave and other benefits under the ADA, although the employee would not be entitled to FMLA benefits.

EMPLOYEE ENTITLEMENT TO A LEAVE OF ABSENCE

The FMLA provides four reasons an eligible employee may take FMLA leave: (1) because of the birth of the employee’s child and to care for the child; (2) because of the placement of a child with the employee for adoption or foster care; (3) to care for the employee’s spouse, child or parent if the spouse, child or parent has a “serious health condition” (in-laws are not included); or (4) because of a “serious health condition” that makes the employee unable to perform the functions of his or her position. The Act and the governing regulations impose strict employee notification and certification requirements, as well as requirements that an employer publish notices and designate leave as “FMLA leave” within certain time frames. If an eligible employee requests leave for one of the above four reasons, the employer must provide up to 12 weeks of unpaid leave during a 12-

month period. An employer certainly can adopt a policy entitling an employee to more generous leave, but a company's leave policy cannot diminish rights granted under the FMLA.

The ADA does not identify leave as the only option and does not state that leave can only be taken for certain reasons. Instead, as long as the employee has a covered disability, the ADA imposes a duty on the employee and employer to engage in an interactive process in order to determine what reasonable accommodation may be necessary and effective. According to the EEOC's regulations and guidance manuals, the first step in that process requires the employee to tell the company that he or she needs an adjustment or change at work for a reason related to a medical condition. The next step imposes a duty on the company to clarify, if necessary, and ultimately identify the appropriate reasonable accommodation. Unlike the FMLA, a leave of absence is only one possible accommodation. An employer is not required to grant a leave of absence in every case if there is another accommodation that is effective or if doing so would create an undue hardship for the employer. In addition, leave may be unpaid as long as the employer also provides unpaid leaves for non-disabled individuals.

Finally, unlike the FMLA, the ADA does not impose a maximum leave period when a leave of absence is given as an accommodation. Under the FMLA, an employee who is unable to return to work after 12 weeks is not entitled to job restoration. However, in some circumstances, an employer may be required under the ADA to extend a leave previously granted, or, in some circumstances, even grant an indefinite leave without an end

date for some reasonable amount of time, provided that the employee cooperates with the employer and continues to provide the employer with sufficient grounds that such leave is needed. Thus, "no fault" termination policies whereby an employee is terminated for a failure to return to work after a specifically prescribed period of time may run afoul of the ADA.

EMPLOYEE RIGHT TO REINSTATEMENT AFTER LEAVE

Under the FMLA, unless the employee is a "highly compensated employee" as that term is defined, an employee who returns from leave must either be restored to the position held when the leave commenced or to an equivalent position with equivalent employment benefits, pay and other terms and conditions. As a condition of job restoration after a leave is taken because of the employee's own "serious health condition," the employer may require a return-to-work certification from the employee's health care provider as long as that requirement is pursuant to a uniformly applied practice or policy regarding leaves generally.

The ADA, on the other hand, requires that an employee be restored to the same position he or she held before the leave commenced, unless the employer can prove that holding the position open would impose an undue hardship. The governing regulations and judicial decisions state that in the limited cases where undue hardship can be proven, the employer must at that point consider whether it has a vacant equivalent position and, if so, must reassign the employee to that equivalent position.

CONTINUATION OF BENEFITS DURING THE LEAVE

The FMLA requires an employer to maintain coverage for an employee under any group health plan for the duration of the leave period at the level and under the conditions such coverage would have been provided if the employee had continued working continuously for the leave duration. In certain circumstances, an employer may recover its insurance premiums if the employee fails to return to work for reasons other than reasons beyond the employee's control. Under the ADA, an employer is not required to continue the employee's benefits unless the employer otherwise provides benefit continuation to non-disabled individuals under similar circumstances.

CREATING ALTERNATE, LIGHT DUTY POSITIONS

As noted above, a leave of absence is the mandated accommodation under the FMLA. Therefore, an employer may not require that an employee accept an alternate or light duty position. An employer may, however, offer a light duty position to the employee, who may or may not accept that alternative. Under the ADA, while an employer is not required to create a new position, considering and ultimately placing an employee in a vacant, light duty position may be a required accommodation, when no other accommodation would permit the employee to remain in his or her current position.

THE UNDUE HARDSHIP DEFENSE

An undue hardship defense is not available under the FMLA. However, under the ADA, an employer may not be required to accommodate an employee if doing so

would cause an undue hardship for the employer. Courts consider several factors to determine whether an undue hardship exists, including the nature and net cost of the accommodation required, the overall financial resources of the employer's facility and of the employer itself and the impact of the accommodation on the employer's operation. As a general matter, once an employee shows that an accommodation is reasonable in the sense that it will provide the desired effect, courts give an employer the opportunity to show that costs are excessive in relation either to the benefits of the requested accommodation or to the employer's financial health or survival.

In order to minimize potential liability, every employer should become familiar with the rights and obligations that presently exist in the various leave statutes and should keep abreast of all developments that may affect those rights and obligations.

Please contact Michael C. Schmidt, Esquire for further information and assistance at mschmidt@cozen.com or (212) 453-3937.

U.S. DEPARTMENT OF LABOR ISSUES USERRA FINAL REGULATIONS

The U.S. Department of Labor recently issued final regulations interpreting USERRA, the Uniformed Services Employment and Re-employment Rights Act. The final regulations do not impose any new obligations on employers. However, they do clarify existing obligations pertaining to military leave.

During this time of increased military service by U.S. service members, employers are advised to review their military

leave and benefits policies and practices to ensure that they are in compliance with USERRA. Since the final regulations also finalize the USERRA notice posting requirement, employers must make sure that they have posted the proper USERRA notice. A copy of the USERRA poster may be obtained from the Department of Labor's website at <http://www.dol.gov/vets/programs/userra/poster.html>.

NEW JERSEY'S IDENTITY THEFT PROTECTION ACT

On January 1, 2006, New Jersey's Identity Theft Protection Act became effective, creating additional safeguards for the use and disclosure of an individual's personal information. In sum, the Act: (1) requires local law enforcement to take reports of identity theft; (2) requires credit reporting agencies to place a freeze on accounts of identity theft victims; (3) requires businesses to notify individuals who have customer information stolen; and (4) prohibits businesses from printing Social Security numbers on mailed materials or from displaying those numbers in any manner.

What does this mean for New Jersey employers? The new law requires New Jersey employers to provide additional information when conducting background checks and to review their recordkeeping and personnel practices to ensure compliance with several new requirements.

First, for companies that obtain background checks pursuant to the Fair Credit Reporting Act and take adverse action based on that information, an additional consumer notice is required. New Jersey employers are

required to include a document entitled "New Jersey Consumers Have The Right to Obtain a Security Freeze" any time a New Jersey employee is required to receive a summary of rights form under the Fair Credit Reporting Act.

Second, the Act requires businesses seeking to destroy a customer's records containing personal information to do so by shredding, erasing or otherwise modifying the information so that it is no longer readable or able to be reconstructed. "Personal information" is defined as an individual's first name or first initial and last name when linked with the individual's Social Security number, driver's license number or state identification card number or account number or credit or debit card number. Since the Act defines "customer" as "any individual who provides personal information to a business," it most certainly applies to New Jersey employers. While the Act does not affirmatively require destruction of records, New Jersey employers need to ensure that all personnel information is appropriately destroyed, whether by shredding or other means, when that information is discarded. For some companies, compliance with this provision may be as simple as implementing a document shredding policy for all personnel files and human resources documents, rather than determining whether particular documents contain personal information.

Third, companies that conduct business in New Jersey and that compile or maintain computerized records are required to disclose all breaches of security of those records to any customer who is a New Jersey resident whose personal information was accessed, or reasonably

believed to be accessed, by an unauthorized individual. Notice must be provided in one of three ways: in writing, by electronic means or by substitute notice, if particular conditions are met. Thus, if a New Jersey employer suspects that its human resources computer system has been compromised, the employer needs to comply with the new obligations under the Identity Theft Protection Act and ensure that it provides proper notice to the affected employees.

Fourth, the Act imposes particular limitations on companies' ability to use Social Security numbers. Businesses are prohibited from:

- Publicly posting/displaying an individual's Social Security number or any four or more consecutive numbers taken from the individual's Social Security number
- Printing an individual's Social Security number on any materials that are mailed to the individual, unless otherwise required by law
- Intentionally communicating or making an individual's Social Security number available to the general public
- Requiring an individual to use his/her Social Security number to access an Internet website, unless a password or unique personal identification number is also required

The Act, however, does not prohibit companies from using Social Security numbers for internal verification and administrative purposes.

Accordingly, New Jersey employers need to examine carefully their current policies and practices. Employers who use Social Security numbers as identification numbers for their employees are advised to switch to separate employee identification numbers to the extent that such numbers are posted on employee badges and/or building security passes or are required for employees to access their employer's servers or computer networks.

In conclusion, the Act imposes additional obligations on New Jersey employers. While many employers already comply with some of the new obligations, all New Jersey employers should carefully review their policies and practices to ensure that they are in compliance with all of the relevant provisions of the new Act.

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TENTH CIRCUIT IMPOSES STRICT STANDARDS FOR THE OLDER WORKERS' BENEFIT PROTECTION ACT

RELEASE REQUIREMENTS

The U.S. Court of Appeals for the Tenth Circuit recently decided a case interpreting the Older Workers' Benefit Protection Act (OWBPA) in a manner different from how most employers have. In *Kruchowski v. The Weyerhaeuser Company*, 423 F. 3d 1139 (10th Cir. 2005), a group of plaintiffs, whose employment with Weyerhaeuser was terminated in a reduction-in-force (RIF), filed an age

discrimination lawsuit under the Age Discrimination in Employment Act, (ADEA), despite the fact that each plaintiff signed a release of claims in return for severance payments they had received in connection with the RIF. Because the Court held that the release did not comply with the OWBPA, it permitted the lawsuit to go forward.

Specifically, the Court found that the Weyerhaeuser release did not comply with certain informational requirements of the OWBPA. Section 626(f)(1)(H) of the OWBPA provides that, in connection with releases sought in the context of a RIF, the employer must:

[inform] the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to- - (i) any class, unit, or group of individuals covered by such a program, any eligibility factors for such program and any time limits applicable to such program

The Court first determined that because Weyerhaeuser initially told the plaintiffs that one group of employees was “covered by the program” (meaning the employment termination program) and later limited that group to a smaller number of employees, it failed to provide the “correct, mandated information.”

Next, the Court determined that Weyerhaeuser did not properly inform the plaintiffs as to the “eligibility factors” for participation in the severance program. Specifically, it found that the employer was required to do more than announce “program-wide parameters for selecting employees for severance.” The Court held that the term “eligibility factors” refers to those factors used

to determine who is subject to the employment termination program and not just the factors used to determine who is eligible for severance pay after employment terminates. In the litigation, Weyerhaeuser stated that in selecting employees for termination, it considered leadership, technical skills, abilities and behavior and whether employees’ skills matched its needs. It had not disclosed these “eligibility factors” to the plaintiffs at the time it provided them with the release to sign. The Court found that Weyerhaeuser’s failure to disclose these factors rendered the plaintiffs’ releases unenforceable and allowed the plaintiffs to pursue their claims.

The decision is somewhat surprising. It has not been the norm for most employers, in reductions-in-force, when seeking releases in return for severance payments, to provide what Weyerhaeuser argued amounted to “an individualized personnel review” of eligible employees. In fact, many employers hope to avoid the necessity of doing exactly that when they design such programs and seek releases in return for severance payments. Nonetheless, employers need to be mindful of this decision and are advised to seek counsel on how best to comply with the OWBPA’s requirements, so as not to end up in Weyerhaeuser’s position of having paid out severance to “buy peace” from lawsuits, while defending a multi-plaintiff claim.

Please contact Sarah A. Kelly, Esquire for further information and assistance at skelly@cozen.com or (215) 665-5536.

EMPLOYEES NOW FREE TO BRING RETALIATORY HARASSMENT CLAIMS

A January 31, 2006 decision by the U.S. Court of Appeals for the Third Circuit, *Jensen v. Potter*, paves the way for employees to bring “retaliatory harassment claims” against employers based on exposure to hostile work environments. To the great dismay of employers (and defense counsel), this decision gives plaintiffs’ attorneys additional tools for their litigation war chests.

In *Jensen*, the plaintiff claimed that she was subjected to sexual harassment and retaliation after reporting that she was harassed by her supervisor. Ms. Jensen’s supervisor called her after an apparent night of heavy drinking and propositioned her for sex. After refusing her supervisor’s “offer,” she reported his inappropriate conduct to a branch manager. Soon after Jensen’s report, the harassing supervisor was transferred - and subsequently fired.

After the supervisor was fired, Jensen claimed that co-workers began to harass her for getting the supervisor in “trouble.” Jensen was subjected to taunts and insults, as well as damage to her automobile. Despite a number of complaints to her new supervisor, at least one co-worker continued to harass Jensen by making a few unwelcome comments per week for the next 19 months. Because of this ridicule, Jensen suffered from stress and had panic attacks.

After acknowledging that the federal courts of appeal are split on the issue, the Court concluded that Jensen could

maintain a suit for retaliation based on the harassment she experienced for reporting her supervisor. This is because Title VII is intended to prevent discriminatory conduct from altering the terms or conditions of the plaintiff’s employment. Furthermore, the Court determined, with respect to Jensen, that the severity and frequency of the insults directed towards her raised a material issue of fact as to whether retaliatory harassment permeated her workplace.

Importantly, the Court also discussed the impact that such retaliatory harassment may have on a sexual discrimination claim:

Retaliation against a person based on the person’s complaint about sexual harassment is not necessarily discrimination based on the person’s sex. If the individuals carrying out the harassment would have carried out a similar campaign regardless of the sex of the person making the complaint, the harassment, while actionable as illegal retaliation, would not also be actionable as discrimination based on sex.

The Court further explained, however, that a woman who is subjected to sexual harassment and is then harassed based on that complaint, will almost always raise a question of fact for a jury as to whether the harassment constituted sex discrimination.

Now that *Jensen* is the law in the Third Circuit, Pennsylvania, Delaware and New Jersey, employers may be held liable for retaliation claims based on co-worker

harassment that does not rise to the level of a discharge or demotion. Moreover, summary judgment may be more difficult to achieve for a defendant employer in sexual harassment cases involving retaliatory co-worker harassment. This will unfortunately increase the cost of litigation in such cases.

Please contact Charles J. Kawas, Esquire for further information and assistance at ckawas@cozen.com or (215) 665-2735.

LABOR & EMPLOYMENT ATTORNEYS "IN THE SPOTLIGHT"

Cozen O'Connor's Labor and Employment Law Practice Group presented "Hiring Without Hazard," an educational seminar focused on common hiring questions and issues, at The Four Seasons Hotel in Philadelphia. The seminar examined several hiring-related issues, including: questions one can ask a prospective applicant during a job interview, the type of information that should be included on a job application and the legal consequences of speaking with an applicant's former employer. Speakers were **Jeffrey L. Braff** and **Charles J. Kawas**.

Joy F. Grese recently joined the firm's labor and employment law group, practicing in the Philadelphia office. A resident of Bryn Mawr, Pa., Joy earned her undergraduate degree from the University of Georgia (A.B., *summa cum laude*, 2002), where she was a member of Phi Beta Kappa, and her law degree from Columbia University School of Law (J.D., 2005), where

she was a Harlan Fiske Stone Scholar, managing editor of the *Columbia Journal of Law and Social Problems*, and a clinic student for the Prisoners & Families Clinic. She is admitted to practice in Pennsylvania.

Carrie B. Rosen and **David J. Walton** (Philadelphia) were named 2005 Pennsylvania "Rising Stars" by *Law & Politics* and were listed in the December 2005 issues of *Philadelphia* magazine and *Pennsylvania Super Lawyers* – *Rising Stars Edition*. **Ramona Hunter** (Seattle) was also selected as a "Rising Star" and was featured in *Washington Law & Politics* magazine. Rising Stars is a listing of outstanding emerging attorneys, age 40 and under or practicing 10 years or less.

Jeffrey L. Braff, **Sarah A. Kelly**, and **Jeffrey I. Pasek** were named to Pennsylvania's Super Lawyer list, which was compiled from the results of an independent balloting survey sent to lawyers across the state. The firm is especially proud of this honor because only five percent of Pennsylvania attorneys were named.





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