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Supreme Court Decision Puts Employers at Greater Risk for Age Discrimination Claims



By James P. Wilkins

In a case decided on June 19, 2008, the United States Supreme Court made it more difficult for employers to defend against a claim of age discrimination based on a disparate impact theory. *Meacham v.*

Knolls Atomic Power Laboratory.

In a typical age discrimination case, a plaintiff will attempt to prove that his employer intentionally discriminated on the basis of age. However, in 2005, the Court ruled that an age discrimination plaintiff can also prove a violation of the ADEA based on a disparate impact theory. In such cases, the plaintiff must prove that regardless of an employer's intent, the employer's use of a facially neutral employment practice results in a statistically significant adverse impact on older workers.

The employer in *Meachem* implemented a reduction in force that resulted in the termination of thirty-one employees. In making decisions about who to retain and who to RIF, the employer had its managers score workers based on "performance," "flexibility," and "critical skills." Applying these criteria, thirty of the thirty-one employees who were selected for reduction were over the age of 40. The laid-off older workers filed suit against their employer, asserting both disparate treatment and disparate impact theories of liability.

The jury rejected the plaintiffs' disparate treatment claim, finding that the employer did not intentionally discriminate on the basis of age. However, the focal point of the case became whether the selection criteria used by the employer in making its RIF decisions had an unlawful disparate impact on older workers.

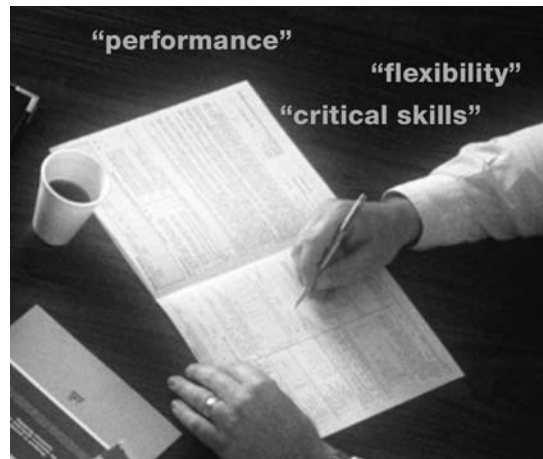
In *Meachem*, the Supreme Court addressed a procedural issue that is both subtle and significant. In response to a plaintiff's proof that the employer's decision had a disparate impact on older workers, an employer is

permitted to argue that the decision it made was based on "reasonable factors other than age." However, the Court clarified that it is not sufficient for the employer to merely meet a burden of production, that is offering some evidence that its decision was based on some reasonable factor other than age. Rather, because the "reasonable factor other than age" is an affirmative defense under the ADEA, the employer bears the greater burden of persuading a jury that it actually relied upon a factor other than age in making its decision and that the factor was "reasonable." The Supreme Court remanded the case to the lower court to determine whether the employer could affirmatively prove its affirmative defense.

The Court's decision in *Meachem* makes it more important than ever for employers to make sure that their employment practices do not have a disparate impact based on age. An employer's first line of defense ought

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to be taking appropriate steps to assure that its decisions do not have a disparate impact based on age or any other protected classification (e.g. race, sex, etc.). For example, once the employer in *Meachem* recognized that the criteria it was using for its RIF decisions would result in 97 percent of the laid off employees being over the age of 40, it should have taken a step back and carefully scrutinized its selection criteria. Failing to do so resulted in years of litigation and substantial attorney fees.



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Employment Applications Should Not Remain Active “In Perpetuity”



By Thomas Evan Green

A recent opinion of the Sixth Circuit Court of Appeals, which covers Ohio, drives home the value of a policy limiting the duration of time in which an employer will consider an employment application “active.” *Yeschick v. Mineta*, April 1, 2008.

The plaintiff in this case, Gary Yeschick, was one of the 10,438 members of the Professional Air Traffic Controllers Organization (“PATCO”) who were fired by the late President Ronald Reagan in 1981. In 1993, President Bill Clinton lifted the rehiring ban that applied to Mr. Yeschick and other PATCO members, and allowed applications for rehire to be submitted to the FAA within a 45-day window. Mr. Yeschick submitted an application within that window, indicating a preference for rehire in the Cleveland, Ohio area. From the time of his application until 1996, however, there was a hiring freeze on controllers in the Great Lakes region. In 1997 and 1998, after the hiring freeze had been lifted, some PATCO controllers, including Yeschick, appeared on two hiring lists for Cleveland-based controller positions. Yeschick, however, was not selected for employment from either of these lists.

As with all employment policies, if an employer elects to have a policy limiting the period of time in which an application will be considered, that policy should be followed consistently.

In 2002, Yeschick learned from another former PATCO controller that the Cleveland FAA office had hired several controllers that were both younger and less qualified than Yeschick. Learning this, Yeschick filed a charge with an internal federal-sector EEO officer, and with the EEOC, alleging age discrimination. After the EEOC charge was processed, Yeschick filed an age discrimination action in U.S. District Court.

The FAA moved for dismissal of Yeschick’s Complaint, arguing that it was untimely. In support of its motion, the FAA pointed out that Mr. Yeschick’s application had been inactive since 2000, and therefore, his 2002 internal EEO complaint and EEOC charge were filed outside the applicable limitations period. The FAA relied on the fact that Yeschick had moved two times since he had applied for rehire, and neither time did he advise the FAA of his new contact information. As such, in 1995, when the FAA sent Yeschick a letter with information about other

possible employment opportunities, the letter was returned by the post office as undeliverable. For that reason, through a random and unscheduled review of the PATCO rehire applications in 2000, Yeschick’s application was deemed “inactive” by the FAA.

Based on these facts, the Court agreed with the FAA and ruled that Yeschick’s 2003 lawsuit was untimely. The Court found that Mr. Yeschick was no longer a candidate for employment at the time of his 2002 complaint and charge, and as such, he was not even considered for the 2002 positions filled by younger controllers. Yeschick appealed that ruling to the Sixth Circuit.

On appeal, Yeschick argued that the expired address explanation was “merely a red herring.” The Sixth Circuit agreed, noting that the FAA had no official or “systematic” policy by which the FAA deemed applications “inactive.” Furthermore, and notably, the Court observed that when Yeschick submitted his application, the recruitment notice indicated that eligible candidates would be ranked each time a vacancy occurred, and candidate referrals could be made “at any time after the closing date.” As such, the Court found that, “the former PATCO applicants could rationally believe that their applications would remain active ‘in perpetuity’ because the notice stated that they could be considered at any time after the closing date. . . .” “[A]lthough Yeschick did not follow up on his application, the FAA gave him reason to believe that his application would remain on file as controller positions became available.”

In light of the Sixth Circuit’s decision, this case was returned to the District Court for further proceedings, which could include a trial.

This case illustrates the practical importance for employers to have a closed time period in which applications for employment will be considered. If the FAA had such a policy in place at the time Mr. Yeschick had applied, his application would have been inactivated by the time the FAA made its 2002 hiring decisions. That policy would have barred his lawsuit – filed nine years after he applied for rehire! Of course, as with all employment policies, if an employer elects to have a policy limiting the period of time in which an application will be considered, that policy should be followed consistently. Although not related to this specific case, employers also should think long and hard about whether to accept employment applications during periods in which they have no plans to hire.

KWWNEWS

In June, Jim Wilkins was elected to serve a one-year term as the Chair of the Board of Trustees of CYO and Community Services of Akron. CYO is a Catholic social services agency that provides services to youth, the disabled, the elderly, and the poor throughout Summit County. Jim has been serving on the CYO Board since 2003.



Industrial Commission of Ohio Amends Policy Statements



By James W. Ellis

In May, 2008, the Industrial Commission of Ohio amended its Policy Statements and Guidelines, which regulate how workers' compensation claims are reviewed by the IC. The amendments included, but were not limited to, changes to policy memoranda regarding the allowance of claims for the aggravation of preexisting conditions, the approval of settlements for state-fund employers, and corrective action for orders finding a violation of a specific safety requirement (VSSR).

Under the Workers' Compensation Act an employer takes its employees as it finds them. As such, the aggravation of a preexisting condition is, generally speaking, compensable under the Act. Prior to the Senate Bill 7 amendments to the Act, which became effective in October 2006, the degree of an aggravation was not a consideration. A claim could be recognized for an aggravation of a preexisting condition if a claimant could show any adverse effect, even if was only subjective complaints of pain. However, after October 11, 2006, a claimant was required to show a "substantial aggravation" of a preexisting condition. Under the amendment "objective diagnostic findings, objective clinical findings or objective test results" were required to establish the substantial aggravation of a preexisting condition.

From October 2006 through May 2008, the IC struggled with the substantial aggravation amendment. It was unclear what evidence was necessary to prove a substantial aggravation, or if a doctor could review a claimant's chart and simply find a "substantial aggravation". The result was complete inconsistency by the hearing officers.

On May 5, 2008, the IC amended its policy on the issue, finding that it was a hearing officer's duty to review the medical evidence and determine if there was a substantial aggravation. Accordingly, the language used by a doctor will have no bearing on whether or not a substantial aggravation of a preexisting condition has been established. Instead a hearing officer will review the medical evidence to determine if a preexisting condition has been substantially aggravated by work-related activities.

Another recent change in IC policy mandates that the IC reject all state-fund settlement applications that do not set forth a reason for the proposed settlement. The Settlement Agreement and Application for Approval of Settlement Agreement (BWC Form C-240) has a section asking for "the circumstances by reason of which the proposed settlement is deemed desirable." In the past it was not uncommon for employers to leave this section blank and still get IC approval of proposed settlements. They will no longer be able to do so.

This change was designed to address the Supreme Court of Ohio's recent decision in *State ex rel. Wise v. Ryan*, which held void an approved settlement that did not provide a reason for the settlement on the C-240. In *Wise*, an unrepresented claimant settled a claim for \$2000. The C-240 settlement agreement did not contain a reason the parties wanted to settle the claim. Despite this, the IC approved the settlement agreement. Years later, the claimant retained an attorney and that attorney sought to set aside the prior settlement due to the incomplete form. The Supreme Court agreed, holding that it was mandatory that the parties provide a reason why settlement is deemed desirable on the C-240.

It is important to note that a reason must be given in support of a proposed settlement when state-fund employers complete a C-240 settlement application.

The change in IC policy instructs all hearing officers to reject any settlement agreement that does not contain a reason for the proposed settlement. Curiously, there is no guidance on what reason(s) will be approved by the IC as "desirable." But, for now, it is important to note that a reason must be given in support of a proposed settlement when state-fund employers complete a C-240 settlement application.

In May 2008, the IC also amended its policy regarding corrective orders when an employer is found to be in violation of a specific safety requirement. The change mandates that hearing officer's include, in any order finding a VSSR, language for the correction of the violation. If a hearing officer determines that no correction is necessary, he or she must indicate that fact in the hearing order. However, orders can no longer be silent on the issue of correcting a VSSR.

Moreover, the policy change states that, if the BWC finds that an employer is not in compliance with a hearing officer's correction order, the Bureau will refer the matter back to the IC as a separate violation of a specific safety requirement. Therefore, if an employer is found in violation of a specific safety requirement, the hearing officer's order must include the time and manner for the correction of the violation. If the employer does not comply with the hearing officer's corrective order, that noncompliance will be treated as a second VSSR.

While the goal is never to be found in violation of a specific safety requirement, the change in IC policy makes it the hearing officer's duty to instruct the employer on correcting the violation. Extreme caution should be exercised in following the hearing officer's corrective language, as the failure to comply with the corrective language may result in a second VSSR.

Supreme Court Decides ERISA “Conflict of Interest” Standard of Judicial Review



By Keith L. Pryatel

On June 19, 2008, the United States Supreme Court decided the standard of review that courts should apply to a fringe benefit claim denial decision where the benefits administrator is operating under a purported “conflict of interest” (*Metropolitan Life Ins. Co. v. Glenn*). The case is an important one because it defines the level of scrutiny federal judges will give to a plan administrator’s decision to deny benefits to a particular claimant-employee.

In the case before it, Metropolitan Life was both the insurer and benefits administrator for a long-term disability insurance plan made available to employees of Sears, Roebuck & Co. The plan document, and its underlying summary plan description, purported to grant MetLife full discretionary authority to determine whether an employee’s claim for benefits was valid. A Sears employee with a debilitating heart condition made application for long-term disability insurance benefits,

in ERISA conflict of interest cases, because it was of the opinion that “benefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways” for there to be just one set of rules. For instance, the Court said that a conflict of interest could prove more important for an insurance company administrator who has a history of biased claims administration, but less important where the administrator has taken active steps to reduce potential bias and promote accuracy.

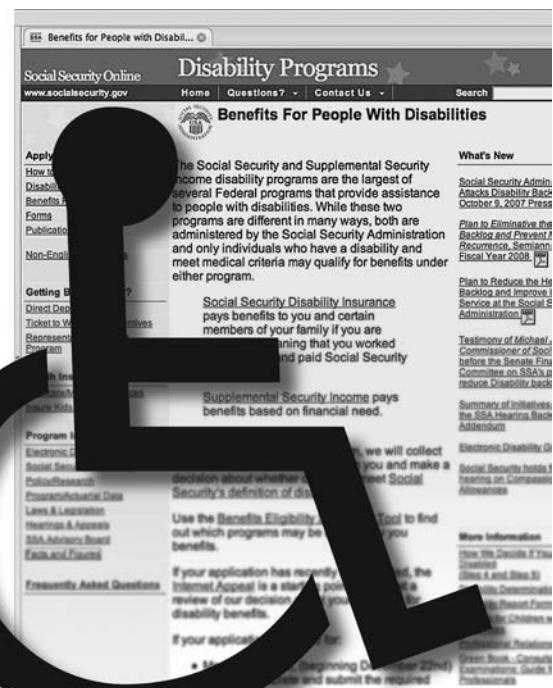
In the case before it, the Court affirmed the Sixth Circuit’s decision that MetLife had abused its discretionary authority in denying long-term disability benefits because of MetLife’s seemingly inconsistent positions. At one point, MetLife encouraged Ms. Glenn to apply for federal social security disability benefits. When she did, and an SSA determination was made that she could not engage in gainful employment for which she was qualified, MetLife then issued a determination directly at odds with the Social Security Administration’s determination. That action, coupled with the apparent “conflict of interest,” was sufficient for the Sixth Circuit to determine that MetLife’s decision-making denying the claim was “arbitrary and capricious.”

While the Supreme Court did not lay down a hard and fast rule for the judiciary to follow in “conflict of interest” ERISA benefit cases, its analysis confirms that such conflicts will enter into the determination of what level of scrutiny will be applied to benefits determinations. In order to gain a more deferential judicial review standard, employers utilizing insurance companies to administer fringe benefits would do well to ensure the insurance companies impose management checks that penalize inaccurate decision-making and wall off claims administrators from those interested in overall insurance firm finances.

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and MetLife initially determined that the claimant met the eligibility criteria, and even encouraged Ms. Glenn to make application for federal social security disability benefits. Later, however, MetLife determined that Ms. Glenn was reasonably qualified to engage in gainful occupational work, a determination that was inconsistent with the Social Security Administration’s finding that she was incapable of performing a broad class of jobs for which she arguably would be qualified. The issue before the Supreme Court was what level of scrutiny should a reviewing federal court apply to a benefits administrator operating under such a “conflict of interest.” That is, since MetLife was both the determiner of claims for benefits and the payor of claims for benefits, it necessarily was operating under a conflict.

The Supreme Court held that where such a “conflict of interest” necessarily exists, it must be weighed as “a factor” in determining whether the plan administrator abused its discretion in denying benefits to the claimant. “Conflicts are but one factor among many that a reviewing judge must take into account,” according to the Court. The Court stopped short of providing a definitive standard of review





Retaliation (With A Twist)



By John W. McKenzie

During a tough economic climate often characterized by employee downsizing and layoffs, employee retaliation claims typically are on the rise. Recently, such claims have made their way to the

Sixth Circuit Court of Appeals but have not been brought by employees, rather third parties.

In an important case for employers to note, the Sixth Circuit in *Thompson v. North Am. Stainless LP* held that an employer does violate Title VII of the 1964 Civil Rights Act where it takes adverse action against relatives or associates of an employee who engaged in protected activity (like filing an OCRC or EEOC charge). In *Thompson*, the North American Stainless employee alleged retaliation after he was fired. His fiancée previously had filed a sex discrimination charge against the company. North American Stainless was granted summary judgment on the basis that Thompson did not have a valid claim. However, the Sixth Circuit reversed, finding that Title VII does prohibit an employer from taking retaliatory action against an employee not involved in protected activity but related to or associated with someone so involved. Notably, while the Sixth Circuit found that such a finding upholds the purpose of Title VII, the Third, Fifth and Eighth Circuits have rejected such third-party retaliation claims.

In another notable but not nearly as far-reaching opinion, the Sixth Circuit overturned a Tennessee District Court summary judgment for an employer in a retaliation case, *Cline v. BWXT Y-12 LLC*. The plaintiff-applicant – who had been previously employed by and had sued the employer for alleged age discrimination – was found to have demonstrated enough evidence for trial based on an allegation the company would not hire anyone in litigation with the company. The court rejected as a

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defense the notion that the actual decision makers had no idea that the litigation involved an age discrimination claim. Consequently, even where an employer might have a neutral company-wide policy against hiring or retaining anyone in litigation against that company – no matter the subject matter – the Sixth Circuit found that such a policy would “necessarily sweep up protected civil rights claims,” and evade anti-retaliation laws. The *Cline* court’s reasoning hints at a public policy approach to retaliation claims.

Pension Protection Act of 2006 – 2008 Impact on Employers



By *Jaime M. Umerley*

The Pension Protection Act (“PPA”) of 2006 was passed in an effort to resolve the chronic underfunding of defined benefit pension plans, including multiemployer pension plans.

Beginning this year, the Act requires that most pension plans become fully funded within a seven year period, with trustees reviewing projections of plan funding status at least once each year. Defined contribution plans (401(k)), profit sharing and money purchase pension plans are not affected by these new funding rules.

Employers who contribute to multiemployer plans are likely to experience increased pension contribution demands in addition to what is required in the employer’s current collective bargaining agreements.

An underfunded defined benefit plan is labeled “endangered” when it is less than 80 percent funded, or where a funding deficiency is projected within seven years. A more severely underfunded plan is labeled “critical” if it is less than 65 percent funded and has a projected funding deficiency within five years or the inability to pay benefits within seven years. Once a plan falls under one of these classifications, the trustees are required to prepare action plans that will improve the funding status over time.

Employers who contribute to multiemployer plans are likely to experience increased pension contribution demands in addition to what is required in the employer’s current collective bargaining agreements.

For example, when a plan is in the “endangered” or “critical” zone, trustees may not accept a collective bargaining agreement that is not consistent with its funding action plans. Nor may trustees allow “endangered” or “critical” status plans to be amended so as to increase benefits unless such action is consistent with the funding action plan. Therefore, both unions and employers will be restricted by the multiemployer pension plans during the bargaining process with regard to benefit increases and pension plan contributions.

Employers contributing to “critical” status plans should be aware that they are now required to pay a surcharge contribution. This surcharge is equal to 5 percent of the contributions outlined in the collective bargaining agreement during the first year that the plan is considered “critical” and will increase to 10 percent thereafter.

Intended to provide an incentive for parties to reach an agreement, the surcharge will terminate once a new contract is negotiated. Alternatively, some multiemployer plans are inviting the parties to reopen their collective bargaining agreement mid-term to adopt higher pension contribution rates. By agreeing to higher pension contributions mid-term, the employer can avoid the surcharges.

The PPA also has resulted in additional disclosure requirements for multiemployer plans. The annual funding notice, which is provided to participants, employers, unions and government agencies, must now be sent out by 120 days after the end of the plan year (rather than up to 11 ½ months after the years ends) and must include expanded information. Trustees must notify participants and employers when plans are discovered to be “endangered” or “critical”, and must detail options for fixing the problems, including the trustees’ strategy and the consequences for participants if its action plan is not successful.

Overall, the PPA has effectively increased the cost of funding plans and has added new obligations for trustees and employers in reaching and maintaining a fully-

funded classification. Despite these changes, employers can take steps to protect their financial interests. For example, employers may have to negotiate different economic provisions in order to cover the added charges and pension liabilities imposed by the PPA. In the end, all participating employers should make it their business to be aware of the funding status of their multiemployer plans.





Ohio Healthy Families Act Update: Beware of Definitive Opinions



By *Lisa A. Kainec*

Many of our clients and friends have called and emailed with questions and concerns about the proposed Ohio Healthy Families Act legislation. For good reason! This proposed legislation presents a host of problems for Ohio employers and for employment attorneys alike. There are many aspects of the legislation that are unclear and susceptible to more than one reasonable interpretation.

We are aware that many organizations have published fact sheets and articles attempting to explain the legislation. We also know that our clients have attended presentations where various attorneys have shared their interpretations of this legislation. Based upon our review of the proposed law, we disagree with many of those interpretations! In fact, the Ohio Legislative Service Commission has recognized that the intent behind certain provisions of the proposed statute “is not entirely clear.”

Before this proposed legislation is placed on the election ballot for November, the proponents of the legislation must present the requisite number of valid petition

signatures before August 6. While many commentators fully expect that this will happen, that first hurdle nonetheless must be cleared.

In the meantime, any employer with 25 or more employees should review its existing paid leave policies and consider the potential impact of this proposed paid sick leave requirement. Employers have an opportunity before the November 4th election to review and revise their existing policies in anticipation of this potential new law. Such revisions may not be possible after its enactment, depending on how the proposed law

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ultimately is interpreted. For more guidance about the options available and to understand the risks and benefits associated with those options, please join us for our Client Seminar on September 9, where we will present a panel discussion on the Ohio Healthy Families Act. You can join in as we wrestle with the proposed statute and its interpretation.

Legislative Watch & Update



By **John W. McKenzie**

In late June, the U.S. House of Representatives approved amendments to the Americans With Disabilities Act (ADA). While certain U.S. Supreme Court decisions have narrowed the ADA's definition of disability, the proposed legislation is designed to clarify as well as expand the definition of individual entitled to ADA protections based on "disability." Stay tuned.

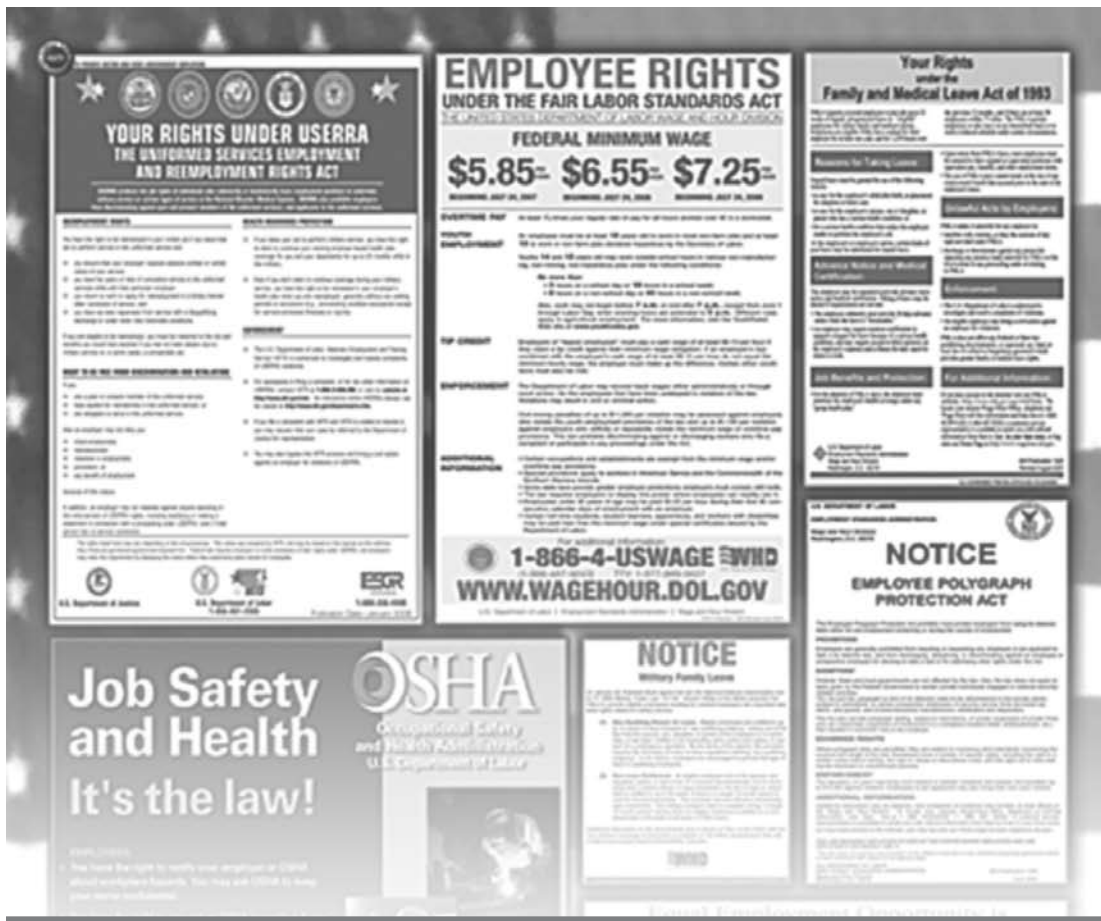
The Employee Misclassification Prevention Act ("Act") was introduced into two U.S. House of Representative Committees in late May. The Act would amend the Fair Labor Standards Act to require additional employer recordkeeping and would increase penalties against employers who "repeatedly or willfully" misclassify employees as independent contractors. With the prospect of such legislation becoming law in the future, it is critically important that employers recognize the

legal distinctions between employees and independent contractors. KWW can help with the necessary case by case analysis.

On June 16, 2008, the U.S. Citizenship and Immigration Services released a newly dated I-9 form for employers. The substance and nature of the form have not changed from the 2007 version, but I-9 forms now have expiration dates. Employers also should note that I-9 inspections are increasing across the Country.

With the prospect of such legislation becoming law in the future, it is critically important that employers recognize the legal distinctions between employees and independent contractors.

Additionally, all employers should update their Minimum Wage posters, as the federal minimum wage increases effective July 24, 2008 from \$5.85 to \$6.55 per hour.



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