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Governor Signs Fundamental Change In Illinois Human Rights Act

On August 17, 2007, Governor Blagojevich signed an amendment to the Illinois Human Rights Act—an amendment that will usher in a sea-change in how charges of discrimination are processed and adjudicated in Illinois. Although the first effects of the amendment allowing discrimination claims to be pursued in state court may not be felt until late 2008 or early 2009, the change in the law will fundamentally alter the litigation strategies of employment discrimination plaintiffs and defendants in Illinois – as well as the risks to employers.

To fully understand the effect of the amendment, it is important to understand the current process. Currently, any charge filed under the Illinois Human Rights Act ("IHRA") is initially investigated by the Illinois Department of Human Rights ("IDHR"). The IDHR ultimately issues a decision on the charge, either finding substantial evidence to support the charge or finding no substantial evidence. A substantial evidence finding results in the charge being sent to the Illinois Human Rights Commission ("IHRC"), where the case would be heard by an Administrative Law Judge in a process similar to court litigation. A finding of no substantial evidence means that the case is terminated, unless the complainant is successful in appealing the decision to the Chief Legal Counsel of the IDHR, or the charge has been "cross-filed" with the EEOC and the complainant obtains a Right to Sue letter from the EEOC and files a lawsuit in federal court.

Now, beginning with charges filed January 1, 2008, complainants will be able to bypass the

IHRC and take their claims to a jury in Illinois Circuit Court. If the IDHR dismisses the charge, the complainant will have the choice between appealing the "no substantial evidence" finding to IHRC or filing a lawsuit in state court. Even if the IDHR finds "substantial evidence," the complainant will have the option of proceeding before the IHRC or the state court.

It is expected that most complainants who are successful in front of the IDHR will avoid the IHRC (where the administrative law judges generally did not award significant compensatory damages) and will file in state court. Plaintiffs' attorneys will probably feel that they have a better chance of succeeding – and recovering large damage awards – before a state court jury than before an IHRC Administrative Law Judge. Therefore, we are likely to see many more cases where the IDHR found "no substantial evidence" landing in court. In fact, many discrimination cases that would now go to federal court are likely to be filed in state court.

At this point, the ultimate impact of the IHRA amendment cannot be known. But judging from how employment discrimination cases are handled in other states that allow for state court trials of employment claims, by the end of the decade it is likely that a substantial portion of employment discrimination cases in Illinois will be filed in state court – and the overall cost to many Illinois employers will be much higher than they experienced in IHRC proceedings.

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New Construction Industry "Independent Contractor" Law In Illinois

On August 6, 2007, Illinois Governor Blagojevich signed into law a bill entitled the Illinois Employee Classification Act of 2007. This new

law, effective January 1, 2008, will punish construction contractors who wrongfully treat an employee as an independent contractor. Supporters of the law estimated that \$124.7 million in income tax was

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lost in Illinois from 2001 through 2005 because of misclassification of workers.

The new Act provides that an individual performing construction services for a contractor – including “moving construction related materials on the jobsite to or from the jobsite” – is deemed to be an employee of the contractor unless it is shown that:

- ♦ the individual is free from control or direction over the performance for the contractor;
- ♦ the service performed is outside the usual course of services performed by the contractor;
- ♦ the individual is engaged in an independently established trade, occupation, profession or business; or
- ♦ the individual is deemed to be a legitimate sole proprietor or partnership (as narrowly defined in the Act).

The Illinois Department of Labor (“IDOL”) is charged with preparing posters in English, Spanish and Polish concerning the requirements of the law and the procedure for enforcement. All contractors who use individuals that are not classified as employees under the Act must post the notice prepared by the IDOL. “Any interested party,” including workers, competing construction contractors, private interest groups and unions, may file a complaint with the Department of Labor. The Department has the power to conduct an investigation and may: (i) issue a cease and desist order; (ii) take affirmative or other action deemed reasonable; (iii) collect any amount of wages, salary or employment benefits or other compensation denied or lost to the individual; and/or (iv) assess a civil penalty.

An employer who has violated a valid Order of the Department may be held in contempt of court. Monetary penalties are \$1,500 for each violation found in the first audit, followed by a penalty not to exceed \$2,500 for each repeat violation within a five-year period. After the second or subsequent violation within a five-year period, the IDOL shall bar the employer from state contracts until four years have elapsed after the date of the last violation. Willful violations shall be punished by penalties of up to double the statutory amounts. Also, an employer who willfully violates this Act shall be subject to a Class C Misdemeanor. A second or subsequent willful violation within a five-year period subjects the employer to a Class 4 Felony. The law precludes any retaliation by an employer against an employee who complains about a violation of the Act.

The Act also provides for a private right of action by any interested party or person aggrieved by a violation of this Act. A lawsuit may be brought in Circuit Court in the county where the alleged offense occurred. Any person incorrectly classified as an independent contractor may recover wages, salary and employment benefits, as well as compensatory damages up to \$500 and, in the case of unlawful retaliation, all legal or equitable relief – as well as attorney’s fees and costs (which could even overshadow the backpay). Accordingly, any construction industry employer that uses individuals as “independent contractors” must carefully evaluate whether they can satisfy the strict requirements for independent contractors or whether they should start treating those individuals as employees.

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Employee Religious Beliefs Given Broad Protection

When an employee will not comply with his employer’s policies and procedures intended to ensure compliance with state law, can the employer suspend that employee for noncompliance? If the employee states a religiously-motivated reason for the noncompliance, possibly not. In *Vandersand v. Wal-Mart Stores, Inc.*, No. 06-3292, the U.S. District Court for the Central District of Illinois found that a pharmacist could pursue an action for religious discrimination claim because his employer suspended him for refusing to sell emergency contraception.

On April 1, 2005, Illinois enacted an administrative rule requiring pharmacies, upon receipt of a valid prescription, to dispense contraceptive devices, including emergency contraception, without delay. Ill. Admin. Code tit. 68, § 1330.91(j). A few

months after the rule became permanent, Ethan Vandersand, a licensed pharmacist at the Wal-Mart in Beardstown, Illinois, received a phone call from a woman identifying herself as a nurse practitioner. The nurse practitioner asked Vandersand if he would dispense emergency contraceptives to her patient. Vandersand replied that he would not.

Vandersand informed his supervisor of the incident, stating that he violated the rule because of his religious beliefs. Wal-Mart allowed Vandersand to choose between being terminated immediately or being placed on unpaid leave of absence. Vandersand chose unpaid leave of absence and subsequently filed a lawsuit claiming religious discrimination in violation of Title VII of the Civil Rights Act of 1964 and a violation of the Illinois Health Care Right of Conscience Act, 745 Ill. Comp. Stat. 70/1 *et. seq.*

Generally, a plaintiff in a religious discrimination case must prove: (1) the person engaged in a religious observance or practice that conflicts with an employment requirement; (2) the person called the religious observance or practice to the attention of the employer; and (3) the religious observance or practice was the basis for the employer's adverse employment action against that person. Vandersand claimed that Wal-Mart discriminated against him based on his religion because: (1) his opposition to emergency contraception is part of his religious belief; (2) Wal-Mart knew he refused to dispense emergency contraception because of these religious beliefs; and (3) Wal-Mart took an adverse employment action against him because of his religious beliefs.

In response to Vandersand's Title VII claim, Wal-Mart argued that it could not be held liable for discrimination because it was simply complying with the Illinois rule requiring that it immediately dispense emergency contraception. However, the court found the rule does not require each individual pharmacist to comply with the rule; rather, the rule only requires that each pharmacy comply with the rule. The court reasoned that Wal-Mart might have complied with the rule without requiring Vandersand to dispense the emergency contraception by asking another Wal-Mart pharmacist to fill the prescription.

In response to Vandersand's Illinois Right of Conscience Act claim, Wal-Mart argued the Act is limited to those professionals and institutions listed in the Act (physicians, nurses, paraprofessionals, or health care facilities), or alternatively,

only to those that can be classified as "health care personnel." The court dismissed this argument. Instead, the court broadly defined the Act to find it covers "[a]ny person, including Vandersand, who refuses to participate in any way in providing medication because of his conscience is protected by the right of conscience act." (emphasis added).

Because of the court's denial of Wal-Mart's motion to dismiss the Complaint, the case can now proceed to trial for the court to determine whether Vandersand has in fact been discriminated against. Even though any fact issues in the case have not been resolved, this decision does provide some helpful insight as to how the court views a conflict between an employee's religious beliefs and related state law or company policies. First, because the court found that compliance with the Illinois rule may be achieved by utilizing different employees who are not religiously opposed to the rule, employers should closely scrutinize their handling of such conflicts to determine if an accommodation can be made without unduly burdening the company. Second, because the court found that the Illinois Right of Conscience Act protects not just those in the health-related or medical profession, but rather protects *any* person who refuses to participate in any way in providing a form of health care services, employers should not limit religious accommodations to those employees who directly provide health care services. Under the court's reading of the Act, even the cashier conducting the final sale of an emergency contraception might be protected when he or she refuses to complete the sale for religious reasons.

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EEOC Finds Singing Rap Lyrics With Racial Slurs To Be Harassment

The EEOC recently filed suit in California against Novellus Systems, Inc. ("Novellus"), claiming that Novellus violated Title VII of the 1964 Civil Rights Act by allowing an African-American employee to be subjected to racial harassment. *EEOC v. Novellus Sys. Inc.*, Case no. 07-4787. According to the EEOC, Cooke had worked at Novellus for about ten years when a Vietnamese co-worker began taunting Cooke by playing and singing along to rap lyrics that included the "N" word and by using racial epithets independently of the music. Cooke asked the co-worker to stop and complained to his immediate supervisor, but his supervisor allegedly took no steps to stop the racially offensive conduct. When Cooke took his complaint to higher management, the company issued a rule barring the playing of racially offensive lyrics in the workplace. However, the EEOC believes the company waited too long to act, since Cooke had allegedly endured five months of racial harassment before the company took action.

The EEOC also contends that Novellus retaliated against Cooke by changing his start time and by eventually terminating his employment. The change in start time interfered with

Cooke's ability to care for his ailing father. Also, Cooke was one of two employees, both of whom were Africa-American, laid off by Novellus. Although Novellus eventually recalled the other laid-off employee, it never rehired Cooke.

In its complaint, the EEOC requests injunctive relief, Cooke's reinstatement and compensation for past and future pecuniary losses, as well as damages for nonpecuniary loss, such as pain and suffering, emotional distress, and humiliation. The EEOC also asks the court to award punitive damages against Novellus for malicious and reckless conduct.

The fact that the EEOC filed a Complaint on behalf of Cooke demonstrates the importance of every supervisor and manager knowing that he or she has a duty to properly investigate an employee's claims of discrimination and harassment and, if necessary, taking action to put an end to such behavior. As an EEOC spokesperson has stated, "we are concerned when we find that an employer failed to respond promptly after being put on notice of racially offensive language or conduct in the workplace."

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California Court Holds That Employment Claims By Bank Vice President Are Not Preempted By The National Bank Act

Under the National Bank Act (“NBA”), national banks are entitled “[t]o elect or appoint directors, and by its board of directors, to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and to appoint others to fill their places.” The NBA has been interpreted as providing national banks with broad discretion to hire and fire bank officers as they choose. As a result, if a person is a president, vice president, cashier, or “other officer” of a national bank within the meaning of the NBA, any claims brought by him or her for violation of employment contract or alleged discrimination are preempted in whole or in part by the NBA.

But a California Court of Appeal has recently ruled, in *Ramanathan v. Bank of America*, A113611, that employment claims brought by a bank vice president under California law were not preempted by the NBA because the plaintiff was not vested with the duties or responsibilities normally associated with a “vice president” position, and he did not meet the court’s four part test of what constitutes an “officer.” The Court of Appeal held that the bank’s internal classification of the employee as a “vice president” was not dispositive of the issue of whether the employee was covered by the NBA.

The bank vice president in *Ramanathan* sued Bank of America for wrongful termination in violation of public policy and discrimination on various grounds. The trial court granted

summary judgment in favor of Bank of America, accepting the bank’s argument that Ramanathan’s claims were preempted by the NBA because he was a “vice president.” On appeal, the California Court of Appeal first rejected Bank of America’s argument that Ramanathan was a “vice president” within the meaning of the NBA. In the Court’s opinion the title was “honorific” in nature and “not vested with any of the duties or responsibilities normally associated with such a position.” The court then weighed whether Ramanathan’s position might constitute an “other officer,” within the meaning of the NBA. Citing a California Supreme Court decision, *Wells Fargo Bank v. Superior Court*, 53 Cal. 3d 1082 (1991), the court stated that in determining who constitutes an “officer” within the meaning of the NBA the court looks at whether:

- (1) the employee holds an office created by the bank’s board of directors and listed in the bank’s bylaws;
- (2) the employee is appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws;
- (3) the employee has the express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts or other legal instruments on the bank’s behalf; and
- (4) the employee’s decision making authority, even if limited by bank

policy, relates to fundamental banking operations in such a manner as to potentially affect the public’s trust in that banking institution.

Applying the four-part test to Ramanathan’s position, the Court of Appeal concluded that Ramanathan was not an “other officer” within the meaning of the NBA. Rather, Ramanathan was a “web architect” whose primary responsibilities at the bank were “assisting with architecture, design and development of software applications using web technologies;” he was not responsible for supervising, hiring or firing other employees; he was not responsible for entering into any contracts on behalf of the bank; and, he was not given access to financial or mortgage documents or other information pertaining to the Bank’s relationship with its customers. Thus, Ramanathan’s duties did not meet the four-part test, and the case was sent back for trial.

Although this case is only binding in California, many other states often look to California for guidance in analyzing legal issues. Therefore, banks in other states should pay heed to the court’s finding here – assuming that it is not reversed by the California Supreme Court before the issue is raised again.

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Court Finds That Disclosure Of Employee's Race Does Not Violate Title VII

Eric Longmire filed suit in a New York Federal Court against his employer Wyser-Pratte Management Co. (“Wyser-Pratte”), a Wall Street investment firm, alleging that Wyser-Pratte violated Title VII of the 1964 Civil Rights Act when it threatened to reveal his true racial identity. Longmire was the son of an African-American father and a white mother. He decided to try to “pass” as white because he believed that racial discrimination was prevalent in investment firms on Wall Street. Shortly after he was hired in 1991, Longmire confided in Wyser-Pratte’s president that he was African-American and asked that his racial background remain a secret. Longmire’s employment with Wyser-Pratte ended in 2004, when he claims that the corporation’s president demanded that he testify falsely in the president’s divorce proceeding or he would disclose Longmire’s racial secret. When Longmire refused, he was terminated and this suit followed.

A federal court in New York has now granted summary judgment in favor of the company, finding that Longmire’s claim regarding the disclosure of his racial identity failed to

state a cause of action under Title VII of the 1964 Civil Rights Act or state and city employment discrimination laws. Specifically, the court held that no federal statute, including Title VII, expressly extends privacy protection to factual information regarding a person’s race. The court also rejected Longmire’s Constitutional “zone of privacy” argument. The court reasoned that, since Wyser-Pratte was not a governmental official or a private party acting under color of state law, there was no zone of privacy afforded to the disclosure of Longmire’s racial background. *Longmire v. WyserPratte*, Case no. 05-6725. It is unlikely that many employees will have a claim similar to that of Longmire. However, in view of the fact that employers are now obligated to seek self-identification of their employees’ race in order to comply with EEO-1 regulations, this case may provide useful precedent in the event that there is ever disclosure of the information gathered.

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Card Check Recognition Can Be Quickly Challenged By Decertification Petition

Over the last 70 years, recognition of a union as the exclusive representative of employees has generally been the result of a secret ballot election conducted by the National Labor Relations Board (“NLRB”) in accordance with procedures under the National Labor Relations Act (“NLRA”). But in the last several years, organized labor has pushed hard for employers to sign neutrality pacts and agree to recognize a union based on checking authorization cards signed by the employees. In the hospitality industry, for example, UNITE HERE! (the principal union representing hotel and restaurant workers) has pushed for – and obtained – written commitments from the larger hotels in many cities (including Chicago) to remain neutral in any union organizing attempt and to recognize the union based upon an independent third party reviewing signed authorization cards obtained by the union.

But the NLRB, which is responsible for enforcing federal labor law, apparently does not see the issue the same way as the unions. In a September 29 decision involving a petition to decertify a union that had obtained bargaining rights as a result of a card check agreement, a 3-2 majority of the NLRB noted: “both the [NLRB] and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card-check.” *Dana Corporation*, 351 NLRB No. 28.

The case involved two employers, Dana Corporation and the Metaldyne Corporation, that had signed neutrality and card check agreements with the UAW. Both companies recognized the UAW based on the union showing that a majority of employees had signed authorization cards. Shortly after this recognition, however, employees at both companies filed decertification petitions with the NLRB. A decertification petition involves a secret ballot election to get rid of a union. The Regional Director for the NLRB dismissed the petitions, based upon a long-held doctrine that a decertification petition is barred for a “reasonable period of time” following an employer’s voluntary recognition of a union (in contrast to the one year bar imposed when the union is elected through an NLRB-conducted secret ballot election).

Finding that a decertification petition should not be barred where an employer has entered into a neutrality pact and recognized the union through a card check, the NLRB majority set out new rules for such a situation. Effective September 29, 2007 (i.e., the date of the decision), there will be no bar to a decertification petition following card-check recognition unless: (1) the employees receive notice of the union recognition and of their right to file a decertification petition or to support the filing of a petition by another union within 45 days of the notice; and (2) 45 days pass from the posting date of the notice without the filing of a valid petition. In changing the rules, the

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NLRB not only noted the preference for a secret ballot election conducted by the NLRB, it specifically noted that card check arrangements “are public actions, susceptible to group pressure” and that “union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees representational options.”

It is likely that the unions will appeal this decision to a federal court of appeals. Even if the ruling in *Dana* is upheld, however, it leaves a number of issues still open – which will undoubtedly result in even more NLRB pro-

ceedings dealing with the effectiveness of union recognition when compelled by neutrality and card-check arrangements. Of course, this can become moot if Congress passes (and a new President signs) the “Employee Free Choice Act” that would amend the NLRA to provide a preference for card-check agreements. See *Labor and Employment Law Newsletter*, Vol. XIV, Issue 2 (April 2007).

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Social Security No Match Regulations Placed On Hold

In the last issue of our Newsletter (August 2007), we reported on the federal regulations that had been issued with respect to “no-match letters” sent by the Social Security Administration. The regulations, known as the “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,” provided a specific series of actions that an employer must take when receiving a no-match letter. However, shortly after the Safe-Harbor regulations were issued, a consortium of unions and business groups filed a motion for preliminary injunction, contending that the regulations were invalid for a variety of reasons. On October 10, the United States District Court for the Northern District of

California issued an injunction. *American Federation of Labor v. Chertoff*, Case No. C 07-04472 CRB. Therefore, for now, employers are not required to follow the procedures set forth in the regulations and, more importantly, are not required to terminate employees who fail to remedy a no-match letter within the 90-day deadline set forth in the regulations.

As this issue develops, we will continue to keep our readers informed.

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