

Management Update  
July 2009

## DHS Will Implement Federal Contractor E-Verify Requirements And Rescind Stalled No-Match Regulation

On July 8, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano announced that the Department intends to implement a Bush-era rule mandating the use of E-Verify by federal contractors and subcontractors. Additionally, Secretary Napolitano announced that DHS is rescinding its controversial "No-Match" regulation.

### ***Implementation of E-Verify Requirements for Federal Contractors***

In June 2008, President Bush issued an Executive Order requiring federal government contractors use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of employees performing federal contract work. Former DHS Secretary Michael Chertoff designated the federal E-Verify program as the system to be used in accordance with the Executive Order. E-Verify is the federal government's web-based employment verification program that compares information from an individual's Form I-9 against federal government databases to verify workers' employment eligibility. For a discussion of the Executive Order, see our June 13, 2008, Legal Alert, available at <http://www.fordharrison.com/shownews.aspx?show=3953>.

Subsequently, the federal agencies charged with implementing the Executive Order issued a rule amending the Federal Acquisition Regulation (FAR) to require federal contractors and subcontractors use the E-Verify program and setting forth federal contractors' responsibilities under the Executive Order. For a more detailed discussion of this rule, see our November 14, 2008, Legal Alert, available at <http://www.fordharrison.com/shownews.aspx?show=4295>.

However, the federal contractor E-Verify rule has been subject to legal challenge in federal court by a coalition of business groups led by the U.S. Chamber of Commerce, who claim the Executive Order and rule violate the Illegal Immigration Reform and Immigrant Responsibility Act's express statutory prohibition against requiring participation in the E-Verify program. As a result of the lawsuit, implementation of the rule has been postponed four times since it was published. The most recent postponement pushed the effective date back to September 8, 2009. Although the lawsuit is still pending, DHS stated in a recent press release, "the Administration will push ahead with full implementation of the [federal contractor E-Verify] rule, which will apply to federal solicitations and contract awards Government-wide starting on September 8, 2009."

### ***No-Match Regulation to be Rescinded***

DHS also announced that it will rescind its controversial No-Match regulation, which set forth a "safe harbor" for employers who receive letters from the Social Security Administration stating that an employee's Social Security Number does not match the agency's records. The safe harbor

required employers to take certain steps to resolve the discrepancy within a certain period of time or face liability. Shortly after being issued in 2007, the No-Match regulation was challenged in court, subject to an injunction and has never been implemented.

### ***Employers' Bottom Line:***

Although it is not clear how the lawsuit challenging the federal contractor E-Verify rule will ultimately affect its implementation, federal contractors and subcontractors covered by the rule should be prepared to comply with the E-Verify requirements for new federal contracts awarded after September 8, 2009. Ford & Harrison attorneys will be providing more detailed information regarding compliance with the rule. In the meantime, if you have questions regarding the E-Verify requirements or other business immigration issues, please contact Charles Roach, [croach@fordharrison.com](mailto:croach@fordharrison.com), 612-486-1631, or any member of Ford & Harrison's Business Immigration Practice Group. •

### Recent Court Decisions Provide Guidance On Fair Pay Act

After being signed into law by President Obama in January 2009, the Lilly Ledbetter Fair Pay Act as written left employers and others in the dark as to how broadly it would be interpreted by courts and what would be considered a "discriminatory compensation decision or other practice." The Fair Pay Act overruled the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), which held that the time period for bringing a compensation-related charge with the EEOC begins to run on the date the discriminatory decision was made and not with each paycheck received by an employee. In response to this decision, Congress enacted the Fair Pay Act, which now permits employees to bring claims that would have been untimely under the Court's ruling.

Under the Fair Pay Act, an unlawful employment practice occurs when: (1) the discriminatory pay decision is made; (2) "an individual" becomes subject to the discriminatory pay decision; or (3) "an individual is affected by the discriminatory compensation decision or other practice." The Act is ambiguous in that it does not define "other practice."

Courts around the country, however, have recently begun interpreting the Act and the meaning of what constitutes a "discriminatory compensation decision or other practice." In a recent opinion from the Southern District of Mississippi, an employee filed suit against her employer alleging she was denied tenure and a related salary increase because of her gender in violation of Title VII. *See Gentry v. Jackson State University* (S.D. Miss. April 17, 2009). Her employer sought summary judgment because the denial occurred in 2004 and the employee did not file her charge of discrimination with the EEOC until 2006, well after the 180 days provided by Title VII for the timely filing of a charge of discrimination.

The court acknowledged that the tenure denial itself was a discrete act of which the employee obviously was aware because the denial of tenure also meant that she was denied a salary increase. However, the court denied the employer's motion for summary judgment, finding that

the denial of tenure, which the plaintiff claimed negatively affected her compensation, qualified as a "compensation decision" or "other practice" affecting compensation within the Fair Pay Act.

In reaching its decision, the court relied in part on an opinion from the Eastern District of New York, which similarly found that an employee's EEOC charge against his employer for a refusal to propose the plaintiff for appointment to associate or full-time professor with tenure two years earlier was timely. *See Rehman v. State University of New York at Stony Brook*, (E.D. N.Y. 2009). The court also cited a decision from the District of Delaware, which held that under the Fair Pay Act a plaintiff's failure to promote claim was timely. *See Shockley v. Minner* (D. Del. March 31, 2009). Additionally, the court cited a decision from the Middle District of Florida, which held that plaintiffs' complaints about demotions and pay reductions that occurred sixteen years before an EEOC charge was filed were timely under the Fair Pay Act. *See Bush v. Orange County Corrections Dept.* (M.D. Fla. 2009).

If these decisions are any indication of how other courts are likely to rule, many cases that would have once been deemed to be untimely will be considered timely, and as a result, claims will be made years after the alleged discriminatory pay decision was made. Further, it is becoming clearer now how courts may interpret "other practice" under the Act.

If you have any questions regarding this article, please contact the author, Diane Perez, an attorney in our Miami office, [dperez@fordharrison.com](mailto:dperez@fordharrison.com) or 305-808-2132, or the Ford & Harrison attorney with whom you usually work. •

#### Nevada Supreme Court Clarifies Rule Regarding Assignability Of Restrictive Covenants

In a case handled by Ford & Harrison attorneys, the Nevada Supreme Court recently held that its rule prohibiting the assignment of noncompetition agreements in an asset purchase does not apply in the context of a corporate merger. *See HD Supply Facilities Maintenance Ltd. v. Bymoer* (Nev. June 11, 2009).

In this case, Bymoer signed noncompetition, nonsolicitation and confidentiality agreements with his original employer, which ultimately became part of HD Supply through a series of mergers. Bymoer subsequently resigned from HD Supply and was hired by a competitor of the company. HD Supply sued to enforce the noncompetition agreement. In response, Bymoer argued that the agreement was unenforceable because the noncompetition agreement did not contain an assignment clause as required by the Nevada Supreme Court's 2004 decision in *Traffic Control Services v. United Rentals* (2004). In *Traffic Control* the Court held, "absent an agreement negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration, employee noncompetition covenants are not assignable."

The Court in *HD Supply* rejected this argument, finding that the requirements of *Traffic Control* do not apply in the context of a corporate merger, but instead are limited to situations involving an asset purchase. The Court held that the decision in *Traffic Control* was based on the common law of contractual assignments, which holds that personal services contracts (such as noncompetition agreements) are not assignable absent consent of the parties. The Court found

that this rule makes sense in the contractual setting of an asset purchase because that transaction introduces into the equation an entirely different entity, the acquiring company.

However, the Court found that this rule does not apply in the context of a corporate merger because in a merger two corporations unite to form a single corporate entity that shares a continuity of existence with the merging companies. The Court also held that where, as here, a relevant merger statute exists, the issue of a covenant's assignability is not controversial. The Court noted that the majority of courts to have considered the issue have found that in a merger, the right to enforce the restrictive covenants of a merged corporation normally vests in the surviving entity.

Accordingly, based upon the distinction between mergers and asset purchases, the Court held that *Traffic Court's* rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger.

If you have any questions regarding this decision please contact the Ford & Harrison attorneys who represent HD Supply, Dawn Siler-Nixon, [dsiler-nixon@fordharrison.com](mailto:dsiler-nixon@fordharrison.com), 813-261-7834 or Dinita James, [djames@fordharrison.com](mailto:djames@fordharrison.com), 602-627-3520 or the Ford & Harrison attorney with whom you usually work. •

U.S. Supreme Court Update

### **Supreme Court Sets New Standard for Evaluating Disparate Treatment Versus Disparate Impact**

In *Ricci v. DeStefano* (June 29, 2009), a 5-4 decision, the Court held that the mere desire to avoid liability under Title VII's disparate impact provision does not automatically justify a conscious decision to violate the statute's disparate treatment provision. Title VII's disparate treatment provision prohibits intentional discrimination on the basis of a protected category, while the disparate impact provision prohibits certain practices that are not intended to discriminate but, in fact, have a disproportionately adverse effect on minorities. Recognizing the difficulty employers may face in balancing these competing interests, the Court adopted a "strong basis in evidence" test to be used in such situations. Under this standard, employers must demonstrate that a strong basis in evidence exists that their actions might violate Title VII's disparate impact provisions before employers can make race-based decisions.

Applying the standard in this case, the Court held that several white and Hispanic firefighters were entitled to judgment in their favor on their claims that the City of New Haven intentionally discriminated against them when it refused to certify the results of tests administered to determine which firefighters qualified for promotions. The City refused to certify the test results based on a concern that the tests had a disparate impact on minorities. However, the Court held that the City failed to show that it had "an objective, strong basis in evidence to find the tests inadequate."

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## **Court Rejects "Mixed Motive" Age Discrimination Claims**

In *Gross v. FBL Financial Services, Inc.* (June 18, 2009), a 5-4 decision, the Court held that to prevail on an ADEA claim, the individual claiming discrimination must prove that age was the "but-for" cause of the alleged adverse employment action – i.e., that the employer would not have taken the adverse employment action but for the individual's age.

This decision means that individuals suing for disparate treatment under the ADEA can no longer prevail by showing that the employer acted with "mixed motives," one of which was the individual's age. Before this decision, many courts permitted individuals bringing age discrimination claims to show that age was one of the reasons for the adverse employment action and required employers to prove that they would have taken the adverse action regardless of age.

Under the Court's decision, "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."

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## **Supreme Court Finds No Current Violation of Title VII Based on Pre-PDA Leave Credit Policy**

In *AT&T Corp. v. Hulteen*, (May 18, 2009), the Court held that an employer does not necessarily violate the Pregnancy Discrimination Act (PDA) by paying pension benefits calculated, in part, based on a system that did not give full credit for time spent on maternity leave but did give full credit for other types of medical leave, where the maternity leave accrual policy was applied only prior to the enactment of the Pregnancy Discrimination Act. In reaching this conclusion, the Court held that there was no necessary violation and that the benefit calculation rule in this case was part of a bona fide seniority system under § 703(h) of Title VII, which insulates it from challenge.

Additionally, the Court held that the PDA does not apply retroactively, noting that there was "no indication at all that Congress had retroactive application in mind" when it enacted the PDA. •