CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

RETAILER

The Express Lane

Retailer's Recap
Trouble Looms Under the ADAAA
Noteworthy Numbers
U.S. Department of Labor Spells Out Rules On Unpaid Internships

By Toby Dykes and Tam Yelling
Birmingham, AL

Retailer's Recap

Are credit checks going the way of the mechanical cash register? Nobody, it seems, wants employers to use credit checks as criteria for making hiring or promotion decisions any more. Except employers. The Equal Employment Opportunity Commission has said that credit checks do not predict future job performance and can have a racially disparate impact. (In other words, they tend to exclude a disproportionate number of applicants or candidates from certain minority groups.) As of the date of this publication, four states have passed statutes prohibiting employers from conducting credit checks in connection with the employment process, and legislation is pending (although currently stalled) in Congress to amend the Fair Credit Reporting Act to contain a similar prohibition. The good news for retailers is that the courts continue to recognize that credit history is relevant for individuals who will be working in cash-handling positions, and the state statutes and the proposed federal legislation all contain exceptions for certain "finance-related" positions.

Plan/Prevent/Protect will radically change retailers' safety, wage-hour compliance obligations. When it comes to workplace safety and wage-hour compliance, as well as equal employment opportunity, an employer has been considered "innocent until proven guilty." Although it may not always seem that way to employers, the government, or a charging party, or a plaintiff, has the burden of proving that the employer did something unlawful. If the employer audits itself and finds a problem, it is usually allowed to correct the problem without advertising it to employees or the government.

The U.S. Department of Labor is proposing to change that longstanding principle with its **"Plan/Prevent/Protect"** initiative. Under Plan/Prevent/Protect, employers will be required to prepare written plans in which they identify "problems" and propose solutions to resolve them. The plans, which are to be developed with employee assistance, must be made available to employees and to the government upon request – something that need not currently be done when an employer performs a voluntary, internal audit of its employment practices or legal compliance.

The DOL has specifically said that it is shifting from what it calls a "catch me if you can" approach to an approach in which the employer has the burden of showing that it has complied with the laws. In essence, the DOL proposes a new "affirmative action" obligation on employers – and this one is not limited to federal contractors but includes all employers subject to the applicable laws. In the wage-hour context, retail employers will be required

to create written FLSA classification analyses for any jobs that they treat as FLSA-exempt, including assistant manager positions.

The DOL promises to issue proposed regulations on Plan/Prevent/Protect in the future.

Freedom of Expression! The Patient Protection and Affordable Care Act, more familiarly known as President Obama's health care legislation, amended the Fair Labor Standards Act to include a **requirement** that employers provide "reasonable break time" and an appropriate location for nursing mother-employees to express milk. This "lactation accommodation" time under the Nursing Mother Amendment to the FLSA is unpaid (unless the employer already pays for break time taken for other reasons) and must be provided whenever the mother has such a need in the first year after the child's birth. The location must be "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public." Several states and the District of Columbia already have laws that require employers to provide such breaks, and the Nursing Mother Amendment does not preempt state laws that provide greater protections to employees. In other words, employers in states with similar legislation would have to comply with their state statutes to the extent that they are more "employee-friendly" than the Nursing Mother Amendment.

The Nursing Mother Amendment exempts employers with fewer than 50 employees who can show that compliance would create an "undue hardship."

FMLA bulletin on "alternative families" not as radical as it seems . . . *or is it?* The DOL has recently issued an **intepretive bulletin** on the circumstances under which an adult who is not the biological, adoptive, or foster parent, can take FMLA leave for a child. From the outset, the FMLA regulations have allowed such leave to an adult who is *in loco parentis* – in other words, who is not a "formal parent" but who acts in the role of the child's parent. Traditionally, this has been believed to include adults who engage in the day-to-day care of the child (for example, a step-parent or a grandparent who is rearing the child) or who provide significant financial support for the child. The DOL bulletin received a lot of publicity because it explicitly said that a partner in a same-sex couple could be a "parent" to the child under this definition. To the extent that a same-sex partner provided the day-to-day care of the child or significant financial support, this should come as no surprise. What is perhaps more surprising, and more radical, is that the DOL's current interpretation is that a theoretically unlimited number of adults can be "parents," and the level of involvement in the child's life may not need to be nearly as significant as we'd originally thought. Therefore, retailers can expect to be fielding many more requests for FMLA leave from these "*quasi*-parents."

Trouble Looms Under the ADAAA

When the Americans with Disabilities Act was amended effective January 1, 2009, there was a fear that the amendments would make it much easier for employees to prove a disability. A recent summary judgment opinion and three new lawsuits by the EEOC show that this fear has officially become a reality.

In ***Hoffman v. Carefirst of Ft. Wayne, Inc.***, a federal court in Indiana is allowing the plaintiff's claims under the ADA Amendments Act to go to trial. The plaintiff alleged that he was discriminated against because of his disability, Stage III renal cancer that was in remission. The defendant moved for summary judgment arguing, primarily, that the plaintiff was not protected by the ADA because his cancer was in remission and therefore he was not disabled. For cases based on conduct that occurred before the ADA Amendments Act took effect in January 2009, this was a good strategy.

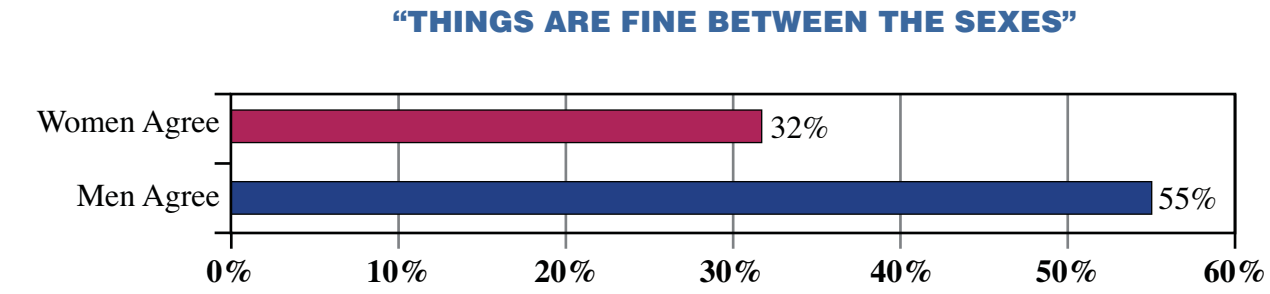
It's not usually a good strategy any more. Noting that this was one of the first cases under the ADAAA that had made it to the summary judgment stage, the Court said that the ADAAA clearly provides that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." (Under the "old" ADA, cancer in remission would normally not be a disabling condition because it would not substantially limit a major life activity.)

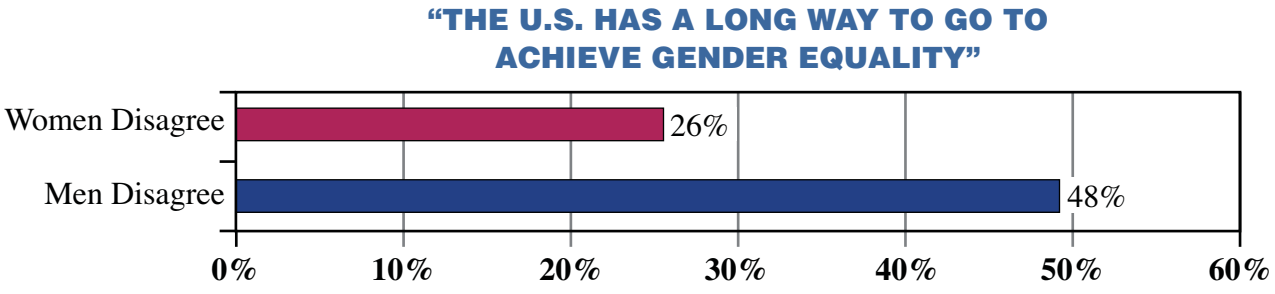
Because Stage III renal cancer would be considered a disability when it was active, the Court found that the plaintiff was disabled within the meaning of the ADAAA.

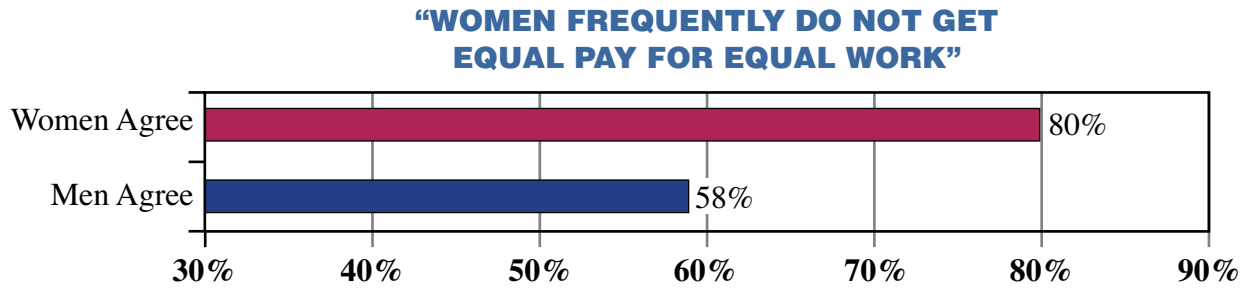
The EEOC has also recently jumped on the ADAAA bandwagon, with three new lawsuits based on the ADAAA's expanded definition of "disability": one against Eckerd Corporation (now Rite Aid), alleging that the company refused to allow a long-term drug store employee with arthritic knees to use a stool at work; one against a surveying firm, alleging that it selected two workers for a reduction in force because they had diabetes and hypertension; and one against a printing company who denied an employee's request for a part-time schedule while he was receiving chemotherapy for cancer.

For employment decisions and accommodation requests that are made after January 1, 2009, employers need to assume that everyone is potentially "disabled" and focus instead on whether the individual can perform the essential functions of the job with or without a reasonable accommodation.

Noteworthy Numbers



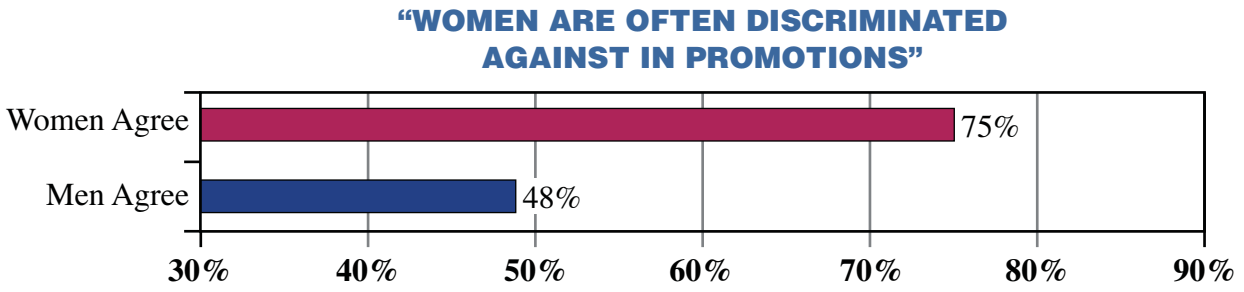


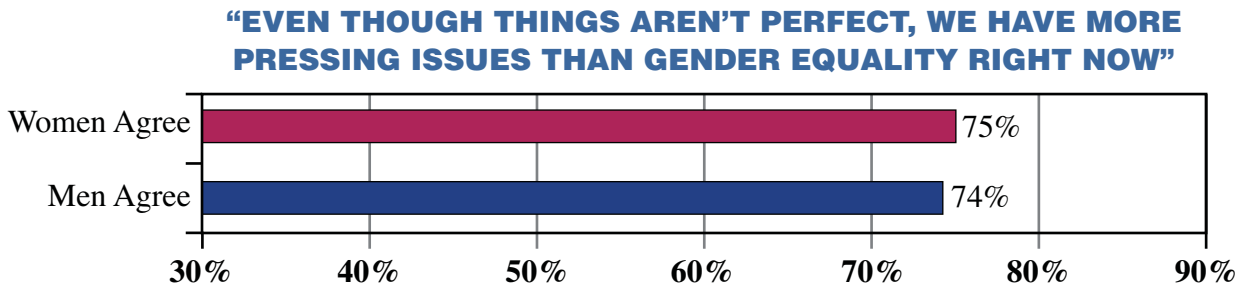


CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

RETAILER

Fall 2010





SOURCE: Harris Poll of 2,227 adults surveyed online between June 14 and 21, 2010.

U.S. Department of Labor Spells Out Rules On Unpaid Internships

Over the years, students have been encouraged to seek unpaid internships in an effort to gain real world experience. Indeed, at some point in our lives, many of us have worked or offered to work for free in exchange for training, work experience and a chance "to get our feet in the door." However, a down economy has led some employers to take advantage of such free labor. The U.S. Department of Labor has noticed, and this year, it issued a clarification of the regulations governing internship programs under the FLSA.

The FLSA says that individuals who are "suffered or permitted" to work must be compensated. The DOL's clarified regulations, which focus on for-profit businesses, offer a six-factor test for determining whether an intern may work without pay:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Generally, internships that are structured around a classroom or academic experience as opposed to the employer's actual operations are more likely to be viewed as an educational experience (e.g., internships where students receive college credit). Internships that provide individuals with skills that can be used in multiple employment settings, as opposed to those internships that provide skills particular to one employer's operation, are more likely to be viewed as training for the

individual. Interns who simply "shadow" employers without performing any significant work themselves are likely to be viewed as receiving an educational experience.

On the other hand, interns who have simply been substituted for regular workers must be paid at least the minimum wage, as well as overtime for their hours in excess of 40 in a given workweek. Interns who work for a trial period and expect to be subsequently hired on a permanent basis will generally be considered employees under the FLSA.

Retailers who use interns should be sure to establish in writing the duration of the internship, as well as all other terms and conditions that will apply.

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 125 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, and Virginia. For more information, visit www.constangy.com.