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MEMORANDUM

To:

From: Bert Bisgyer

Date: June 6, 2001

Re: Employment Law Update

This memorandum reports updates on selected legal developments and issues of importance to _____ in the employment context.

I. Ergonomics

A. OSHA: The Death of the Federal Ergonomics Standard?

On March 9, 2001, the U.S. House of Representatives voted to rescind the Occupational Safety and Health Administrations ("OSHA") ergonomics standard, one day after the measure was approved in the U.S. Senate. President Bush's signature on the measure brought to an end a rule that OSHA had been developing since the early 1990s to protect workers from carpal tunnel syndrome and musculoskeletal disorders ("MSDs").

The vote, under the Congressional Review Act ("CRA"), will likely bar substantially similar federal regulatory action on ergonomics in the workplace. Under the CRA, a vote against a federal regulation prevents an agency from promulgating a future rule that is substantially the same as the one overturned. Although the Bush Administration's Labor Secretary, Elaine L. Chao, pledged a new effort to address musculoskeletal disorders and other ergonomics hazards, the CRA may well prevent federal ergonomics standards from being implemented. Still, Chao has vowed to take a new approach that may include rule-making which emphasizes prevention and compliance assistance - rather than just after-the-fact enforcement. However, many have predicted that nothing will happen on the federal regulatory front with ergonomics during this administration.

It is important to remember that OSHA can continue to cite businesses for ergonomics violations under the general duty clause of the Occupational Safety and Health Act. Under the general duty clause, every employer must provide a hazard-free place of work. As a practical matter, though, OSHA lacks the inspectors to investigate every complaint and must select those enforcement efforts that it desires to emphasize. In addition, ergonomics issues are

very labor intensive. For OSHA to find a violation under the general duty clause, it must document that there was a hazard present, that the employer should have known about it, and that there was something the employer could have done to remediate the hazard.

Given Congress' rejection of the ergonomics regulation, OSHA may opt to take some additional positive measures without a standard. OSHA may issue voluntary guidelines or it may propose specific guidelines for specific industries. For example, in 1990, OSHA issued a set of ergonomics guidelines for the meat-packing industry. It could do the same in the manufacturing sector. Of course, there is still the question of whether states, especially those that are most "pro-employee," such as California, New York, Michigan, and others, will re-double their efforts to increase standards.

Note in this regard that various states currently are considering proposed ergonomics standards. Such standards would, inter alia, include required training, an active program to reduce or eliminate identified "ergo stressors," work strategies to reduce the development of MSDs, the implementation of engineering controls, work practice controls, and/or administrative controls in response to same, and other measures. Virginia, Maryland, and District of Columbia developments in this area should also be monitored.

Further, on a related front, the National Safety Council recently concluded a public comment period on a proposed voluntary consensus standard on ergonomics. That standard would serve as a voluntary guide for occupational safety and health professionals and would be integrated into a set of voluntary standards published by the American National Standards Institute.

B. Other Legal Considerations

It is important to recognize that ergonomics issues may raise a litany of other legal considerations. These include, for example, the nature and extent of employer obligations under worker's compensation statutes, other OSHA requirements, the Americans with Disabilities Act ("ADA"), family and medical leave laws, Title VII, and related state and local laws, among others. Thus, in assessing an ergonomics issue, HR officials should consider whether a particular condition is (or may become) a covered disability under the ADA, and whether the employee is "otherwise qualified" within the meaning of that law. If so, it must be determined whether reasonable accommodation(s) are feasible and necessary, e.g., whether the job and/or how it is performed should be restructured, and whether various leaves, light duty work, reassignment, or other opportunities should or must be provided. This situation can be further complicated by the fact that employer prerogatives under some statutes, such as worker's compensation laws, may appear to conflict with particular employee prerogatives under the ADA and the Family and Medical Leave Act, among other laws.

In the final analysis, good ergonomics practice and proactive measures prevent injuries and time lost from work. That is good business whether or not explicitly required by law.

II. U.S. Supreme Court Update

A. Supreme Court Upholds Enforceability of Mandatory Arbitration Agreements

In *Circuit City Stores, Inc. v. Adams*, 85 FEP Cases 266 (March 21, 2001), the U.S. Supreme Court affirmed that the Federal Arbitration Act of 1925 ("FAA") (which requires enforcement of valid arbitration agreements) allows businesses to require employees to take various disputes with their employers to arbitration instead of court. That case involved a sales employee who signed an employment application form that included an arbitration provision. Two years later, the employee sued his employer in state court bringing state employment discrimination and tort claims. The employer asked the court to compel arbitration.

Disagreeing with the other federal appeals courts then having addressed the issue, the U.S. Court of Appeals for the Ninth Circuit ruled that the FAA does not apply to employment contracts. The Supreme Court, however, rejected that view, holding that employment agreements are not exempt from the FAA, and that an employer can compel arbitration pursuant to a valid agreement. As the Supreme Court stated:

> "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."

The Supreme Court also held that the FAA "preempts" state laws precluding arbitration of various statutory claims. This is significant because most employment discrimination lawsuits combine state, federal and common law claims. Therefore, the various claims need not be tried separately and can be required to be heard in the arbitration.

B. The Supreme Court Holds That Future Lost Wages Are Not Included Within the Damages Cap of the Civil Rights Act of 1991

On April 23, 2001, the Supreme Court heard argument on whether an award of future lost wages - so-called "front pay" - in employment discrimination suits falls under the cap that Congress imposed on compensatory and punitive damage awards in the Civil Right Acts of 1991 ("the Act"). (*Pollard v. E.I. du Pont de Nemours & Co.*, No. 00-763.) The U.S. Chamber of Commerce and others have argued that front pay is capped by the Act, whereas the EEOC has argued that front pay was not capped by Congress.

The Act for the first time gave plaintiffs claiming intentional employment discrimination the right to a jury trial and the right to receive compensatory and punitive damages. But with the right to recover damages, Congress also imposed limits. The Act sets damages caps ranging from $50,000 to $300,000, depending on the size of the employer's workforce.

On June 4, 2001, the Supreme Court decided Pollard and held that front pay is an equitable remedy not subject to the cap. That case involved co-worker sexual harassment of which the plaintiff's supervisors were aware. Such harassment resulted in plaintiff taking a medical leave for psychological assistance, and her subsequent dismissal for refusing to return to that "hostile environment". As a result of this decision, front pay may be awarded for lost compensation without any cap, either in the period between judgment and reinstatement, or in lieu of reinstatement, in addition to compensatory and punitive damages (which are subject to the cap).

Front pay is particularly significant to older workers who, but for the proven age discrimination, may well have remained in their jobs until retirement. In those situations, courts routinely order front pay until the date of retirement.

C. Supreme Court Holds That a Single Sexual Remark Does Not Violate Title VII

In *Clark County School District v. Breeden*, 2001 U.S. LEXIS 3365 (April 23, 2001), the plaintiff alleged that during a review of job applicant files, a male co-worker made an offensive sexual remark. The plaintiff complained to her employer and later alleged that she was retaliated against for these complaints. The Supreme Court, however, held that no reasonable person could have believed that the single incident complained of could have violated Title VII.

D. Are Workers with Repetitive Stress Injuries Covered Under the Americans With Disabilities Act?

On April 16, 2001, the Supreme Court agreed to decide whether workers with repetitive stress injuries merit protection under the ADA. (*Toyota Motor Mfg., Kentucky, Inc. v. Williams,* No. 00-1089, *cert. granted,* 4/16/01.) The case will be heard in the Fall and a decision will likely issue in 2002.

This case will offer the Supreme Court its first look at whether the ADA covers carpal tunnel syndrome and other repetitive stress injuries. Toyota Motor Manufacturing ("Toyota") is appealing a lower court decision that sided, in part, with a paint inspector who has carpal tunnel syndrome and tendonitis. Toyota alleged that the employee was not entitled to the ADA's protection because she had an isolated injury that prevented her from only a narrow set of job-related functions and, thus, was not "substantially limited in a major life activity."

E. Is an Employer Required to Reassign an Employee in Contravention of an Established Seniority System?

Also on April 16, 2001, the Supreme Court agreed to decide whether the ADA requires an employer to accommodate a disabled worker by reassigning him to a more manageable position when that move conflicts with the established seniority system. (*US Airways, Inc. v. Barnett*, No. 00-1250, *cert. granted* 4/16/01.) At issue is whether US Airways violated the ADA when it failed to consider reassignment for a cargo handler with back problems, when reassignment would have involved bypassing the seniority system. The lower court had ruled that "a seniority system is not a per se bar to reassignment" and should be considered as a factor in deciding whether the proposed reassignment would pose an undue hardship to the company.

F. Do Federal Affirmative Action Programs Amount to Reverse Discrimination?

On March 26, 2001, the Supreme Court agreed to review whether federal programs intended to help minority businesses amount to reverse discrimination against whites. (*Adarand Constructors, Inc. v. Mineta*, No. 00-730, *cert. granted* 03/26/01.) The Court agreed to hear the latest challenge to a highway construction program that offered incentives to big companies to hire subcontractors owned by racial minorities. In 1995, the Court issued a landmark ruling which drastically limited the scope of federal affirmative action programs.

III. Employee Misconduct and the Americans With Disabilities Act

Alcoholics and drug users often engage in misconduct which is causally related to their condition. Before an employer takes adverse employment action against such an individual because of his or her conduct, the employer should review the requirements of the ADA.

Alcoholism is generally regarded as a disability under the ADA. Thus, an employee who is an alcoholic will likely be entitled to the protections of the ADA. However, an employee's alcoholism will not ordinarily protect him or her from the consequences of misconduct caused by the alcoholism. *See Brookins v. The Indianapolis Power and Light Company*, 90 F.Supp. 2d 993 (S.D. Ind. 2000) (the employer lawfully terminated the plaintiff for absenteeism and failing to call in, even though the employee attributed his misconduct to his alcoholism, anxiety, and depression). An employer may also take adverse action, including termination, against an employee who is intoxicated while on the job, regardless of whether that individual is an alcoholic. The ADA specifically states that an employer may require that employees not be under the influence of alcohol while at work.

Further, many courts have held that an employer may take adverse action against an employee who engages in off-duty misconduct, even if that off-duty misconduct is related to his or her alcoholism. For example, an employer may be able to discharge an employee who is convicted of drunk driving off the job if the employee's job requires that (s)he operate a company vehicle.

An individual who "currently" uses illegal drugs is not protected under the ADA. Exactly what constitutes "current" illegal drug use will generally be determined on a case-by-case basis. At least one court has noted that a one-year abstinence from drugs will not be considered current use of illegal drugs, but that the use of illegal drugs

during the weeks prior to discharge may well be considered current use. The interpretation of "current use" is crucial because an employee who is a current illegal drug user is not entitled to *any* protection under the ADA.

Note: In assessing whether a disability is covered and subject to accommodation under ADA and state law, keep in mind that some states (such as California) expand such employee protections beyond the coverage of the ADA.

IV. Disability-Based Harassment Creates a Cause of Action under the Americans With Disabilities Act

Disability-based harassment is a cause of action under the Americans With Disabilities Act, the U.S. Court of Appeals for the Fifth Circuit held in the first such decision by a federal appeals court (*Flowers v. Southern Reg'l Physician Servs. Inc.*, 5th Cir., No. 99-31354, 3/30/01).

The language of the ADA and Title VII is similar, the Fifth Circuit noted, and "dictates a consistent reading of the two statutes". Following the language in *Meritor Savings Bank v. Vinson* (40 FEP Cases 1822, 1986), the Court interpreted "the phrase 'terms, conditions, and privileges of employment,' as it is used in the Americans With Disabilities Act ("ADA") to 'strike at' harassment in the workplace".

In this case, a medical assistant told her supervisor and close friend that she was HIV-positive. Afterward, she was avoided by her supervisor, required to take four random drug tests within a week, "written up" twice, placed on probation twice, and then fired. The medical assistant sued under the ADA, alleging that she had been fired because of her disability and that she was subjected to "harassing conduct" designed to force her from her job. A jury found that her disability was not a motivating factor for her firing, but that she was subjected to disability-based harassment that created a hostile work environment. The Fifth Circuit affirmed the violation but rejected the damage award.

The U.S. Court of Appeals for the Fourth Circuit became the second federal appeals court to hold that disability-based harassment is a cause of action under the ADA (*Fox v. General Motors Corp.*, 4th Cir., No. 00-1589, 4/13/01).

In that case, an employee who had injured his back on the job re-injured his back and was placed on light-duty restrictions after returning from disability leave. His immediate supervisor attempted to accommodate his restrictions, but other supervisors and co-workers harassed him and allegedly ordered him to perform jobs beyond his restrictions. He also alleged that he and other disabled workers were the targets of "constant verbal harassment and insults".

The Fourth Circuit observed the similarity in the language of the ADA and Title VII and in the remedial purposes of the two statutes. "[T]he ADA, like Title VII, creates a cause of action for hostile work environment harassment", the Court concluded, affirming the jury's award of damages.

V. Supreme Court Applies the Americans with Disabilities Act to Professional Sports

In PGA Tour v. Martin, No. 0024 (May 29, 2001), the Supreme Court held (7-2) that a professional golfer with a degenerative circulatory disorder has a "disability" under the ADA. The Court found that the PGA Tour was an entity operating public accommodations within the meaning of the law which had to make reasonable modifications in its policies where necessary to accommodate individuals with disabilities, unless that would fundamentally alter the nature of the public accommodation. The Court concluded that the Tour's walking requirement was not fundamental to tournament play and ordered the Tour to allow Martin to use a cart in competition. The Court reiterated that an individualized inquiry is required in all instances. This decision may impact the employment arena, because future plaintiffs may now be encouraged to challenge particular job requirements as not being "essential," while looking to the courts to second-guess a business' policy determinations in that regard.

VI. Investigating an Applicant - Criminal Background Check

Generally, there are few statutory enactments requiring an employer to conduct a criminal background check. Most of the statutory enactments requiring criminal background checks involve employees engaged in child care, employees of schools and school districts, nurse aides, home health care workers, private security patrols, school bus drivers, mental health care workers, and employees of elder care facilities. Other employment positions for which some jurisdictions require criminal background checks include tow truck drivers, fire/security alarm system installers, ambulance personnel, juvenile detention center employees, locksmiths, and the like.

Absent a specific statutory requirement, an employer generally has no duty to investigate the criminal background of an employment applicant or current employee. However, there may be a common law duty to conduct such checks. For example, in *Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978), Maryland's highest court held that an employer ordinarily has no duty to inquire into the criminal record of a prospective employee. However, the court recognized that an employer may be liable to a member of the general public under the theory of negligent hiring. The plaintiff in that case brought suit against a tavern owner for negligent hiring after the plaintiff was assaulted by a bartender who had a significant criminal record. The court sided with the employer and held that the employer's obligation to use reasonable care in the selection of employees is met when the employer makes an "adequate inquiry" or otherwise has a reasonable basis for believing that the employee is competent. The critical standard in cases in which an employee has committed an intentional tort upon a member of the public is "whether the employer knew or should have known that the individual was potentially dangerous".

This principle has also been applied to find negligent hire with respect to a maintenance employee who had access to residents of a housing complex. Note further that if criminal conviction inquires are made, there must be a non-negligent follow-up by the employer with respect to any information that is provided by the applicant in that regard.

Various statutes, regulations, and policies may limit the dissemination of certain criminal history information, or its use in hiring. The EEOC's guidelines for employers preclude questions about arrest and conviction records if employers use those records to disqualify a disproportionate number of minority applicants. Statistically, minority applicants are more likely to have an arrest or conviction record. Therefore, unless the employer can show that an arrest or conviction is directly related to the particular job that is sought by the applicant, the inquiry may subject the employer to a claim of employment discrimination. In this regard, conviction records are more reliable than arrest records, because there has been a judicial determination of guilt, whereas arrest records typically have no probative value at all. In short, EEOC takes the position that conviction records should only be used by employers in applicant screening consistent with "business necessity".

Employers using criminal background checks should verify that such investigation satisfies all statutory requirements and fulfills the duty of reasonable care under the common law. For example, some statutes specifically require both state and federal background checks to be conducted, while others limit the scope of criminal background checks. In situations where the employer's place of business is located near a state border, or where the employer knows that the employee resides in a different state or has a substantial work and/or residence history in another state, the employer should expand the scope of any background check to ensure that a reasonable investigation is performed.

In the final analysis, the best way to keep unqualified employees out of the workplace is by the careful use of an effective employment application, followed by diligent verification and analysis of the information that the applicant has provided. In this regard, make sure that any applicant screening practices, tests, exercises, profiles, pre-employment inquiries, consumer investigative reports, and the like meet applicable federal, state, and local requirements.

VII. Workers Win More Lawsuits

According to a March 27, 2000 report in *USA Today*, employees are prevailing more often in employment discrimination matters and receiving bigger awards. The EEOC obtained a total of $246 million in cash benefits for claimants in fiscal year 2000, more than double the $118 million obtained in 1992. The increase comes despite just a modest rise in the number of charges filed.

According to a study from Jury Verdict Research, the probability of a verdict favoring a plaintiff in employment cases jumped from 49% in 1994 to 71% in 1999. Further, the median compensatory damages award received by workers has risen from $127,500 in 1996 to $200,000 in 1999. According to the article, more than 50% of employers have been sued by workers. The most common charges were gender discrimination and sexual harassment, followed by wrongful discharge and racial discrimination.