

## LABOR & EMPLOYMENT LAW ALERT

APRIL 2009

*Jed L. Marcus, Esq.*

### The EEOC and Caregiver Discrimination: Sex, Race, Disability, and the Creation of a New Protected Class

On April 22, 2009, the Equal Employment Opportunity Commission (EEOC) offered employers new guidance and best practices on avoiding discrimination against workers with caregiving responsibilities. It supplements a 2007 EEOC guidance document on unlawful disparate treatment of employees/caregivers. The new guidance suggests language for a written policy addressing caregiver protection and offers best practices in recruitment, hiring, promotion, and terms and conditions of employment. The best practices include the following:

- Train managers and supervisors on their legal responsibilities regarding employees with caregiving responsibilities under federal regulations including the Americans with Disabilities Act, the Equal Pay Act, the Pregnancy Discrimination Act, Title VII of the Civil Rights Act and the Family and Medical Leave Act (FMLA).
- Develop, distribute and enforce a strong EEO policy that clearly explains examples of discriminatory behavior against caregivers.
- Respond to caregiver discrimination complaints efficiently and effectively. Identify and remove barriers to re-entry for individuals who have taken leaves of absence due to caregiving responsibilities or other personal reasons.
- Encourage employees to request flexible work arrangements that allow them to balance work and personal responsibilities.

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination against caregivers.



Caregiver discrimination issues have emerged as a major trend, especially with a weakened economy and reductions in force. We urge all employers to train their managers and supervisors to prevent employment discrimination and minimize legal action. Protect your company from lawsuits by educating your employees on their responsibilities when it comes to discrimination and harassment in the workplace. Absent proper training, employees may inadvertently violate the law.

Employers adopting any of the EEOC recommended accommodations will want to ensure that their policies are uniform and consistently applied, regardless of gender. Any favoritism towards one gender over the other, especially if based on stereotypes, likely will be found to be a violation of state and federal sex discrimination laws.

Please call us if you have any questions, or if we can assist you in any way. ■

## U.S. Supreme Court Rules Unionized Employees Can Be Compelled to Arbitrate Their Age Discrimination Claims if Their Labor Contracts Contain Clear and Unmistakable Language in Favor of Arbitration

For many years now, unionized employees who claimed that their employers discriminated against them in violation of Title VII could circumvent the arbitration clause contained in their labor contracts, relying on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a U.S. Supreme Court case which held that Title VII forbids enforcement of arbitration clauses in Title VII discrimination cases. A new Supreme Court case, however, has rejected *Gardner-Denver*, at least in the context of age discrimination cases, concluding that unionized workers' discrimination claims must be arbitrated if the labor contract contains a clear and unmistakable intention to arbitrate these claims. In *14 Penn Plaza LLC, et al. v. Pyett, et al.*, 556 U.S. \_\_\_\_ (2009), a union and a multiemployer bargaining association negotiated a very detailed grievance and arbitration provision that specifically included discrimination claims. After several workers filed grievances alleging that they were transferred in violation of workplace discrimination laws and the labor contract, the union first filed for, and then withdrew, a demand for arbitration. The district court denied the employer's motion to compel arbitration and the Second Circuit Court

of Appeals affirmed, holding that *Gardner-Denver* prohibits enforcement of collective-bargaining provisions requiring arbitration of ADEA claims.

The U.S. Supreme Court reversed, holding that a provision in a labor contract that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law because: (1) the arbitration clause was freely negotiated; and (2) the narrow holding in *Gardner-Denver* does not control. That is, *Gardner-Denver* "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims," but "the quite different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gardner-Denver* did not control the outcome where the labor agreement's arbitration provision expressly covers both statutory and contractual discrimination claims.

The Court also took an opportunity to reject past dicta that was critical of arbitration to vindicate statutory discrimination rights.

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The Court explained that requiring claims to be resolved through arbitration does not waive the statutory right to be free from workplace discrimination, only the right to seek resolution in court. It also rejected the union's claim that inherent conflicts between the interests of a bargaining unit and the individual employee made arbitration inappropriate, finding that such an argument amounts to an unsustainable collateral attack on the National Labor Relations Act ("NLRA"). Congress accounted for the conflict in several ways: union members may bring a duty of fair representation claim against the union; a union can be subjected to direct liability under the ADEA if it discriminates on the basis of age; and union members may also file age discrimination claims with the EEOC and the National Labor Relations Board.

**The Bottom Line.** While the case is historic in nature, it may have little practical impact on employers, most of whom are non-union. Further, most labor contracts do not contain arbitration clauses as detailed as the one in *14 Penn Plaza*. Still, for employers whose labor contracts are expiring, it may be worth negotiating a broader arbitration clause. If you have any questions, please call us. ■



*Emily J. Wexler, Esq.*

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## The Department of Labor Issues New Guidance on Compensatory Training Time

**With the current state of the economy, many employers may be looking for areas in which to cut costs.** While employees' payroll costs for attendance at seminars and training may be an attractive area to cut costs, be careful. Consult with a Labor and Employment attorney before doing so because you may be violating wage and hour law.

There are two governing principles under the Fair Labor Standards Act ("FLSA"): non-exempt

employees must be paid a minimum wage for each hour worked, and all employees must be paid for every hour worked. Generally, time that is spent for the benefit of the employer, with the employer's knowledge, and that is considered a principal activity of the employee, is considered hours worked and is therefore compensable. However, questions frequently arise as to whether time spent on various job related activities, such as training or attendance at seminars, is compensable. Generally,

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time spent attending employer-sponsored lectures, meetings and training programs is compensable. There is an exception to this general rule when the activity meets all of the following four criteria: (a) attendance is outside of the employee's regular working hours; (b) attendance is, in fact, voluntary; (c) the course, lecture, or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance. 29 C.F.R. § # 785.27.

Recently, the Department of Labor, Wage and Hour Division ("DOL") released three notable Wage and Hour Opinion Letters intending to provide further guidance on these four criteria. Two of the letters involve study time and the other involves state required certification programs. Opinion Letter FLSA2009-13 involved the question of whether time spent by employees taking web-based prerequisite classes at home in preparation for a voluntary job-related training class is compensable time. In this case, the employer employed technicians who installed, monitored and serviced voice and data communications circuits. The technicians, working with a specific network system, were required to take four ten-hour web-based prerequisite classes at home in preparation for a voluntary job-related training class. Despite the fact that these classes were "voluntary," completion of the course would result in the employees being more proficient with the advanced network systems. The DOL found that such time is compensable under the FLSA, specifically because the training was directly related to the employee's job. The DOL

found that "by making the technicians better able to perform their jobs, the training and the prerequisite classes are directly related to the technicians' jobs." Thus, under these circumstances, the DOL confirmed that studying which occurs outside of the normal work day is nonetheless compensable.

Opinion Letter FLSA2009-15 was issued in response to a request for an opinion on whether time spent outside normal working hours by city employees studying for city-required training programs, seminars and classes is compensable. The request also sought guidance on whether the city could limit the number of hours spent studying for such programs, seminars and classes. The DOL opined that all time spent studying is compensable, but that the city may limit the time the employees spent studying under the FLSA. In this case, the city employer required certain employees to attend and pass various training programs intended to help employees become more proficient in their jobs. The city employees attended the training during normal working hours. During the training, the instructor required city employees to perform certain homework assignments in preparation for the next training program. The DOL, in finding the time compensable, explained that because the homework was mandatory, study time at home would be compensable. Moreover, the city employer could limit the time spent doing homework, but only if the limit was realistic; even if the employee took longer than the time limit, such time would still be compensable. As the DOL

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explained, one appropriate alternative may be if the employee were permitted to study within the class period or during the normal work day. Thus, under these circumstances, the DOL confirmed that studying which occurs outside of the normal work day is compensable.

Contrast these two Opinion Letters with one issued in January 2009, FLSA2009-1, wherein the DOL held that time spent by child care center employees in State-mandated training programs offered by the employer and required of the employee as a condition of maintaining their State certificate, was not hours worked for which the employee had to be paid. In that case, the child care center employees were required by the State to maintain their personal license by completing certain training or continuing education, after regular working hours at the day care center. Attendance was voluntary and was taught by independent bona fide institutions of learning. The DOL acknowledged that,

ordinarily, the training would be compensable as it is directly related to the employee's job. However, the difference was that the training was taught by an independent bona fide institution of learning. 29 C.F.R. § # 785.31. Moreover, with regard to the specific industry of child care services, the DOL considered training to maintain an employee's license to be one of general applicability that is for the benefit of the employee to gain or continue employment with any child care service provider.

**The Bottom Line.** All employers should carefully consider whether employee training satisfies the four general requirements for compensable time under the FLSA. When in doubt, call us, and we will be happy to help you out. ■

Emily J. Wexler, Esq.

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## Employers Face New Immigration Regulations and Forms

**The U.S. Citizenship and Immigration Services (USCIS) has amended regulations governing the types of acceptable identity and employment authorization documents that employees may present to their employers**

**for completion of the Form I-9, Employment Eligibility Verification.** Employers are now required to complete a new, revised Form I-9 Employment Eligibility Verification for: (a) all newly hired employees; (b) rehired

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employees; and (c) reverification of employees with temporary work authorization, upon the expiration of that authorization. A new Form I-9 should not be completed for existing employees.

An employer does not need to complete a new Form I-9 for persons who were: (a) hired before November 7, 1986, who are continuing in their employment and have a reasonable expectation of employment at all times; (b) employed for casual domestic work in a private home on a sporadic, irregular, or intermittent basis; (c) independent contractors; (d) providing labor to employers who are employed by a contractor providing contract services (e.g., employee leasing or temporary agencies); or (e) not physically working on U.S. soil. Employers must remember that they cannot contract for the labor of an alien if they know that they are not authorized to work in the United States.

The most significant changes in the new Form I-9 from the current Form I-9 include a reduced list of acceptable documents, a revised instruction sheet and a new Form M-274 Handbook for Employers. Under the new Form I-9, all documents presented to employers must be unexpired. The employee may present any of the following documents under List A to their employer:

- U.S. Passport or U.S. Passport Card;
- Permanent Resident Card or Alien Registration Receipt Card (Form I-551);

- Foreign passport containing a temporary I-551 stamp or I-551 printed notation on a machine-readable immigrant visa;
- Employment Authorization Document containing a photograph (Form I-766);
- For certain non-immigrants, a foreign passport with Form I-94 or Form I-94A; or
- Passport from the Federated States of Micronesia or the Republic of the Marshall Islands with Form I-94 or I-94A.

Employers must retain completed Forms I-9 for all employees for three years after the date they hire an employee, or one year after the date employment is terminated, whichever is later. These forms can be retained in paper, microfilm, microfiche, or electronically. Expired documents, including U.S. Passports, Temporary Resident Cards or Employment Authorization Cards are no longer accepted under List A.

If an employer acquires a business and its employees, it may choose to keep the previous owner's Forms I-9 for each acquired employee, but the new employer is responsible for any errors or omissions in them. To avoid this liability, the employer may choose to complete a new Form I-9 for each acquired employee, but the employer must do this uniformly for all of its acquired employees, without regard to actual or perceived citizenship status or national origin.

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U.S. Department of Homeland Security, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, and the Department of Labor give employers three days' notice prior to inspecting whether the employers properly retained Forms I-9. If the Forms I-9 are stored in an off-site location, then the employer must inform the investigating officer of the location where they are stored and make arrangements for the inspection. The inspecting officers can perform an inspection at an office of an authorized agency of the United States.

Employers should take the following steps to ensure that they have complied with the above regulations by making sure that: (a) procedures

and policies for verifying an employee's identity are in writing and signed off by management; (b) documentation is created showing that the employer has conducted awareness training for staff that handles Forms I-9; and (c) the employer conducts a wider audit if they find problems in a sample audit. ■



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## Upcoming Speaking Engagements:

**Bressler Labor and Employment Practice lawyers will be speaking on the following subjects in the coming months:**

**May 28, 2009:** The EEOC and Caregiver Discrimination. Jed Marcus will be speaking on Caregiver Discrimination and Employer Responses. Sponsored by the *H.R. Roundtable, New York City, NY.*

**June 5, 2009:** Hot Tips in Labor and Employment Law: 2009. Jed Marcus will be speaking on Legal Ethics in Labor and Employment Law. Sponsored by the Labor and Employment Section of the New Jersey State Bar Association. *New Jersey State Bar Association Law Center, New Brunswick, NJ.* ■

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