LABOR AND EMPLOYMENT LAW UPDATE

COLLECTIVE ACTIONS: THE GOLDEN HORDE OF THE 21st CENTURY

On October 5, 2005, Electronics Arts, Inc. announced a $15.6 million settlement of an action brought by approximately 200 computer graphic artists who claimed they were improperly denied overtime wages. The Electronic Arts settlement was preceded this year by settlements of $37 million to 3,250 stock brokers employed by Merrill Lynch, and $30 million to 400 account executives employed by Countrywide Home Loans, Inc. In May 2005, a $53.5 million judgment was entered against Farmer's Insurance on behalf of 945 claims' representatives.

Each of these lawsuits was brought under the Fair Labor Standards Act ("FLSA"), which governs minimum wages, overtime pay and child labor. The FLSA, as well as the Family and Medical Leave Act ("FMLA") and the Age Discrimination in Employment Act ("ADEA"), contain procedures which enable multiple claimants to sue an employer for substantial damages. The ease with which hundreds if not thousands of claimants can join such a lawsuit is a fact which Electronic Arts, Merrill Lynch, Countrywide and Farmer's Insurance now know all too well.

REQUISITES FOR A COLLECTIVE ACTION: The starting point for a collective action can be a suit by a single plaintiff brought on behalf of himself and "others similarly situated." To join the lawsuit, a potential claimant need only (1) show that he is similarly situated to the named plaintiff, and (2) file a written consent with the court to become a party. This procedure differentiates collective actions from class actions which generally have more complex procedural requirements.

DISCOVERY AND NOTICE: Based upon a minimal showing, a plaintiff can obtain the assistance of the court in notifying other potential plaintiffs of the lawsuit. This assistance generally includes an order directing the employer to provide plaintiff's counsel with the names and addresses of current and former employees who fit the definition of "similarly situated." The assistance also entails approval of a written notice to be mailed to potential claimants and/or posted on employee bulletin boards at the employer's places of business. An approved notice typically consists of a description of the lawsuit, the right to join the lawsuit, the procedure for joining the suit and the rights against retaliation provided by the statute in question.

DAMAGES: The FLSA, ADEA and FMLA each allow for the recovery of double (or liquidated) damages. A successful claimant under FLSA or the FMLA is entitled to liquidated damages unless the employer establishes that it acted in good faith. Claimants under the ADEA can recover liquidated damages if they can prove the employer willfully violated the Act. The FLSA, ADEA and FMLA also each provide for an award of attorney's fees to successful plaintiffs.

DEFENSE STRATEGY: Collective actions present unique challenges and opportunities for employers. A comprehensive defense will pursue (1) a dismantling of the collective action, (2) the dismissal of the claims common to all claimants, (3) a ruling which discourages potential future claimants, and (4) an aggressive attack on each individual claimant, which includes defenses and counterclaims, if any.

RETIREE HEALTH BENEFITS REVISITED

The April 2005 Labor and Employment Law Update reviewed a ruling in *AARP v. EEOC* in which a federal judge blocked an EEOC rule change regarding health care benefits for retirees. On September 27, 2005, the judge reversed her earlier ruling. The reversal is only the latest development in a continuing war between younger and older retirees.

ERIE COUNTY RETIREES ASSOC. V. COUNTY OF ERIE: In 2000, the Third Circuit held that an employer violates the ADEA if it reduces or eliminates retiree health benefits when retirees become eligible for Medicare, unless the employer can show either (1) that the health benefits available to Medicare-eligible retirees are equivalent to the benefits provided to retirees not yet eligible for Medicare, or (2) that it is expending the same costs for both groups of retirees. The EEOC later adopted the opinion as its national enforcement policy.

EEOC RULE: In response to intense pressure from employers, labor organizations, benefits experts and state and local governments, the EEOC in 2004 reversed its national enforcement policy. The new rule creates an exemption from the ADEA for employee benefit plans which "alter, reduce or eliminate health benefits when [a retiree] is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan." The exemption applies whether or not the retiree enrolls in the other benefit program.

AARP SUIT: The AARP sued the EEOC in federal court in Philadelphia and argued that the new rule allows younger retirees to be provided with better health care benefits than older retirees, in violation of the ADEA.

THE REVERSAL: In March 2005, the judge in the AARP suit ruled that the EEOC lacked the power to change the judicial construction of the ADEA set forth in the earlier Third Circuit decision. Thereafter, the Supreme Court in *National Cable and Telecommunications Assoc. v. Brand X Internet Services* redefined the deference to be afforded to agency rules. Based upon this opinion, the judge set aside her prior order and ruled that the EEOC rule is a permissible interpretation of the ADEA despite the contrary view of the Third Circuit.

PREDICTION: The AARP will likely appeal the ruling to the Third Circuit.

NOVEMBER FIRM SEMINARS

MONDAY, NOVEMBER 7, 2005: "Emerging Liability Issues for Lawyers in the 21st Century", sponsored by First Indemnity Insurance Agency of Texas, First Mercury Insurance Group and State National Insurance Group. Belo Mansion, Dallas, Texas.

DISCLAIMER

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