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Legal Update

In This Issue…

Page 1
Labor & Employment
Family responsibility (caregiver) discrimination: A new twist on old law

Construction
Combating material price volatility

Page 4
Firm News

PITTSBURGH, PA
BOSTON, MA
CHARLESTON, WV
HARRISBURG, PA
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RICHMOND, VA
SOUTHPOINTE, PA
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Labor & Employment

Family responsibility (caregiver) discrimination: A new twist on old law

Allison L. Feldstein

As employers continue to struggle with issues involving work-life balance, employees with caregiving responsibilities—both male and female alike—are increasingly asserting Family Responsibility Discrimination (FRD) claims when they are denied job opportunities and other benefits because of their responsibilities at home. In a 2009 study, the Center for Worklife Law at the University of California, Hastings College of Law, reported a 400 percent increase in caregiver or FRD claims within the last decade. This number is significant in light of the 23 percent decline in general employment discrimination cases between 2000 and 2005. Even more concerning is that employee-plaintiffs are estimated to prevail in FRD cases more than 50 percent of the time, obtaining multimillion-dollar verdicts in some cases.

continued on page 2

Construction

Combating material price volatility

Scott D. Cessar

As the major construction cost indices amply demonstrate, there has been tremendous volatility in the costs of construction materials over the last five to 10 years. At one point, diesel fuel was as high as $5 per gallon and then dropped to as low as $2 per gallon. Booming economies and growing international demand caused the cost of steel to escalate by as much as 60 percent per ton, only to fall as worldwide economic problems slowed construction and demand for steel, resulting in a glut of steel in many markets.

continued on page 3

Labor & Employment

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Why the dramatic increase? Statistics from the United States Department of Labor show that 60 percent of women are working or looking for work, and women make up 46 percent of the workforce. Women now account for approximately half of all managerial, professional and related positions in the workforce. The rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as were their counterparts 30 years ago. As a direct result, men's role in family caregiving has also increased. According to Department of Labor statistics, between 1965 and 2003, the amount of time men spent providing childcare has nearly *tripled*. And, remember, family caregiving responsibility not only involves care for small children, but also for elderly or disabled parents, spouses and other relatives.

In April 2007, the EEOC formally weighed in on this matter, issuing Enforcement Guidance entitled "Disparate Treatment of Workers with Caregiving Responsibilities." The EEOC's guidance reaffirmed what most employers already knew: Employers cannot stereotype employees based on preconceived notions regarding how employees' caregiving responsibilities will affect them at work. In May 2009, the EEOC followed with a memorandum entitled "Employer Best Practices for Workers with Caregiving Responsibilities" to aid employers in "reduc[ing] the chance of EEO violations against caregivers, and to remove barriers to equal employment opportunity."

What Is FRD or Caregiver Discrimination?

Contrary to popular belief, having family responsibilities is not, in and of itself, a protected characteristic under federal anti-discrimination laws (although Alaska and Washington, D.C., for example, have enacted laws creating such a protected class). Rather, FRD claims most often arise under Title VII of the Civil Rights Act of 1964, which prohibits employers from "fail[ing] or refus[ing] to hire an individual or to otherwise discriminate against an individual with respect to terms, conditions, or privileges of employment, because of such individual's…sex." 42 U.S.C. § 2000e-2(a). Sex-based stereotypes about working mothers and false perceptions of masculinity or men as caregivers, no matter how well-intentioned or benevolent, frequently serve as the basis for FRD claims, e.g., "Jane needs a part-time position more than Jim does; he has a wife who can take care of the kids." Similarly, employment decisions based on stereotypical notions about pregnant women, or women who may become pregnant, violate the Pregnancy Discrimination Act and, in most cases, also constitute typical sex discrimination: "Jane won't be interested in a position requiring weekly travel—she's 4 months pregnant. Let's give the job to John; he doesn't have a family, so he will be able to give the job his full effort."

> *"Contrary to popular belief, having family responsibilities is not, in and of itself, a protected characteristic under federal anti-discrimination laws ..."*

Sex-based discrimination aside, the ADA's "association clause" also frequently serves as the basis for FRD claims. The ADA prohibits employers from "…excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 1211(b)(4). Assumptions about an employee's dedication to his/her job because of the need to care for a disabled relative will violate the ADA, e.g., "Jane can't handle the account executive position. How can she handle the long hours *and* take care of her disabled mother?"

Other federal and state leave statutes, such as the federal FMLA, in addition to ERISA and the Equal Pay Act, also frequently involve claims of employees as caregivers.

What Should Employers Do?

There are a variety of things employers can do to ensure compliance with federal and state laws giving rise to FRD claims. Like FRD claims themselves, these suggestions are not new or particularly novel. However, given the spike in FRD claims, employers should revisit policies, procedures and benefit programs to ensure equal application and employee access. In addition:

- Train supervisors and managers on FRD matters, including legal protections and prohibited conduct.
- Encourage supervisors and managers to consult with human resources when confronted with FRD issues throughout the employment relationship, from hiring to termination.
- Review and update employment policies to ensure compliance with applicable FRD laws, including time and attendance policies, non-discrimination policies, anti-harassment policies, alternative work schedules and benefits plans and programs.
- Properly document all legitimate business reasons for employment decisions.
- Ensure that there is an effective complaint mechanism in place for investigating and responding to allegations of inappropriate comments and conduct.

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Construction

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The future looks no more certain as economists views differ, with predictions ranging from stagflation to deflation to hyperinflation based on burgeoning budget deficits throughout the major industrial economies and the possibility of internal problems slowing economic growth in countries like China, India and Brazil, among others.

Owners and contractors alike, particularly on large, long-term construction projects, are faced with the choice of gambling on the future. For owners, the question is whether they should lock in prices at bid time, notwithstanding that prices may fall, causing them to lose out on savings, or skyrocket, in which case they may be faced with a contractor unable to meet the demands of rising prices and either failing financially or seeking to make up the losses through claims or other means. For contractors, the question is whether they should include additional contingency in their bid as a hedge against rising prices, at a risk of not being competitive, or should pass on the job due to the risk.

This gamble for owners and contractors alike, however, may be contractually addressed—to provide a fair mechanism to address the problem—by way of price adjustment clauses. Such clauses are already routinely included in many federal fixed-price contracts, as provided for under the Federal Acquisition Regulations, and also by many state Department of Transportation contracts with reference to the price of commodity items such as asphalt, cement, diesel fuel, steel and other materials. Such price adjustment clauses, however, are not often used in private construction contracts in the United States, notwithstanding their merits.

Notably, price adjustment clauses in both public and private construction contracts are routinely used throughout the rest of the world. The commonly used worldwide form construction contracts issued by the Paris-based Federation Internationale des Ingeniers-Conseils (FIDIC)—akin to the American Institute of Architects (AIA) contract documents regularly used in the United States—expressly provide a detailed mathematical formula to address cost fluctuations in order to remedy inequalities that arise due to market conditions not anticipated by the parties. This formula relies on an agreed cost index, which is then applied across the board.

With all of the existing economic uncertainty, perhaps now is the time for both public and private American owners to adopt a more proactive approach and begin to regularly incorporate price adjustment clauses in their contracts, and for owners and contractors alike to follow a more transparent financial approach in order to address this always possible and substantial problem.

This can be done in a comprehensive manner using an agreed-upon cost index such as the FIDIC methodology. Indeed, any number of such cost indexes are regularly published in the United States that are adjusted for regional price variations. This can also be done in a less comprehensive manner, which may be best until the American construction industry becomes more accustomed to addressing the ramifications of price fluctuations.

This less comprehensive manner could be as simple as having the contractor demonstrate, by invoices or by certifications from its supplier, the changes in the cost of materials from bid time to post-contract. To ensure honesty, the contractor may be required to certify its costs at bid time and to also escrow its bid, along with appropriate supplier quotes and pricing. Another simple approach is to instruct the contractor in the contract documents to estimate and identify the number of units of an item to be used, but not to incorporate the cost for the item in its bid price and instead bid the item as an alternate with only its direct costs broken out. The contractor would then include in its pay application the number of the units used in that pay period with proof of the direct price and that it was a competitive price. The contractor would then be paid that amount for the units, plus an agreed markup. This approach works particularly well for commodity items, like diesel fuel, cement, asphalt and even, in some cases, structural steel.

In contractually providing for cost adjustments, the frequency of price adjustments must be addressed. Experience teaches that monthly is perhaps too often, but that annual may not be soon enough to avoid substantial unanticipated costs or downward adjustments, particularly if the contract monies have been paid and must be reconciled with the contractor. Consideration should also be given to contractually limiting adjustments only if prices increase or decrease by at least a specified percentage, such as 10 percent or 15 percent. This works to avoid what may otherwise be a floating price subject to constant and sometimes inconsequential readjustment. Moreover, contractors must realize that price adjustment is a two-way street. If costs decrease, the amount they will be paid will also decrease. This is a matter of basic fairness.

However accomplished, by using some sort of price adjustment clause, both owners and contractors will eliminate risk and uncertainty by minimizing the possibility of unanticipated windfalls or losses. It stands to reason that the use of price adjustment clauses should also result in more competitive bids, as contractors will not feel as compelled to include contingencies based on uncertain economic conditions. All of this should have a corresponding effect on avoiding project conflicts that may arise. The benefits of cost adjustment clauses, thus, are real and substantial. Their use on your next project—particularly a project longer than two years—certainly merits serious consideration.

Scott D. Cessar chairs the Construction Law Group and the Pittsburgh office of the national law firm of Eckert Seamans Cherin & Mellott. His practice covers a broad range of civil litigation with a primary focus on construction law. He has extensive trial and alternative dispute resolution experience representing clients before state and federal courts, arbitration panels and mediators across the country. Scott has been selected for inclusion in Pennsylvania Super Lawyers and The Best Lawyers in America in the area of construction law. He can be reached at scessar@eckertseamans.com or at 412.566.2581.

Firm News

Eckert Seamans' strategic growth initiative has continued with the addition of more new faces and energy, particularly increasing strength in such areas as real estate, aviation, energy, utilities and environment.

Members

Stephen I. Burr joins the firm's Boston, Massachusetts office as Chair of the Real Estate Group. He previously practiced with the firm from 1991–1999. With more than 20 years of experience, Steve focuses his practice on complex corporate, energy and real estate transactions and capital structures on all types of real estate. He has led development projects, financings, equity and debt offerings, restructurings, sale-leasebacks and traditional leasing transactions on a national basis. In addition, he has experience in the restructuring or disposition of distressed U.S. commercial real estate assets for foreign and domestic investors, lenders and owners. Steve has detailed knowledge and experience in restructuring troubled senior debt sold into commercial mortgage backed securities pools and in representing issuers and investors in troubled syndicated real estate and oil and gas private placements. He earned his J.D., *magna cum laude*, from the Boston College Law School and his undergraduate degree from Lawrence University, with distinction.

James G. Ehrig joins the firm's Washington, D.C. office. He has years of experience advising aviation clients in all aspects of regulatory compliance in a wide variety of administrative, adjudicatory and enforcement matters before the Department of Transportation, the Federal Aviation Administration, the National Transportation Safety Board, the Transportation Security Administration, Customs and Border Protection, the United States Patent and Trademark Office and other federal and state agencies. Jim previously served as an attorney advisor at the DOT's Office of Hearings, as an attorney advisor at the Securities and Exchange Commission Office of Hearings and as a law clerk in D.C. Superior Court. He earned his J.D. from the Loyola University Law School and his undergraduate degree from Hobart College.

Richard J. Pelliccio joins the firm's White Plains, New York office. He focuses his practice on complex litigation matters. Prior to joining private practice, Rich served as in-house counsel for the London, United Kingdom office of Assicurazioni Generali, S.p.A. Over the course of his legal career, he has successfully prosecuted a complex fraud action that culminated in a $25 million recovery; represented defendants in complex, multi-district litigation; represented numerous financial institutions in matters arising out of UCC Article 2-a finance leases; defended entities in adversary proceedings in United States Bankruptcy Courts alleging preferential and fraudulent transfers and represented numerous creditors in Chapter 11 bankruptcy proceedings. Rich earned his J.D. from the University of Notre Dame Law School and his undergraduate degree, also from the University of Notre Dame, *magna cum laude.*

Special Counsel

John R. Hanger joins the firm's Harrisburg, Pennsylvania office. He recently left office as Secretary of the Pennsylvania Department of Environmental Protection after serving for over two years under former Governor Edward G. Rendell. John is also a former Commissioner of the Pennsylvania Public Utility Commission, making him one of the few people who have had major policy-making authority in both utility and energy as well as environmental agencies. He will support Eckert Seamans' practices in the areas of energy, utility and environment, concentrating in alternative energy, clean transportation infrastructure, energy efficiency, competitive energy markets and smartgrid. As Secretary of the Pennsylvania DEP, John managed an agency of more than 2,800 employees with a mission to protect Pennsylvania's air, land and water from pollution and provide for the health and safety of its citizens through a cleaner environment. He has played a major role in drafting and enacting the Pennsylvania Alternative Energy Portfolio Standards Act, requiring approximately 4,000 megawatts of new wind, solar and other renewable energy sources; Act 129 authorizing Pennsylvania's electric utilities to operate energy conservation programs; Act 1 that provided $625 million for alternative energy projects; the 2005 Growing Greener Law and the 2010 Recycling Reorganization.

Associates

Jessica K. Bae joins the firm's Philadelphia, Pennsylvania office. She focuses her practice on intellectual property and professional liability matters. Jessica earned her J.D., *cum laude*, from the Drexel University Earle Mack School of Law and her undergraduate degree from the University of Oregon.

Luder F. Milton joins the firm's Richmond, Virginia office. He focuses his practice on the representation of businesses and individuals in commercial and utilities litigation, as well as regulatory matters before the agencies, boards and commissions of the Commonwealth of Virginia. Luder earned his J.D. from the Washington & Lee University School of Law and his undergraduate degree from Brigham Young University.

Sarah Shyr joins the firm's Washington, D.C. office. She concentrates her practice on litigation with a focus on products liability and complex civil litigation including business torts and contract disputes. Sarah earned her J.D. from the Washington & Lee University School of Law and her undergraduate degree from Cornell University.

Desiree L. Wilfong joins the firm's Philadelphia, Pennsylvania office. She focuses her practice on intellectual property and professional liability matters. Desiree earned her J.D., *magna cum laude*, from the Drexel University Earle Mack School of Law and her undergraduate degree from Dickinson College.

Brian L. Wolensky joins the firm's Philadelphia, Pennsylvania office. He focuses his practice on general litigation and product liability issues. Brian earned his J.D., *magna cum laude*, from the Chapman University School of Law and his undergraduate degree from Lebanon Valley College.

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