KAUFMAN & CANOLES
A Professional Corporation
Attorneys and Counselors at Law

Legal Advisory

Summer 2004

Employment Law Update

In this Issue:

U.S. Supreme Court Says No to "Reverse Age Discrmination" — Page 2

Final Showing: Kaufman & Canoles 20th Annual Employment Law Update — Page 3

Employer Liable Despite Assertion That Insurer Was Responsible For Defending Claim — Page 3

D.O.L. Finalizes "Fairpay"Rules

On April 23, 2004 after listening to thousands of comments from workers, employees, and human resource professionals, the Department of Labor ("DOL") published its final regulations, which are now called the FairPay rules, modifying the set of laws that govern the payment of overtime for the "White-Collar" exemptions (executive, administrative and professional employees). The DOL claims the FairPay rules, which will become effective on August 23, 2004, were implemented to provide clear, straight-forward (and stronger) overtime rules and end the confusion that has led to an explosion of lawsuits that did little to protect worker rights or provide much-needed guidance to employers.

Under the new FairPay rules, workers earning less than $23,660 per year, or $455 per week, are now guaranteed overtime protection. As a result of this change, the DOL estimates that an additional 1.3 million low-wage workers who were denied overtime under the old rules will now be entitled to overtime pay. The FairPay rules will also strengthen overtime protection for police officers, firefighters, and licensed practical nurses.

As in the past, certain White-Collar executives, administrators and professional employees are not entitled to overtime pay. However, the FairPay rules eliminate the cumbersome long and short duties test in favor of a new single standard test. The FairPay rules also create a new overtime exemption – the "highly-compensated" employee exemption - which generally eliminates overtime to White-Collar employees who make more than $100,000 per year.

The FairPay rules also make it easier for employers to discipline exempt employees. Under the FairPay rules, employers can dock an exempt employee's pay (in increments of a day or more) for disciplinary reasons – without placing the exemption at risk.

Although the final regulations may be altered or amended by Congress – this is an election year, after all – it is more likely than not that these regulations as written will go into effect on August 23, 2004. Employers should therefore become familiar with the FairPay rules and determine which of their employees will likely have an exemption status change. Because the DOL has announced plans to step up its enforcement procedures once that the final regulations go into effect, employers would be wise to ensure compliance with the new regulations long before the deadline.

If you would like more information about the FairPay rules, or help with a wage-hour self-audit, call any member of the K&C Employment Team. You can also check out the DOL's new website, specially created to help employers understand and implement the new regulations. It includes a number of videos and PowerPoint presentations you can download and use in the workplace. The DOL's FairPay website can be found at www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm.

www.kaufmanandcanoles.com

U.S. Supreme Court Says No to "Reverse Age Discrmination"

Earlier this year, a divided U.S. Supreme Court refused to recognize claims that employees in their forties were illegally discriminated against when they were treated less favorably than employees fifty or older. In *General Dynamics Land Systems, Inc. v. Cline,* General Dynamics eliminated full post-retirement health care for employees who were not fifty or older as of mid-1997. Because the Age Discrimination in Employment Act (ADEA) protects all employees forty or older, General Dynamics employees between forty and fifty claimed that treating employees fifty or older more favorably was illegal discrimination.

The Sixth Circuit Court of Appeals sided with the employees, holding that the ADEA's plain language allows for such reverse discrimination claims. However, the Supreme Court reversed, concluding that the ADEA provides a "remedy for unfair preference based upon relative youth," leaving the relatively young in the cold "outside the statutory concern." The Supreme Court went on to note that "[i]f Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under forty."

Practical Pointer

The *General Dynamics Land Systems* case clarifies that reverse age discrimination claims are not recognized under federal law. Similarly, Virginia law does not recognize claims of younger employees discriminated against due to their youth. So, Virginia employers don't run the risk of age discrimination when implementing a policy or practice that favors older employees. However, employers with operations in other states should check the laws of the states in which they do business to make sure applicable state laws don't prohibit discrimination against younger employees.

Retaliation Claims Abound

When an employer is accused of discrimination or other inappropriate conduct, a natural reaction may be to respond with quick disciplinary action against the offending employee. This impulse is present whether or not there was any basis to the claim by the employee, but employers are well advised to be patient and avoid any appearance of retaliation. Retaliation claims are costing employers millions of dollars every year, and these claims can be successful even when the underlying charge of discrimination is meritless.

The Equal Employment Opportunity Commission (EEOC) recently reported that retaliation claims have doubled during the past decade. As reported in this Update last Fall, a retaliation lawsuit filed by the EEOC in Norfolk Federal Court led to a record $4 million verdict. At the March 25th showing of K&C's 20th Annual Employment Law Update, Richmond attorney Harris Butler, who specializes in suing employers, explained why he and other employee advocates like to file retaliation cases.

Given this increasing risk, supervisors should be counseled to document and report complaints, even oral ones, relating to discrimination, harassment, workplace safety, fraud and/or misuse of corporate and/or governmental resources. Managers should also be careful to avoid any of the following common mistakes that have led to retaliation liability:

1. Personalizing the allegations.
2. Making knee-jerk emotional reactions to allegations whether they are true or not.
3. Failing to rely on advice from HR and/or legal counsel against shunning the complainant or otherwise treating the complainant differently in any way.
4. Failing to document performance issues both before and after receiving a complaint.
5. Failing to recognize that the timing of discipline may appear to be retaliatory even if discipline was justified.

K&C Employment Team Expands on Peninsula

The Labor and Employment Section of Kaufman & Canoles is pleased to announce that Andrew Mulcunry is now a member of our Team on the Peninsula. Andy previously practiced law in South Carolina where he represented management in a full range of employment matters. Together with Susan North in Williamsburg and Frank Edgar in Newport News , Andy will strengthen Kaufman & Canoles' standing on the Peninsula as a leader in representing management in all aspects of labor and employment law.

Final Showing! 20th Annual Update Highlights Most Popular Topics and Speakers

Top 10 Outrageous Cases Unveiled

The ballots are tallied. The 5th Annual Top Ten Outrageous Employment Law Cases will be announced at the ***final showing of the 20th Annual Employment Law Update*** *on July 22, 2004 at the Newport News Omni Hotel.*

This year's program features new information and materials on the most requested topics to be presented by some of our most popular speakers. For example, hear Richmond "hired gun" attorney Harris Butler, who specializes in suing employers, provide his valuable perspective during *The K&C Discipline & Discharge Clinic* with all new video vignettes.

The first two showings of this program received rave reviews, so reserve your seat now! Attendees of this year's program will receive more than just popcorn and peanuts (also included!). To commemorate our 20th Anniversary, each attendee will receive "One Free Admission Ticket" to attend one of Kaufman & Canoles' new Supervisory Training Clinics.

For more information or to register, please contact Kristen Bown at (757) 624-3232 or visit www.kaufmanandcanoles.com.

This program has been approved for 5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

"I Bagel Your Pardon" - Is This the Most Outrageous Case?

One of the candidates for this year's most outrageous case involves a New York billing clerk, Liberty M. Argueta, who "repeatedly hit" a co-worker on the forearm with a bagel. The confrontation that would ultimately end with Ms. Argueta's termination for one-sided violence, took place at a breakfast honoring her supervisor. Although she had not contributed any money for the breakfast, Ms. Argueta helped herself to a bagel. When a contributing co-worker complained to Ms. Argueta about taking the bagel, a verbal and physical dispute began and continued to escalate.

According to a witness' testimony, the co-worker suffered swelling from repeated "bagel blows;" however, Ms. Argueta denied the attack claiming wrongful termination based on discrimination against her Hispanic background. A federal district court in New York rejected her claim stating, "Argueta presents no evidence suggesting that those charged with the decision to terminate her harbored any discriminatory animus whatsoever." Anger management may be the *yeast* of Ms. Argueta's problems.

Employer Liable Despite Assertion That Insurer Was Responsible for Defending Claim

Employment practices liability insurance coverage is being sought by employers more and more frequently in an effort to avoid liability resulting from employment decisions. However, in *Lehr v. Audiovox Communications Corp.*, a Virginia Federal Court ruled that a default judgment against an employer for a discrimination claim would stand despite the employer's assumption that its insurance carrier was defending the claim. Under the circumstances of this case, the Court found that the employer's reliance on the carrier to represent its interest was not reasonable. The Court found that the employer should have taken steps to defend itself and the Court felt Audiovox at least shared blame for the default judgment.

Practical Pointer

At the outset, employers are well-advised to purchase adequate coverage and make sure they retain the right to have a say in hiring experienced counsel to defend any employment action that may be filed. Once coverage is in place, the *Lehr* case points out the need for written confirmation that a lawyer hired by the insurance company is defending any employment claim that may be filed.

Labor & Employment

Legal Advisory
Kaufman & Canoles
P. O. Box 3037
Norfolk, VA 23514

PRSRT STD
US POSTAGE
PAID
PERMIT #2
NORFOLK, VA

Inside This Issue

- D.O.L. Finalizes "Fairpay" Rules
- U.S. Supreme Court Says No to "Reverse Age Discrimination"
- Employer Liable Despite Assertion That Insurer Was Responsible
- K&C Employment Team Expands on Peninsula
- "I Bagel Your Pardon" - Is This The Most Outrageous Case?
- Retaliation Claims Abound

Visit us on the Web at www.kaufmanandcanoles.com for timely updates or to register for our seminar.

K&C LABOR AND EMPLOYMENT SECTION

Contact Us

Name	Phone	E-mail
Burt H. Whitt, Chairman	(757) 624-3275	bhwhitt@kaufcan.com
David N. Anthony	(804) 771-5730	dnanthony@kaufcan.com
Stanley G. Barr, Jr.	(757) 624-3274	sgbarr@kaufcan.com
Robert J. Barry	(757) 624-3268	rjbarry@kaufcan.com
Marie D. Carter	(804) 771-5755	mdcarter@kaufcan.com
Ann S. Dodson	(757) 624-3226	asdodson@kaufcan.com
Frank A. Edgar, Jr.	(757) 873-6304	faedgarjr@kaufcan.com
Shad C. Fagerland	(804)771-5709	scfagerland@kaufcan.com
Laura Geringer Gross	(757) 624-3308	lggross@kaufcan.com
Kevin D. Holden	(804) 771-5730	kdholden@kaufcan.com
Scott W. Kezman	(757) 624-3008	swkezman@kaufcan.com
Richard C. Mapp, III	(757) 624-3285	rcmapp@kaufcan.com
Andrew J. Mulcunry	(757) 873-6321	ajmulcunry@kaufcan.com
Heather A. Mullen	(757) 624-3312	hamullen@kaufcan.com
Susan Childers North	(804) 771-5760	scnorth@kaufcan.com
L. Scott Seymour	(757) 624-3113	lsseymour@kaufcan.com
David J. Sullivan	(757) 624-3249	djsullivan@kaufcan.com
Shepelle Watkins-White	(757) 546-4135	swwhite@kaufcan.com

If you would like to be added to the Kaufman & Canoles mailing list or if your name, title, company or address needs to be revised, please notify Kristen M. Bown, Kaufman & Canoles, P.O. Box 3037, Norfolk VA 23514
757-624-3295 FAX 757-624-3169 e-mail - kmbown@kaufcan.com

Copyright © 2004. Kaufman & Canoles. All Rights Reserved. The contents of this publication are intended for general information only and should not be construed as legal advice or a legal opinion on specific facts and circumstances.

Legal Advisory
Kaufman & Canoles
www.kaufmanandcanoles.com