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Increased Enforcement Activity Expected from Department of Labor and EEOC

By Bethany C. McCurdy, Esq.

With the recent recess appointments of Jacqueline A. Berrien, Chai R. Feldblum, and Victoria A. Lipnic to the Equal Employment Opportunity Commission ("EEOC") and an increased budget for the Department of Labor ("DOL"), employers should expect a surge in federal enforcement of employment and wage and hour laws in the months and years ahead. Although no major actions have yet occurred, employers can anticipate the areas of increased enforcement areas based on recent events.

First, employers can expect an increased focus by the EEOC on age discrimination claims, as well as the issuance of new regulations for current employment discrimination laws. On Friday May 6, 2010, Ms. Berrien, the recently appointed Chair of the EEOC, testified before the Senate Committee on Health, Education, Labor and Pensions in support of the Protecting Older Workers Against Discrimination Act, which currently is pending before Congress. The bill would amend the Age Discrimination in Employment Act ("ADEA") by inserting language that overturns the Supreme Court's 2009 decision in *Gross v. FBL Financial Services*, 129 S.Ct. 2343. The *Gross* decision held that plaintiffs seeking to advance an age discrimination claim cannot succeed if there is a mixed motive -- thus they cannot bring a claim if the motivating factor is age plus another factor. This has been extended by some courts to claims under the Americans with Disabilities Act ("ADA") as well.

In addition to Ms. Berrien, Ms. Feldblum and Ms. Lipnic were also recently appointed to the EEOC, and each will serve through the end of 2011. At that point, Congress will have to vote on their confirmation. Ms. Feldman previously served as counsel to

the American Civil Liberties Union, where she played an active role in the drafting of ADA, as well as its recently enacted amendments. Ms. Feldblum also helped draft the Employment Non-Discrimination Act (EDNA), which would prohibit discrimination in employment on the basis of sexual orientation and gender identity. EDNA is currently pending before Congress. Ms. Lipnic was Assistant Secretary of Labor for Employment Standards from 2002 to 2009 under President Bush and most recently was of counsel at a Washington, D.C., law firm. Ms. Berrien most recently served on the NAACP Legal Defense and Education Fund.

The three EEOC appointments now provide the EEOC with a full quorum, which will allow it to act on many issues that have been pending, such as drafting regulations to the Americans with Disabilities Act Amendments Act and the Genetic Information Nondiscrimination Act. Additionally, Ms. Berrien's recent testimony highlights the EEOC's renewed vigor in addressing age discrimination claims, which are rapidly increasing in number and now make up over one quarter of all EEOC charges. Employers should expect the EEOC to position itself as a strong advocate for employees who claim age discrimination and to aggressively pursue such claims.

In addition to increased EEOC activity, employers should expect increased scrutiny from the DOL. Hilda S. Solis, a former Congress Member from California, was confirmed as the Secretary of Labor in February 2009. Over the past year, Secretary Solis has initiated efforts to significantly increase investigation of wage and hour violations. Repeat violations of minimum wage, overtime, and workplace safety laws have been targeted as a high priority. Toward this end, the staffing level of the Wage and Hour Division will increase by 29% from 2009 to 2011, allowing the DOL to crackdown on wage and hour violations and better pursue wage and hour claims.

As part of the increased effort on wage and hour enforcement, the DOL has launched a public awareness campaign called, "We Can Help." While the campaign nominally is aimed at all workers, it is particularly aimed at those industries in which the DOL considers workers "vulnerable" to wage and hour violations. These targeted industries include construction, apparel, manufacturing, restaurants, hotels and motels, and home health care. As part of this effort, the Wage and Hour Division is adding bilingual staff and investigators, which will assist the DOL in communicating with workers who do not speak English as their primary language.

The DOL also will enhance its efforts to investigate workers who are misclassified as independent contractors. This Misclassification Initiative, which will have 90 dedicated investigators, will focus on specific industries, such as trucking and construction, which the DOL believes have a high percentage of misclassified workers. By identifying misclassified workers, the DOL hopes to restore any benefits and compensation due to the workers, as well as recoup lost payroll taxes from the employers. The Misclassification Initiative also includes training

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for Occupational Safety and Health Administration ("OSHA") inspectors to learn, while on site inspections, how to recognize employees who may be misclassified. Finally, the Misclassification Initiative includes a coordinated effort to work with and reward states that successfully identify companies that misclassify their workers. Employers who have not recently reviewed their employment classifications would be wise to do so now in conjunction with their legal counsel to stay ahead of the Misclassification Initiative.

While most employers may not think either the DOL or the EEOC has been inactive in recent years, they should nonetheless be prepared for a surge of activity by way of increased claims of discrimination and wage and hour violations.

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