

Employment Law Update June 2009

Employment Auditor's Notepad

EXPANDED HIPAA OBLIGATIONS UNDER THE STIMULUS PACKAGE

Among the many obligations imposed on some employers under the Federal Stimulus Package, also known as the American Recovery and Reinvestment Act of 2009 ("ARRA") are new and expanded obligations under the Health Insurance Portability and Accountability Act ("HIPAA"). Previously, HIPAA imposed certain security and privacy rules aimed at protecting an employee's private health information on employers with employer-sponsored health plans. Under the new rules, employers may be subject to ARRA's expanded HIPAA regulation if they either sponsor an employee health plan or receive information in connection with medical exams, screenings, requests for accommodation, or family or medical leave. Of the new requirements imposed by ARRA, covered employers are now required to notify any individual whose information is released in violation of HIPAA rules.

Now may be a good time to review your company's document privacy policies and complaint process to ensure you are in compliance.

Fleming PC regularly conducts employment compliance audits for companies of all sizes.

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From the United States Supreme Court . . .

AN EMPLOYEE CLAIMING AGE DISCRIMINATION MUST SHOW AGE WAS THE BASIS FOR THE EMPLOYER'S ACTION AND NOT JUST A MOTIVATING FACTOR

Title VII of the Civil Rights Act prohibits discrimination on the basis of sex, race, color, religion or national origin. In order to prove a discrimination claim under Title VII, a plaintiff must only show the illegal grounds for discrimination was a "motivating factor" for the action. Then, the burden shifts to the employer to show it would have taken the action regardless of the claimed discriminatory basis. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95 (2003). One might have presumed that the same mixed-motive, burden-shifting test would apply to federal age-discrimination claims brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), which was patterned after Title VII. On June 18, 2009, however, the Supreme Court held otherwise, finding that the burden-shifting framework under Title VII has never applied to ADEA claims.

In *Gross v. Financial Services, Inc.*, 557 U.S. ____, No. 08-441, slip op. at 2 (June 18, 2009), plaintiff Jack Gross who was 54 years old at the time he was demoted, proved that age "played a part or a role" in his employer's decision to demote him. The Supreme Court held that under the express language of the ADEA statute, Congress prohibited discrimination against a person "because of such individual's age." *Id.* at pp. 7-8 quoting 29 U.S.C. § 623(a)(1) (emphasis in original). This language, the Court reasoned, left no room for a "mixed-motive" test, and instead, under the ADEA, a plaintiff must prove that "but for" the person's age, the challenged conduct would not have occurred. *Id.* at p. 12. While the impact of this decision remains to be seen, Congress will likely take action to amend the ADEA to match the language of Title VII. California employers should take note that they are likely subject to the age-discrimination proof standards under FEHA.

EMPLOYER CAN ONLY ENGAGE IN INTENTIONAL DISCRIMINATION TO REMEDY PAST DISCRIMINATORY PRACTICES WHEN THERE IS A STRONG BASIS IN EVIDENCE THAT IT WILL BE SUBJECT TO LIABILITY FOR ITS PAST PRACTICES.

In *Ricci v. DeStafano*, 557 U.S. ____, No. 08-328, slip op. (June 29, 2009), the Supreme Court held that the City of New Haven was wrong to disregard the test results of a firefighters promotional exam, where it was alleged that the test results allowed only whites to be promoted. Because the effect of throwing out the test results would necessarily discriminate against the white firefighters who passed the exam, the City would first have to show that the test disparately impacted black firefighters under Title VII. Because the evidence only showed a "significant statistical disparity" rather than a "strong basis in evidence" that it would have been subject to liability, i.e., either that the test questions were not job related and consistent with a business necessity, or that an equally available and valid test existed that was less discriminatory, the Court held the City was wrong to throw out the test results.