Fenwick Employment Brief

May 9, 2007
Victor Schachter Editor 650.335.7905
Saundra L.M. Riley Contributor 650.335.7170
Fenwick
FENWICK & WEST LLP

EEOC REQUIRES NEW EEO-1 FORM FOR 2007 REPORT, REVISED COLLECTION AND REPORTING REQUIREMENTS FOR 2008 REPORT

Employers with 100 or more employees and federal contractors with 50 or more employees must comply with new Employer Information Report (EEO-1) requirements, including a revised report form that must be used in 2007 and revised collection and reporting requirements for 2008. Some of the key changes are summarized below.

- **New report form:** Employers must use a new report form (http://www.eeoc.gov/eeo1/eeo1_2007_d.pdf) beginning with the survey due by September 30, 2007.
- **New/revised ethnic and racial categories:** The new report form contains new and revised ethnic and racial categories including "two or more races," "Asian," "Native Hawaiian or other Pacific Islander," "Black or African American," and "Hispanic or Latino."
- **Self-identification verses visual inspection:** The EEOC prefers an employee's self-identification of race and ethnicity. Employers may only provide race or ethnicity information from records or visual observation when an employee refuses to self-identify.
- **Resurveying employees:** Although not required for the September 2007 report, the EEOC encourages employers to resurvey current employees. Employers may accomplish the resurvey by any means that allows employees to confidentiality self-identify, including through use of a secure Intranet.
- **Job Categories:** Several job categories have been revised. For instance, the former category "officials and managers" has been divided into two–"Executive/Senior Level Officials and Managers" and "First/Mid-Level Officials and Managers"–to reflect responsibility and influence within an organization.

Employers should begin taking steps to ensure compliance with these (and other) changes, including reviewing all changes, assessing how and when to resurvey the workforce, updating HRIS systems to reflect the new categories, and revising processes to routinely collect the necessary data (for instance, through the new hire process). More information about the revised EEO-1 is available from the EEOC at http://www.eeoc.gov/eeo1/index.html.

The following questions may help address some of the issues arising from the revised EEO-1 reporting obligations:

Q: Must a company use the revised report form for the survey due by September 30, 2007?
A: Yes.

Q: Must a company resurvey its workforce in order to capture and report in 2007 the revised ethnic and racial data requested by the revised EEO-1 report form?
A: No. The EEOC is not requiring companies to resurvey workforces to capture such data for the revised EEO-1 report due on September 30, 2007.

Q: When must a company report the revised demographic information requested by the revised EEO-1 report form?
A: 2008. Employers are required to collect and report the revised demographic information in their 2008 EEO-1 reports. However, the EEOC encourages employers to utilize opportunities–particularly those that do not impose additional burdens–to gather revised data as soon as possible, such as through use of routine updates of employees' personal information and new hire forms.

Q: Must a company report revised ethnic and racial information in the 2007 revised EEO-1 report if it already has collected such information?
A: Unclear, but advisable. The administrative information available to date does not expressly require an employer to report such information; however, the required use of the revised EEO-1 report would imply that employers should report any revised demographic information available to them.

Bottom line, even if a company has not collected revised ethnic and racial information, it need not be alarmed about the new requirements for purposes of its 2007 EEO-1 report. However, such employers should be aware that the new requirements will impact the substance of their 2008 EEO-1 reports and should diligently take steps–ideally starting now–to ensure compliance with the new requirements.

EMPLOYER SUCCESSFULLY CHALLENGED CLASS TREATMENT OF OVERTIME CLAIMS

In a recent victory for employers, a California appellate court agreed that a group of account managers could not pursue their overtime claims as a class. In *Walsh v. IKON Office Solutions, Inc.*, plaintiffs Ryan Walsh and Kevin Miller sought to represent a class of IKON employees who allegedly worked more than eight hours in a day and forty hours in a week without overtime pay. The trial court initially allowed the employees to pursue the claims, including account managers who were allegedly misclassified as exempt from overtime wage laws. Shortly before trial, at IKON's request, the trial reassessed its prior determination and held that the plaintiffs could not represent a class of account managers.

On appeal, the court agreed class treatment was inappropriate because individual questions of fact and law were too prevalent to resolve the claims of the class as a whole. For instance, the performance of tasks alleged to be common to all account managers actually varied significantly among individuals and offices, depending on the manager's territory, number of customers and job orders, support staff, and personal approach to each account.

This decision provides employers an excellent tool to challenge plaintiffs' attempts–which are growing more and more frequent–to leverage individual wage and hour claims into class actions.

NEWSBITES

Full Ninth Circuit to Rehear Disability Discrimination Claims Against UPS

The full Ninth Circuit Court of Appeals (comprised of 28 judges) has agreed to rehear the case of a class of hearing-impaired United Parcel Service Inc. ("UPS") employees who claimed UPS violated the Americans with Disabilities Act when it refused to consider them for certain driver positions. See *Bates v. United Parcel Serv. Inc.*, 9th Cir., No. 04-17295. As reported in the November 6, 2006 Fenwick Employment Brief, a three-judge panel previously allowed plaintiffs to pursue their claims without first proving they could safely perform the driving position. It also required UPS to justify its application of a standard that screened out plaintiffs as job-related and consistent with business necessity. Rehearing by the full court has been set for June 20, 2007.

Employer on Hook for Supervisor's Alleged Offsite Harassment

A plaintiff may bring her harassment claims against her former employer–based on offsite conduct by her supervisor–to trial. In *Myers v. Trendwest Resorts, Inc.*, former employee Alissia Myers sued Trendwest Resorts for sexual harassment she allegedly suffered at the hands of her supervisor Ayman Damlahki. Among other conduct, Damlahki allegedly subjected Myers to non-consensual physical contact while on "driving for dollars" trips wherein Trendwest employees followed customers home to obtain payment from them. While the trial court initially granted summary judgment for Trendwest, in part, because the conduct occurred outside the work place, the appellate court disagreed. Acknowledging the conduct physically took place offsite, the trips–and resulting harassment–occurred within the employment context making Trendwest responsible for the supervisor's conduct.

Salaried Executive Entitled to Labor Code Protections–and Attorney Fees

On April 17, 2007, a California appellate court recognized that a salaried executive may seek attorneys' fees under the Labor Code if determined to be a prevailing party in his action for nonpayment of wages. In *On-Line Power, Inc. v. Mazur*, David Mazur brought a counterclaim against On-Line Power for failing to pay his full wages as outlined in his employment agreement. The appellate court concluded that the wage protection statutes of the Labor Code applied with equal force to hourly and *salaried employees*. Further, On-Line Power's concurrent breach of the employment agreement–which lacked an attorneys' fee provision–did not preclude Mazur from seeking attorneys' fees under the Labor Code.

Statistical Evidence, Standing Alone, Not Enough to Prove Intentional Discrimination

In another recent decision, a California appellate court reversed a jury verdict finding the County of Los Angeles ("County") intentionally discriminated against County police officers based on race. In *Frank v. County of Los Angeles*, a class of minority officers of the County police asserted race discrimination claims against the County, relying heavily on expert testimony that the predominantly-Caucasian sheriff's department was better paid than the predominantly-non-Caucasian County police. In rejecting the verdict, the court emphasized that statistical evidence, alone, is not enough to establish intentional discrimination. The plaintiffs were required–but failed–to produce additional evidence of intent to discriminate based on race.