FENWICK & WEST LLP

Weekly Employment Brief

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Thomas Moyer Co-Editor
Allen Kato Co-Editor 415.875.2464

EEOC ISSUES NEW INTERNAL ADA GUIDELINES REGARDING TEMPORARY HELP AGENCIES AND THEIR CLIENTS

In a detailed enforcement guidance recently issued by the EEOC, both staffing firms and their clients may be considered "employers" under the Americans with Disabilities Act, and consequently have obligations to the contingent workers they place or employ. The EEOC made the following important conclusions:

- Neither a staffing firm nor its client may ask disability-related questions or require medical examinations until after an offer with a particular client has been made. A staffing firm's placement of a person on its roster of candidates eligible for assignment is not considered an offer of employment.
- After an offer has been made, both companies may ask disability related questions or require examinations if uniformly applied to everyone in the same job category.
- Refusal of employment based on workers' disabilities must be job-related and consistent with business necessity.
- Normally a staffing firm is responsible for providing reasonable accommodations for job applications, but both companies are responsible for providing accommodations needed on the job itself.

A copy of the enforcement guidelines are available on the EEOC's Web site at http://www.eeoc.gov.

US SUPREME COURT TO REVIEW TITLE VII DAMAGES CAP

The US Supreme Court recently agreed to settle whether victims of on-the-job harassment can win damages that are higher than the cap set by Congress under Title VII. Under Title VII, compensatory damages are subject to a $300,000 cap set by Congress as part of the 1991 amendments to the Civil Rights Act. At issue for the court in *Pollard v. DuPont Chemical Co.*, is whether Tennessee chemical plant worker Sharon Pollard can collect more than the cap in "front pay," or money she presumably would have earned had she been able to continue working for DuPont. The Supreme Court ruling, expected by summer, may affect any employee who wins a Title VII harassment or discrimination case where the potential front pay is over $300,000.

CALIFORNIA SUPREME COURT STRIKES DOWN SAN JOSE AFFIRMATIVE ACTION PROGRAM

The California Supreme Court recently struck down a San Jose minority outreach ordinance, in the first test of California Proposition 209's ban on affirmative action. Hi-Voltage Wire Works Inc. sued San Jose after the contractor lost its bid on a city project because it did not contain a sufficient number of women and minority-business subcontractors nor document outreach efforts. California voters approved Proposition 209 in 1996 to amend the state constitution to prohibit "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin . . ." The Supreme Court found that "It is clear the voters intended to adopt the original

construction of [Title VII] and prohibit the kind of preferential treatment accorded by this program."

NEW EEOC REGULATIONS FOR VALID WAIVER OF FEDERAL AGE CLAIMS

New federal EEOC regulations, effective January 10, clarified requirements for employers to obtain valid waivers of federal age discrimination claims from departing employees. Employees who accept severance pay and benefits in return for signing a waiver may bring suit to challenge the validity of the waiver without having to tender back the payment to the employer. Employers may not avoid the "no tender back" rule by using other means to limit an employee's ability to challenge the waiver. For instance, the employer may not require the employee to pay damages or attorneys' fees simply for filing suit, nor may it unilaterally abrogate or avoid the duties to which it agreed, even if the waiver is challenged. Thus, the employer remains obligated to pay retirement or other payments it agreed to provide. However, the employer may obtain an offset of the money paid for the waiver against any award the employee is given in his or her age discrimination suit. It is important to remember that a valid waiver may be enforced so long as the waiver complies with the procedural requirements of the federal Older Workers Benefit Protection Act.

FEDERAL CONTRACTOR RESPONSIBILITY RULE IS PUBLISHED

With strong support from organized labor, the Clinton administration issued a controversial new regulation, effective January 19, linking eligibility for federal contract awards to a prospective contractor's record of compliance with labor and employment, tax, environmental, antitrust, and consumer protection laws. In selecting a contractor, the federal contracting official must evaluate the bidder's record of compliance with these several laws. The AFL-CIO lauded the new regulation as a "welcome safeguard" to discourage tax dollars from going to companies that do not adhere to "business ethics." Business groups, including the U.S. Chamber of Commerce, have already threatened suit to stop the implementation of the regulation on the ground that it violates equal protection by giving vague and overbroad discretion to federal officials to make decisions based upon alleged violations that have no bearing on the ability to perform the contract.