



LABOR & EMPLOYMENT

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Message from the Firm

While 2009 begins to wind down, enforcement of employment laws continues to increase. Developments in just the past few weeks are illustrative. In Texas, BP Products, North America was issued \$87.4 million in proposed penalties by OSHA for allegedly failing to correct potential hazards. In Maryland, a painting contractor was ordered to forfeit over one million dollars in assets and sentenced to six months in a halfway house for, among other things, knowingly hiring illegal aliens. In California, Lawrey's Restaurants, Inc. agreed to a million dollar settlement with the EEOC regarding claims that it hired only female servers at its restaurants.

From coast to coast, employers large and small continue to face the daily challenges of employment law compliance. In addition to existing laws, employers have faced new requirements in 2009 in areas such as disability and genetic discrimination. Perhaps the largest new obligation of 2009 is yet to take form – employer obligations under federal health care reform. We encourage employers to stay abreast of continuing developments in the field and take proactive steps to avoid liabilities.

Improper Use of Background Checks Can Be Costly

By Daniel W. Morris, Counsel

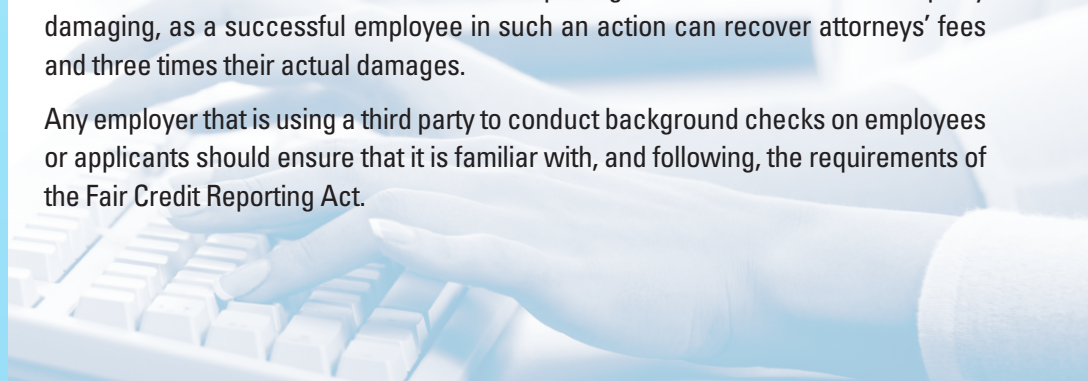
Recently, two companies separately agreed to pay civil penalties totaling a combined \$77,000 to resolve accusations that they violated the Fair Credit Reporting Act in connection with their hiring processes. The Federal Trade Commission brought separate lawsuits in federal court against Quality Terminal Services, LLC and Rail Terminal Services, LLC. In both lawsuits, the FTC alleged that the companies contracted with a credit agency to conduct background checks on employees and applicants, including criminal record reviews, and then made hiring and firing decisions based on those background checks. The FTC also alleged that each company failed to provide the employees with the notices required by the Fair Credit Reporting Act.

These cases are an important reminder that the Fair Credit Reporting Act applies to most employers that conduct background checks on employees and applicants and highlights the need for them to understand and follow the requirements of the Act. The Fair Credit Reporting Act is implicated when an employer hires a third party to conduct background checks and seek employees' and job applicants' credit records, criminal histories and other background information.

The Fair Credit Reporting Act requires an employer to provide the applicant or employee with notice before it takes adverse action, which includes dismissal or rejection of an employment application, based on a consumer report. The employer must also provide the employee with a copy of the report, identify the agency that provided the report to the employer, and inform the affected individual of his or her right to obtain a free copy of the report to dispute its accuracy.

The cases against Quality Terminal and Rail Terminal illustrate that the FTC can bring an action on behalf of employees, but employees also have the ability to bring their own action for violations of the Fair Credit Reporting Act. The result could be equally damaging, as a successful employee in such an action can recover attorneys' fees and three times their actual damages.

Any employer that is using a third party to conduct background checks on employees or applicants should ensure that it is familiar with, and following, the requirements of the Fair Credit Reporting Act.



Early Attention to Union Issues Key in Plant Closings

By Scott M. Wich, Partner

In good times and in bad, plant closures can be a drastic but effective tool to improving performance. Whether intended to align costs with decreased market demand or allow the pursuit of opportunities in other locations, the shuttering of a facility is sometimes an attractive strategic option. While operational issues tend to dominate such decisions, early attention to labor issues in the unionized setting is essential. Failure to adequately address such matters can derail closing plans.

On September 21, 2009, Pratt & Whitney announced the closure of two facilities in Connecticut with plans to lay off approximately 1,000 workers. According to Pratt & Whitney, approximately 85% of the eliminated jobs are covered by a labor contract with District 26 of the International Association of Machinists and Aerospace workers.

The following day, District 26 filed a federal court lawsuit against Pratt & Whitney seeking to enjoin the plant closures and layoffs. In the lawsuit, District 26 alleges that Pratt & Whitney failed to engage in good faith bargaining and, consequently, violated a provision of the labor contract that largely prohibits the transfer of bargaining unit

work. It asserts that rushed negotiations and unreasonable demands indicated that Pratt & Whitney made no good faith effort to keep the work in Connecticut. District 26 seeks to stop Pratt & Whitney from removing any work from the bargaining unit until the expiration of the current labor agreement in December 2010 – far beyond the layoff timeline announced by Pratt & Whitney. The Connecticut Attorney General's office is publicly supporting the suit.

As the lawsuit proceeds in the upcoming months, Pratt & Whitney's planned closures are, at best, in limbo. At worst, the court can enjoin the closures and cause Pratt & Whitney's plans to be set back by a year or more. While it is not always possible to avoid union opposition, employers are well advised to review labor contracts sufficiently in advance of a plant closing to permit adequate time to fulfill bargaining obligations. Such time can also be used to negotiate agreements with the union that will facilitate the closing process. Advance planning is key. A failure to adequately prepare for labor issues or the many other laws (such as WARN) that are triggered by a plant closing can result in very costly delays.

Reversing Course: Employers Face Increasing Race Discrimination Claims From White Employees

By Stefanie R. Munsky, Associate

On the heels of the U.S. Supreme Court decision in *Ricci v. DeStefano*, which held in favor of a group of white firefighters in a reverse race discrimination case, the U.S. Court of Appeals for the Second Circuit recently vacated the dismissal of a white employee's failure to promote and hostile work environment claims. In *Aulicino v. New York City Department of Homeless Services*, a white employee sued his employer alleging a hostile work environment and failure to promote. The basis for the employee's claims was that he was subjected to racial harassment from his African-American supervisors and denied a promotion for which he was qualified because of his race.

Reviewing first the plaintiff's failure to promote claim, the Second Circuit held that the plaintiff had produced sufficient evidence for a jury to conclude that he was qualified for the promotion, particularly in light of the fact that the African-American employee who received the promotion lacked the same qualifications listed in the job posting as the plaintiff. The Second Circuit found that a jury could infer discriminatory intent in the denial of the promotion based upon racially derogatory comments made by the plaintiff's supervisors and remanded the cause of action for trial.

The Court also vacated the dismissal of plaintiff's hostile work environment claim and remanded it for reconsideration by the lower court. In so holding, the Court found that the lower court failed to

view the evidence in the light most favorable to the plaintiff. The plaintiff provided evidence of at least two periods of relatively frequent harassment, as well as two comments that could be inferred as physical threats that the lower court failed to consider.

The *Aulicino* decision reaffirms for employers the importance of treating complaints of race discrimination and a hostile work environment seriously, regardless of the race of the employee.



Company Pays \$450K Fine for Employing Illegal Aliens

By Daniel P. O'Brien, Associate

George's Processing, Inc., a poultry processing company with locations in three states, recently paid a \$450,000 fine as part of a settlement agreement related to the employment of illegal alien workers. The Department of Homeland Security conducted a work site investigation into a plant in Missouri that resulted in the arrest of 136 illegal aliens. The U.S. Attorney for the Western District of Missouri then sued the company under the Immigration and Nationality Act, seeking to "enjoin, prevent, and deter" the company from employing unauthorized aliens. The company settled the same day they were sued.

The substantial fine was intended to send a message to employers across the country that the government intends to dutifully uphold immigration laws, and that violators of these laws will be prosecuted. In addition to the financial penalty, two of the company's hiring personnel were convicted of harboring illegal aliens and inducing illegal aliens to remain in the United States.

The action against George's Processing is just an example of the government's ramped up immigration control efforts. For example, in September the government began requiring

all federal contractors and subcontractors to enroll in E-Verify in order to confirm the employment eligibility of their employees. Employers should take the necessary precautions to increase their awareness of immigration laws and related regulations. Specifically, human resources and management personnel should be educated in the most recent aspects of immigration law. Employers need to focus on shaping their internal practices and confirm that their hiring process is constructed to avoid the risk of such significant fines and potential individual liability for employees.

Protection Under Civil Rights Law Extended to Independent Contractors

By Sheryl A. Orwel, Associate

Even though independent contractors are not considered employees, employers can still be held responsible for discriminating against them. In a precedent-setting case from the U.S. Third Circuit Court of Appeals, *Brown v. J. Kaz, Inc.*, the Court held that an independent contractor is allowed to bring a claim for racial discrimination under the Civil Rights Act of 1866 ("Section 1981") against people or entities with whom they have contracted to work.

The issue in *Brown* arose when Kimberly Brown, the plaintiff, applied for a sales position with J. Kaz, Inc., which does business under the name Craftmatic, a distributor of adjustable beds. Brown, an African-American woman, participated in a three-day training session for prospective sales representatives at Craftmatic's Pittsburgh office. There were two other trainees, neither of whom was African-American. On the last day of the training, Brown signed Craftmatic's independent contractor agreement to be a sales representative.

Later that day, Jay Morris, Craftmatic's recruiting manager, approached Brown and the other two trainees and shook hands with the two trainees. However, "for reasons that are unclear, Brown refused to shake Morris' hand." Brown alleged that after she refused to shake Morris' hand, he stated the following: "Well, you ain't nothing but a black person anyway" and "Well, you ain't nothing but the N word." Brown further alleged that she asked Morris, "Are you calling me a nigga," and he "smirked and shook his head."

Morris reported the incident to John Girty, Craftmatic's owner, and told him he did not want Brown working as a sales representative. After the meeting with Morris, Girty terminated Craftmatic's independent contractor agreement with

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Brown for the sales representative position.

Brown sued Craftmatic. Confronting this new issue of whether Section 1981 protects independent contractors, the Third Circuit determined it did. The Court's decision expands employers' exposure to discrimination lawsuits beyond traditional employees. Thus, while utilizing independent contractors may be good for business because of the cost savings, an employer is no less exposed to race discrimination lawsuits.

EFCA Update

The battle over the Employee Free Choice Act is shifting to the recent nominees to the National Labor Relations Board and the impact those nominees will have in rule making and interpretation of federal labor law. One nominee that is the subject of increasing controversy is Craig Becker, a union attorney who stated in a 1993 law review article that:

"Employers should be stripped of any legally cognizable interest in their employees' election of representatives... employers should have no right to raise questions concerning voter eligibility or campaign conduct."

Source: Becker, Craig, "Democracy in the Workplace: Union Representation Elections and Federal Labor Law," 77 Minn. L. Rev. 495 (1993).



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