Supplemental Recent Developments

By

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**Wednesday, April 14, 2010**

**Unpaid Internships**

The threat by the Obama administration's Secretary of Labor Solis to aggressively enforce, as against for-profit entities, the notion that interns must be paid a minimum wage, has generated an extraordinary amount of discussion in the blogosphere. Among the many blogs on this topic worth reading are Lawffice Space, Jackson Lewis’ Wage & Hour Law Update, Swarthmore’s Daily Gazette, and the Workplace Prof Blog.

Posted by Robert B. Fitzpatrick at 5:05 PM 0 comments

**A New Twist on “Non-Competes”**

Rob Radcliff reports on the anti-trust investigation of technology companies (e.g., Google, IBM) that allegedly have agreed that there will not be mobility of certain “geek” employees from one tech company to another. In other words, allegedly these companies have agreed that if you will stay away from my talent, I will stay away from yours. The Justice Department is investigating. Rob, with tongue-in-cheek, styled his blog yesterday about this as “how to enforce a non-compete without a non-compete.”

Posted by Robert B. Fitzpatrick at 5:04 PM 0 comments

**Tuesday, April 13, 2010**

**FICA Tax Treatment of Severance Pay**

In United States v. Quality Stores, Inc., 2010 U.S. Dist. LEXIS 15825 (W.D. Mich. Feb. 23, 2010), a case where the employer sought a refund of $1,000,125 in Federal Insurance Contributions Act (FICA) taxes paid with regard to severance payment to former employees, Judge Janet T. Neff held that payments made to employees in a reduction-in-force were not “wages” for FICA purposes. The parties had stipulated that the payments were made on account of the employees’ involuntary separation from employment.

A conflicting ruling was issued in 2008 by the Federal Circuit in CSX Corp. v. United States, 518 F.3d 1328 (Fed. Cir. 2008), which reversed 52 Fed. Cl. 208 (Fed. Cl. 2002).

There are a series of revenue rulings from 1957 to 1990 in the matter, summarized in CSX Corp., 518 F.3d at 1334-40.
The Sixth Circuit will now determine whether it agrees with Judge Neff or the Federal Circuit. If the former, there will be a circuit split, and maybe resolution by the Supreme Court.

Employers should request refunds in the interim, and employees' counsel should condition severance agreements on requests for refunds.

Posted by Robert B. Fitzpatrick at 11:54 AM 0 comments

Monday, April 12, 2010

Pattern or Practice Claims

There are several open questions regarding pattern or practice claims. One is whether an individual can maintain a private, non-class action pattern or practice claim. Some courts have suggested that they cannot. See, e.g., U.S. v. City of New York, 631 F. Supp. 2d 419, 427 (S.D.N.Y. 2009) ("Courts have held that an individual cannot maintain a private, non-class, pattern-or-practice claim."); Tucker v. Gonzales, No. 03 Civ. 3106, 2005 U.S. Dist. LEXIS 21616, 2005 WL 2385844, at *5 (S.D.N.Y. Sept. 27, 2005) (collecting cases holding that pattern or practice claims are limited to class actions); see also Blake v. Bronx Lebanon Hosp., No. 02 Civ. 3827, 2003 U.S. Dist. LEXIS 13857, 2003 WL 21910867, at *5 (S.D.N.Y. Aug. 11, 2003) (doubting the propriety of a pattern or practice claim in a non-class action complaint).

Posted by Robert B. Fitzpatrick at 5:28 PM 0 comments

ENDA - Transsexuals

How little some of us know about transsexuals was underscored for me the other day when I read about an Iranian movie “Be Like Others” directed by Tanaz Eshaghian, which is about transsexuals in the Islamic Republic of Iran. In Iran, sex-change operations are legal. Interestingly, over two decades ago, Ayatollah Khomeini issued a fatwa making sex-change permissible for “diagnosed transsexuals.” As homosexuality is punishable by death in Iran, apparently they flock to the country’s best-established gender reassignment surgeon, Dr. Bahram Mir Jalali, so that they can live “a decent life.”

Posted by Robert B. Fitzpatrick at 5:27 PM 0 comments

Paycheck Fairness Act
April 20th has been designated by some NGOs as Equal Pay Day. Keep your eye on the status of the Paycheck Fairness Act as we move closer to April 20th. April 20th was selected as these groups contend that, for the average full-time female employee to earn the same amount of money as the average male employee, said average female employee would need to work nearly four additional months – until the third week of April – on account of an alleged 23% gender gap.

The House of Commons in London last week enacted a similar piece of legislation. A state-written summary of The Equality Act 2010 is available here. The actual law is some 251 pages in length.

WSJ in its Weekend Edition here discusses all of this as well as competing studies on the pay gap between men and women. Interesting research by two Cornell University economists, Francine D. Blau and Lawrence M. Kahn, who concluded that the “unexplained” gender gap, as of 1998, was 9%.

You can view my paper on the Paycheck Fairness Act here and my prior blog post on the Act here.

Posted by Robert B. Fitzpatrick at 5:13 PM 0 comments

**Does Disparate Impact Analysis Apply to Federal Employee Discrimination Cases?**


Members of the D.C. District Court remain divided on the issue. In *Breen v. Peters*, the court concluded that 29 U.S.C. § 633a, the section prohibiting age discrimination in federal employment, did not preserve sovereign immunity against disparate impact claims because the text of the section prohibits discrimination, not intentional discrimination. 474 F. Supp. 2d 1, 6 (D.D.C. 2005). "The text of § 633a does not explicitly or implicitly require a plaintiff to prove that the federal employer was motivated by animus or intended to discriminate in violation of the law. In short, the plain language of § 633a does not support the distinction between disparate treatment and disparate impact." Id. In contrast, in *Silver v. Leavitt*, the court relied on "the significant question of sovereign immunity, and the Supreme Court's acknowledgment that the nature of the ADEA differs markedly from that of Title VII" to conclude that a disparate impact