LABOR PERSPECTIVES

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NOTICES OF INSPECTION CURRENTLY BEING ISSUED TO MANY PUERTO RICO EMPLOYERS BY THE U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

As our clients and friends are well aware, the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, requires employers to hire only persons who are authorized to work in the United States. Moreover, employers are required to verify the employment eligibility of persons hired after November 6, 1986, by means of the Employment Eligibility Verification Form I-9. A properly completed Form I-9 for each hired employee must be retained for either three years after the date employment begins, or one year after the date the person's employment is terminated, whichever is later.

In assessing compliance with the I-9 employment eligibility verification requirement, the U.S. Immigration and Customs Enforcement ("ICE"), the Federal Agency responsible for enforcing customs and immigration laws, has recently issued notices of inspection to numerous employers in Puerto Rico. Under applicable regulations, ICE provides a three-day advance notice to an employer prior to conducting a review of that employer's Forms I-9. In executing the review, an ICE Special Agent visits the workplace and conducts an inspection of the pertinent documents. I-9 violations may result in costly civil penalties and even criminal penalties under certain circumstances.

Thus, in light of the potential liability and the short time between the notice of inspection and the actual visit by an ICE Special Agent, we highly recommend that your company promptly conduct a thorough internal audit of I-9 documentation to verify that you are in compliance. You may consult the current Handbook for Employers regarding compliance with I-9 requirements, which was revised on April 3, 2009. It is available at the U.S. Citizenship and Immigration Services' website at: http://www.uscis.gov/files/nativedocuments/m-274.pdf.

Additionally, we recommend that employers collect and have readily available the following information and

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documentation, which ICE commonly requests in its I-9 compliance audits:

1. list of current employees and of employees hired during the past three years;

2. date of hire of all current employees, as well as date of hire and date of termination of each employee hired and/or terminated during the past three years;

3. employment contracts for all the current employees and for employees hired during the past three years;

4. payroll records for the past three years;

5. copies of salary payment checks for the past three years;

6. quarterly tax statements and copies of all W-2 Forms submitted to the corresponding authorities for the past three years;

7. copies of quarterly wage-and-hour reports and/or payroll data for all employees (current and terminated) for the past three years;

8. business information, if applicable, including Employer Identification Number (EIN), Taxpayer Identification Number (TIN), owner's Social Security numbers (SSN), owner's address information, telephone numbers, e-mail addresses, copies of articles of incorporation, and copies of business licenses;

9. copies of all correspondence from the Social Security Administration (SSA) to the employer for the past three years regarding mismatched or non-matched Social Security numbers. These missives are known as Employer Correction Requests or Requests for Employee Information, and are commonly referred to as "no-match" letters; and

10. documents evidencing that the company is a current or previous participant in E-Verify or the Social Security Number Verification Service.

If your company needs advice or assistance in conducting an internal I-9 audit, or if you receive a notice of inspection from ICE, feel free to contact us. McConnell Valdés LLC has an Immigration Practice Team within the Labor and Employment Law Practice Group to provide such advice or assistance. McV

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Maggie Correa-Avilés is a Member in the Labor and Employment Law Practice Group of McConnell Valdés LLC.

A DIVIDED UNITED STATES SUPREME COURT REVISITS STANDARDS FOR DISPARATE IMPACT DISCRIMINATION CASES

In a five to four decision, the U.S. Supreme Court reversed a District Court judgment that held that the city of New Haven, Connecticut, had not violated Title VII of the Civil Rights Act of 1964 ("Title VII") when it discarded objective test results used to identify the best qualified firefighters for the purpose of promotions. The cases of Frank Ricci et al. v. John DeStefano et al., No. 07-1428 and 08-328, were decided on June 29, 2009.

The city of New Haven, after a long detailed process to establish an objective and job-based qualification process, administered examinations for the purpose of selecting the best qualified candidates for available firefighter positions and promotions. The tests results showed that the white candidates received the higher scores. Had the tests results been confirmed, all the available positions and promotions were going to be filled by white candidates. As a result, the city of New Haven decided not to certify the results alleging that, if it had certified the results of the examinations, it would have engaged in a practice of disparate impact on minority black firefighters who obtained, after applying the objective criteria, lower scores than the white candidates. Since the city of New Haven feared litigation and liability under Title VII due to the disparate impact on minority firefighters, it decided to ignore the results of the tests. The white and Hispanic candidates who were denied a chance for promotions, even though they approved the exams, alleged that they were discriminated against based on their race by the City's decision to discard the tests.

Title VII prohibits intentional acts of discrimination based on race, among other reasons, as well as practices and policies which may not have the intention to discriminate but that result in a disproportionate adverse impact on minorities. In this case, the disproportionate adverse impact had an effect on the white and Hispanic minority groups. In these instances, the employer has available the defense of showing that its policies or practices were job-related and necessary for business reasons. The employee, in turn, has to demonstrate that the employer had available another alternative which it could have adopted to avoid the disparate impact and serve its employment and legitimate business needs.

The evidence presented in the Ricci case demonstrated that the city of New Haven had discarded the tests results just because the higher scores were obtained by the white candidates. Since the exams were valid and objective, equally administered to all, and considered the elements that a firefighter must know to advance in his job position, New Haven's decision to ignore the tests just based on race, without any other justification, was found by the Supreme Court to be improper. Adopting the "strong basis in evidence" standard applied in previous decisions under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States to Title VII claims, the Supreme Court concluded that the employer may discriminate to remedy race-based discrimination only where there is strong evidence that the action was necessary to resolve a conflict under Title VII between disparate-treatment and disparate-impact discrimination, and that there was no other valid alternative.

Before an employer may take intentional discriminatory actions to avoid or lessen the unintentional disparate impact, the employer must have a strong-evidence basis to believe that it will violate the Title VII provision against disparate impact discrimination unless it does not take the race-based decision to discriminate. In other words, the employer may not have another alternative to avoid disparate-impact treatment but to discriminate.

Justice Ruth Bader Ginsburg filed the dissenting opinion in which three other Justices joined. In her conclusion to the dissenting opinion, Justice Ginsburg stated: "This case presents an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place. But what this case does not present is race-based discrimination in violation of Title VII. I dissent from the Court's judgment, which rests on the false premise that respondents [New Haven] showed 'a significant statistical disparity,' but 'nothing more.'..." M&V

Sandra L. Negrón-Monge is Counsel in the Labor and Employment Law Practice Group of McConnell Valdés LLC.

HAS YOUR COMPANY CONSIDERED IMPLEMENTING A VOLUNTARY EXIT INCENTIVE PROGRAM INSTEAD OF A LAYOFF?

Faced with a need to reduce costs, many employers often begin by planning reductions in the work force ("RIF"). However, RIFs are certainly not the only alternative available to a struggling employer. Options such as temporary shutdowns, hiring freezes, reduction or elimination of overtime work, or voluntary exit incentive programs may meet an employer's cost-reducing needs without resorting to a RIF. If an employer chooses to implement an exit incentive program instead of, or in advance of, a layoff, it should consider the following general characteristics of such a program and the requirements to follow in order for it to be in compliance with applicable law.

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First, the employer has some degree of discretion as to the programs' design, eligibility criteria and benefit components. Companies may elect to structure the same as a "voluntary resignation program," without regard to eligibility for retirement benefits, or as a "voluntary retirement program." A "voluntary resignation program" that is not limited to retirement-age employees can be offered to a subset of employees of a Company (e.g., only to managers, members of a particular department, or employees at a single facility). On the other hand, "voluntary retirement exit programs" are offered only to employees who are already eligible to immediately receive retirement benefits or to persons nearing retirement benefit eligibility.

"Voluntary exit incentive programs" offer special benefits to persons who voluntarily terminate their employment during a "window" period, usually consisting of one to three months. The program components vary greatly, but almost all of them provide some form of severance pay, either in a lump sum or in the form of salary continuation. The amount of the special payment is often determined under a formula based on the years of service of the participating employees. Other common benefits include: (1) continued group health coverage totally or partially subsidized by the Company; (2) subsidized COBRA health continuation coverage; (3) outplacement or continuing education assistance; (4) payment of pro-rated partial year bonuses; and/or (5) vesting pension, profit-sharing, stock bonus or saving plans benefits.

Normally, these benefits are offered in exchange for and in consideration of the execution of a Separation Agreement and General Release through which the participating employees waive any and all claims they may have against the employer. The Age Discrimination in Employment Act ("ADEA"), as amended by the Older Workers Benefit Protection Act, requires that the waiver of federal age discrimination claims be knowing and voluntary, and sets forth very detailed requirements for the validity of the releases. These additional requirements have to be met as to eligible participants who are age 40 or older.

More specifically, the exit incentive program must be designed to ensure that (1) an employee has sufficient time to consider his or her options (if two or more employees are offered participation in the program the individuals are entitled to at least 45 days to consider the separation agreement; if only one employee is participating, then the consideration period is 21 days); (2) accurate and complete information regarding the available benefits is provided to the eligible employees; and (3) the employer informs the individual in writing of the group covered by the program, the eligibility requirements and time limits of eligibility, the job titles and ages of all individuals who are eligible or who were selected for the program and the ages of all individuals in the same job classification or organization unit who were not selected.

Further, as to voluntary retirement

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incentive programs, the ADEA states that the program cannot withhold benefits from workers older than a stated age, unless the employer can prove that the criteria for benefit eligibility do not constitute arbitrary age discrimination. However, the program may be designed to apply only to workers at or older than a stated age. For example, a program designed so that the benefit is available only to employees who have reached a certain age with a specified number of years of service, such as age 55 with ten years of service, would not violate the ADEA because it does not have an eligibility "ceiling" based on age, although it does have an eligibility "floor" based on age.

In deciding to provide severance pay through a "voluntary exit incentive program," an additional consideration is whether the program will be subject to the provisions of the Employee Retirement Income Security Act ("ERISA"). In order to constitute an ERISA-covered employee benefit plan, an exit incentive program that provides severance benefits must involve an ongoing administrative scheme and a discretionary program sponsored by the employer. For example, an employer's commitment to perform the following actions in connection with administering the program could be considered indicative of the existence of an ERISA plan: (1) making systematic benefit payments; (2) determining the eligibility of claimants; (3) calculating benefit levels; (4) disbursing funds; (5) monitoring the availability of funds for benefit payments; and (6) keeping appropriate records in order to comply with reporting requirements. However, if the employees are only receiving a one-time lump sum payment of severance triggered by a single event, such as the need to reduce the number of employees, it is unlikely that the program will qualify as an ERISA plan.

ERISA imposes reporting, disclosure and fiduciary requirements on a wide range of employee benefit plans, such as those providing severance pay. It should be noted that even an unwritten policy or practice of paying severance benefits can be subject to ERISA without it being the intention of the employer to create an ERISA plan. On the contrary, employers may purposely elect to create an ERISA plan, which includes preparation and distribution of a summary plan description, in order to be in compliance with the statute. These issues should be addressed with counsel on an individual basis.

Should your Company be interested in creating and establishing a Voluntary Exit Incentive Program, our attorneys in the Welfare Benefits and ERISA Litigation Practice Team within our Labor and Employment Law Practice Group will be glad to provide advice and assistance regarding these programs. MCV

PRACTICE GROUP NEWS

Maggie Correa-Avilés has been elected member of McConnell Valdes LLC's Policy Committee. **Maggie** is a Capital Member in the Labor and Employment Law Practice Group. She has been with the Firm for 30 years, concentrating in litigation in the employment area in both local and federal courts. We are very proud of her new achievement!

Sandra L. Negrón-Monge was a speaker at a seminar sponsored by Oriental Bank on May 13, 2009. The seminar was held at The Holiday Inn in Isla Verde and clients and friends of Oriental Bank attended the same. **Sandra's** topic was the American Recovery and Reinvestment Act of 2009.

The Labor and Employment Law Practice Group hosted its second Round Table Seminar of 2009 on August 21. The Seminar was held at McConnell Valdés LLC's facilities and over 30 clients and friends attended the same. The topics discussed were the use of the Internet as a recruiting tool, employee use of social networking sites, as well updates on recent case law and proposed legislation affecting employers. **James D. Noel** and **Jessica Figueroa Arce** were the speakers during this round table. The Round Table Seminars are provided free of cost to clients and friends of the Firm several times during the year.

Miguel A. Rivera Arce is an Associate in the Labor and Employment Law Practice Group of McConnell Valdés LLC.

U.S. SUPREME COURT HANDS EMPLOYERS A MAJOR VICTORY IN AGE DISCRIMINATION CASES UNDER ADEA

In a case that will dramatically change the landscape of federal age discrimination litigation, the U.S. Supreme Court recently issued an opinion in Gross v. FBL Financial Services, Inc., No. 08-441, which increases the standard of proof that claimants must satisfy in actions brought under the Age Discrimination in Employment Act ("ADEA"). Specifically, a sharply divided Supreme Court established that plaintiffs pursuing claims of age discrimination under the ADEA will be held to a more stringent standard of proof than plaintiffs pursuing claims under the other principal federal anti-discrimination statutes. Thus, after Gross, it is more difficult for claimants to prevail on federal age discrimination claims.

Historically, the standard of proof in ADEA cases has generally mirrored the standards set out by the courts in cases under Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII is the federal law that prohibits employment discrimination based on race, color, religion, sex, or national origin. Under both Title VII and the ADEA, it is rare to encounter a case where the adverse employment action, challenged by the claimant as discriminatory, can be attributed to purely discriminatory factors or purely legitimate factors. It is often the case that, while employees are able to bring forth direct or circumstantial evidence pointing to discriminatory animus, employers are also able to cite legitimate factors such as poor performance or misconduct as the reasons behind an adverse employment decision.

For such "mixed-motive cases," Title VII expressly provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Thus, when a claimant demonstrates that an unlawful factor such as race or sex was involved to any significant degree in an adverse employment decision, the claimant has established a violation of Title VII. At this point, the burden shifts to the employer to prove that it would have made the same decision, regardless of the unlawful factor that was allegedly taken into account. Based on similarities in statutory language and parallel policy considerations between Title VII and the ADEA, courts have generally applied these Title VII standards to ADEA cases. However, based on the Gross decision, this will no longer be true for ADEA claims.

In Gross, the U.S. Supreme Court held that the Title VII approach to mixed-motive cases does not apply to claims under the ADEA. Specifically, the Supreme Court held that a plaintiff bringing an ADEA claim must show by a preponderance of the evidence that age was the "but for" cause of the employer's adverse employment decision. In addition, the Court found that an employer need not show it would have made the same decision regardless of age, even if the employee produces some evidence that age may have been a contributing factor in the decision.

The facts of the case were as follows. In 2003, Jake Gross, a 54-year-old, long-term employee of FBL Financial Group, Inc. ("FBL"), was reassigned from the position of claims administration director to claims project coordinator. As a result of his reassignment, many of his job responsibilities were assigned to a newly created position filled by another employee, who was in her late forties and had previously been supervised by Gross. Although Gross' compensation was not reduced, he considered his position change to be a demotion. In 2004, Gross filed suit alleging that his reassignment was based, at least in part, on his age, in violation of the ADEA. FBL claimed in its defense that the decision to reassign Gross was part of a corporate restructuring and his new position was better suited to his skills.

In its decision, the Supreme Court explicitly rejected the notion that a plaintiff may establish discrimination by showing that age was simply a "motivating factor." Of particular significance to the Court was that, unlike Title VII, the ADEA has not been amended to include "motivating factor" language. Under the text of the ADEA, it is unlawful for an employer to discriminate against an individual "because of" age. As interpreted by the Court, "because of" age means that age was the "reason" the employer decided to act. Therefore, "[t]o establish a disparate-treatment claim under the plain language of the ADEA…a plaintiff must prove that age was the 'but-for' cause of the employer's adverse

decision." In addition, the Court held that "the plaintiff retains the burden of persuasion" at all times in ADEA cases. Consequently, ADEA cases will not be governed by the long-followed burden-shifting framework. Rather, in order to successfully assert a claim of age discrimination, a plaintiff must prove by a preponderance of the evidence that age was the determinative factor behind the challenged employer decision.

The Gross decision is a victory for employers. It will make it more difficult for frivolous claims to succeed under the ADEA. Plaintiffs now need to meet a more exacting "but for" test to prove their claims, and they have the burden of persuasion in all cases, including mixed-motive cases. As a consequence, courts may see a decline in federal age discrimination claims. However, it is important to note that this decision only applies to the ADEA. As such, courts may also see a proportional rise in age discrimination claims based on P.R. Act No. 100, the local statutory counterparts, which has a less demanding legal liability standard.

While Gross has important ramifications for age discrimination claims, as well as discrimination cases in general, only time will tell the full impact of this decision. As always, employers need to carefully evaluate all surrounding circumstances before taking any adverse employment actions which may affect employees within the age-protected category which ADEA established. All adverse employment action should be based on objective non-discriminatory factors.

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EMPLOYERS NARROWLY ESCAPE ADDITIONAL BURDENS RELATED TO PATERNITY AND MATERNITY LEAVE

On June 30, 2009, both the Puerto Rico Senate and the House of Representatives signed and approved Senate Bills 486 and 487 providing for a special paternity leave and an extension of the already existing maternity leave, for parents whose infants were born prematurely.

A first in its class, Senate Bill 486 mandated that employers from the private sector provide their employees a paid leave for those fathers whose infants were born prematurely and/or whose infants or mothers had post-natal complications. The paid paternity leave would have consisted of a five (5) working day period, starting on the date the infant is born.

In order to be eligible, fathers could not have engaged in domestic violence and they must have provided their employers the infant's birth certificate and a medical certification validating that the child was born prematurely and/or that the mother suffered from post-natal complications.

Similar on its premises as to Senate Bill 486, Senate Bill 487 proposed amendments to Act No. 3 of March 13, 1942 ("Act No. 3"), known as the "Working Mothers Act." Specifically, pursuant to the amendments proposed to Act No. 3 by Senate Bill 487, a working mother who gave birth to her child prematurely would be able to extend her post-natal maternity leave for the pre-natal amount of leave that she was not able to enjoy. The working mother could have requested reinstatement after only two (2) weeks of post-natal maternity leave if she submitted a medical certificate stating that she was able to return to work.

Senate Bill 487 also proposed amendments to Act No. 3 by providing working mothers a right to extend their pre-natal maternity leave, with full compensation, in the event that they were scheduled to give birth on a given date, but did not do so. In said cases, the pre-natal maternity leave was extended until the actual date of birth, as long as the mother had already exhausted the four weeks of pre-natal maternity leave. If the working mother, or the infant(s), suffered post-natal complications that prevented her from returning to work for a period exceeding four (4) weeks from the date of birth, the employer was obligated to pay for and extend the resting period of the working mother for a term of no longer than four (4) additional weeks.

If post-natal complications continued beyond the four (4) additional weeks, working mothers would have had a right to an additional eight (8) weeks of maternity leave, without pay. In order for a working mother to have been eligible for the four (4) and eight (8) additional weeks of leave, a medical certificate had to be submitted to the employer before the resting period expires.

On July 15, 2009, Senate Bills 486 and 487 were submitted to the Governor for his signature or veto. Nevertheless, the time provided to do either expired without any action by the Governor, thus effectively rejecting the bills through a "pocket veto." Admittedly, Senate Bills 486 and 487 looked after a very laudable and noble cause. However, if enacted, they would have entailed additional hurdles for employers in an already leave-saturated environment. Given the overwhelming support these bills gained in the legislature, similar, if not identical, measures will certainly re-surface in the future. McV

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