



WOODS ROGERS ^{PLC}
ATTORNEYS AT LAW

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Labor & Employment Update

WOODS ROGERS PLC

**COMPLIANCE REMINDER
Significant Changes to COBRA Elections and Premiums**

By: Thomas M. Winn, III

This is just a reminder that the American Recovery and Reinvestment Act of 2009 (“ARRA”) provides for premium reductions and additional election opportunities for health benefit continuation under COBRA. Eligible individuals pay only 35 percent of their COBRA premiums and the remaining 65 percent is reimbursed to the coverage provider through a tax credit. The premium reduction applies to periods of health coverage beginning on or after February 17, 2009 and lasts for up to nine months for those eligible for COBRA during the period beginning September 1, 2008 and ending December 31, 2009 due to an involuntary termination of employ-

ment that occurred during that period.

We previously issued guidance on these significant developments, which guidance can be found [here](#). In addition, the Department of Labor has established a site that contains model notices, fact sheets and FAQs providing further information about these changes. Visit <http://www.dol.gov/ebsa/cobra.html> for more information. Covered employers should review and update their health continuation policies to comply with these changes and/or verify that their plan administrators are doing so.

COBRA Continuation Benefits Expanded

By: Dudley F. Woody

Since COBRA continuation coverage was enacted by Congress in 1985, it has been available only to employees of employers with 20 or more employees. Continuation benefits have now been extended in Virginia in certain circumstances to all employees regardless of the size of the employer.

than 20 employees. This coverage is extended to employees terminated between September 1, 2008, and ending December 31, 2009, and during any additional period during which federal premium assistance is extended.

Effective April 8, 2009, the Virginia legislature quietly passed a provision which extended COBRA continuation coverage (the ability of a terminated employee to continue existing group health insurance coverage after termination at the employee's expense) to involuntarily terminated employees who are members of group health plans for employers with fewer

Small employers (those with fewer than 20 employees) are required to make the coverage available and to provide involuntarily terminated employees notice of their rights within certain time frames provided for in the Act.

Employers covered by this new provision should act promptly to avoid violation of their new obligation to terminated employees.

SAVE THE DATE FOR THE 28th ANNUAL WOODS ROGERS' LABOR & EMPLOYMENT SEMINARS
New for 2009: 1/2 day Seminars in Danville: November 16, 2009 and Lynchburg: November 19, 2009
Full Day Seminar: Roanoke: December 10, 2009

Supreme Court Sides with White Firefighters in New Haven Firefighter Case

By: Thomas R. Bagby

A divided United States Supreme Court recently held that the City of New Haven, Connecticut violated Title VII of the Civil Rights Act of 1964 (“Title VII”) when it threw out the results of firefighter promotional exams on which white firefighters scored higher than African-Americans and Hispanics. In a 5-4 decision, the Court held that New Haven intentionally discriminated against white firefighters when it decided not to use the results of promotional exams out of a concern over potential lawsuits by minority firefighters who did not score as high as whites on the exams. (Ricci v. DeStefano, No. 07-1428 (U.S., June 29, 2009).

New Haven, like many public employers, is required by law to use job-related examinations to fill vacancies in its lieutenant and captain ranks. The written exams resulted in adverse impact against minority candidates - - that is, whites scored higher on average than minorities on the promotional tests. Had the city used the results of the exams, no African-Americans would have been promoted to vacancies in either the lieutenant or captain positions. As a result, the City refused to certify the results of the exams and no promotions were made.

Certain white and Hispanic firefighters who likely would have been promoted sued the City alleging they were denied promotions because of their race. The lower courts sided with the City.

The case required the Supreme Court to address and attempt to reconcile two theories of discrimination that may be used under Title VII - - disparate treatment and disparate impact. Under a disparate treatment theory, an employee has to show that he was intentionally treated differently

because of his race. Under a disparate impact theory, employees can establish a Title VII violation where a facially neutral device, such as a written test, has a discriminatory effect on minorities or other protected groups and the employer has not shown the test to be job-related.

In ruling in favor of the white firefighters, the Supreme Court determined that the City engaged in intentional discrimination when it threw out the test results because they feared using the results could subject the City to a disparate impact suit brought by minority firefighters who scored lower on the tests. In doing so, the Court said employers who make race-based decisions in circumstances such as this can face liability from disappointed white candidates unless they show there was a “strong-basis-in-evidence” for believing they faced disparate impact liability if they used the test results. In the New Haven case, the Supreme Court found that the City had not met this “strong-basis-in-evidence” standard and therefore violated Title VII when it refused to act on the test results.

The decision is likely to have significant effect in the public sector where written tests are required by law in many instances. The ruling creates a dilemma for employers using written tests that have an impact on minorities - - act on the test results and face potential lawsuits from minorities or throw the test results out and face lawsuits from disappointed white candidates. Whether in the public or private sector, the case demonstrates the importance of ensuring that any written tests used are valid and job-related for the position in question and that there are no alternative tests or other methods that have lesser adverse impact that equally serve the employer’s needs.

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ICE I-9 Offensive, E-Verify and No-Match Letters

By: Anthony Monioudis

In the space of one week, the Department of Homeland Security (DHS) made a flurry of announcements. First, just before the July 4th weekend, came word of a major offensive targeting 652 employers around the United States for I-9 audits by U.S. Immigration and Customs Enforcement (ICE). This action demonstrates that the current leadership at DHS intends to continue the prior administration's effort to put the heat on employers with regard to illegal hires, emphasizing criminal sanctions and punishment over civil fines. Within days, Krispy Kreme Doughnut Corporation, an audited company, negotiated a \$40,000 fine settlement together with revision of its immigration compliance program, including the implementation of new procedures. It turns out that Krispy Kreme had employed dozens of unauthorized workers at one of its factories in Cincinnati.

Then, likely in connection with two ongoing court cases, DHS Secretary Janet Napolitano reaffirmed the Depart-

ment's commitment to mandate the use of E-Verify by all federal contractors (the subject of litigation in federal court in Maryland), but agreed to abandon the Social Security No-Match Rule (the subject of a lengthy battle in federal court in California). Secretary Napolitano indicated that the DHS's prior Rule on no-match letters would be rescinded since, with improvements to E-Verify, it was no longer necessary.

It appears that employers can breathe a sigh of relief at being freed from the morass created by the No-Match Rule. However, employers should be on their guard with regard to their I-9 records and procedures, taking care to make sure that their records are in order. Now may be the time to perform in-house audits to determine compliance and avoid the risk of becoming a targeted employee for an ICE audit.

Supreme Court O.K.'s Higher Burden for Employees in Age Cases

By: Thomas R. Bagby

The United States Supreme Court recently established a higher burden for employees in cases brought under the federal Age Discrimination in Employment Act ("ADEA"). In Gross v. FBL Financial Services, Inc., No. 08-441 (U.S., June 18, 2009), the Court held that a plaintiff bringing an ADEA disparate treatment (intentional discrimination) case must prove that age was the "but-for" cause of the challenged employment action and not just one motivating factor in the decision.

In establishing the more stringent burden in ADEA cases, the Court declined to follow the Title VII method of proof, where an employee can establish a discrimination claim merely by showing that an improper consideration was "a motivating factor" for the adverse action. The Court declined to apply Title VII standards because Title VII, unlike the ADEA, explicitly authorizes claims where an improper consideration was "a motivating factor."

The Court also noted that the ADEA's requirement that an employer has to have taken action "because of" age means

that age has to be the "reason" for the action. Thus, to establish a disparate treatment claim of intentional discrimination under the ADEA, a plaintiff must prove that age was the "but-for" cause of the employer's decision. In other words, the decision would not have been made "but-for" the employee's age.

The case is important because it clarifies the burden on employees in a "mixed motive" case brought under the ADEA. A "mixed motive" case is one where the employee claims an employer's actions were motivated by both permissible reasons and unlawful discriminatory reasons. Thus, the burden in age discrimination "mixed motive" cases always remains with the plaintiff and, unlike under Title VII, does not shift to the employer when the employee shows that age was one of the factors for the challenged decision. The standard will make it more difficult for employees to succeed in cases where both permissible and impermissible reasons may have motivated the employer's actions.

