On The Hill

NELA's Washington Report

NELA Advocates for Employee Rights
National Employment Lawyers Association

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Since last month's *On The Hill*, there have been major developments on many of NELA's top priorities. The Civil Rights Tax Relief Act was introduced in both Chambers of Congress. An inclusive Employee Non-Discrimination Act was introduced in the House with 126 cosponsors. The EEOC voted on a Notice of Public Rulemaking proposing changes to its Americans with Disabilities Act (ADA) regulations in light of the recently passed ADA Amendments Act and held a hearing on the impact of the U.S. Supreme Court's recent decision in *Gross v. FBL Financial Services, Inc.* on enforcement of the Age Discrimination in Employment Act. The Senate Homeland Security and Governmental Affairs Committee marked up a whistleblower protection bill that includes jury trials and damages, albeit in somewhat limited form. Patricia A. Shiu, NELA's longtime Executive Board member and current member of the Board of The Employee Rights Advocacy Institute For Law & Policy, was named as the new Director of the Office of Federal Contract Compliance Programs in the U.S. Department of Labor. I report on these developments and more below.

In This Issue:

Civil Rights Tax Relief Act Of 2009 Introduced

On June 25, 2009, the Civil Rights Tax Relief Act (CRTRA) Of 2009 was introduced in both the House (H.R. 3035) and the Senate (S. 1360). In the House the bill was introduced by Representative John Lewis (D-GA) with Representative James Sensenbrenner (R-WI), an original co-sponsor of the CRTRA, and was referred the Ways and Means Committee. In the Senate, the bill was introduced by Senator James Bingaman (D-NM) with Senator Susan Collins (R-ME), also an original co-sponsor, and was referred to the Finance Committee.

The CRTRA will change the way damages are taxed in employment and civil rights claims in two ways. The CRTRA will exclude non-economic damage awards in employment and civil rights cases from gross income. In addition, the CRTRA will tax back pay and front pay at rates reflecting the years in which they were or would have been earned, rather than the year in which such damages are received. (It would *not* change the requirement that employees pay income tax on back pay and front pay awards.)

The CRTRA has broad support from both sides of the aisle. The bill benefits employees by ensuring plaintiffs will be made whole after experiencing unlawful discrimination and benefits employers by making settlements in discrimination cases less expensive. The bill will also benefit our judicial system by reducing litigation and encouraging settlements.

At NELA's Annual Convention in June, almost 200 people signed letters to their Representatives asking them to cosponsor the CRTRA. If you haven't done so yet, ask your Senators and Representative to support the CRTRA by visiting the Take Action Center.

Employee Non-Discrimination Act Introduced

On June 24, 2009, Representative Barney Frank (D-MA) introduced an inclusive Employee Non-Discrimination Act (ENDA), H.R. 3017, with 126 cosponsors. ENDA would ban employment discrimination on the basis of sexual

orientation and gender identity. It was referred to the Committees on Education & Labor, on House Administration, Oversight & Government Reform, and on The Judiciary.

As previously reported, in the 110th Congress, the House passed a similar bill that would have banned employment discrimination on the basis of sexual orientation (but not gender identity) by a vote of 235-184.

EEOC Hearing On Age Discrimination In Employment Act & The Impact Of *Gross v. FBL Financial Services, Inc.*

On July 15, 2009, the U.S. Equal Employment Opportunity Commission (EEOC) held a hearing on recent developments under the Age Discrimination in Employment Act (ADEA). Acting Chair Stuart Ishimaru began the meeting by noting the marked increase in age discrimination claims over the past few years, including a 28% increase in 2008. Acting Vice Chair Christine Griffin added that this trend is expected to continue because poor economic conditions have destroyed many 401k accounts and made pensions difficult to sustain. The Commission then heard from three panels, two of which included NELA members.

On the first panel, Professor Michael Campion from Purdue University Law School testified on the harmful effects of age stereotypes in the workplace. He also highlighted the need for better EEOC regulations in ADEA disparate impact cases. Prof. Campion pointed out that the ADEA defines age discrimination as discriminatory bias against employees over 40. Thus, a study showing a discriminatory bias against older employees that benefits younger employees who are also over the age of 40 is not considered by the courts as permissible evidence of discrimination under the ADEA. In other words, an employer is not liable for age discrimination when a strong preference is shown for employees aged 40-45 coupled with strong preference against all employees over 45. The Commissioners took this testimony under consideration and hinted at taking regulatory action on the issue.

Former NELA Executive Board member Cathy Ventrell-Monsees testified about the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.* The Court found in *Gross* that to prove disparate treatment under the ADEA, a plaintiff must show by a preponderance of the evidence that a discriminatory bias was the "but for" cause of the adverse employment action. Ms. Ventrell-Monsees testified on the far-reaching consequences of this decision, including its detrimental effect on discrimination claims by older people of color and older women and the decision's implications for the use of the *McDonald-Douglas* burden-shifting framework under the ADEA. She advocated quick legislative action to correct the Court's ruling. She was followed by Rae Vann, general counsel for the Equal Employment Advisory Council, who testified on behalf of employers. Ms. Vann praised those employers actively working with their older employees to avoid layoffs and asserted most employers do not desire or intend to participate in age discrimination.

After a second panel featuring plaintiffs who movingly told their stories about being denied relief for age discrimination because of restrictive interpretations of the ADEA, a third panel focused on the Supreme Court's decision in *Kentucky Retirement Systems v. EEOC*. The Supreme Court ruled in this case that even if a disability benefits plan is facially discriminatory, a plaintiff must demonstrate an employer's subjective discriminatory motivation in order to prove that a disability benefits plan discriminated against employees on the basis of age. Eric Dreiband, a partner at Jones Day Law Firm and a former General Counsel of the EEOC, urged the EEOC to take regulatory action on this issue, particularly to provide guidance on the six-factor test set out in this Supreme Court decision. NELA Age Discrimination Committee Co-Chair Laurie McCann, a senior attorney for the AARP, pointed out that the Court's decision is contrary to Congress' expressed intent in the Older Workers Benefit Protection Act, a bill that specifies the ADEA's applicability to pensions and retirement plans. She advocated a legislative remedy for this terrible decision.

In their testimony, Ms. Ventrell-Monsees and Ms. McCann emphasized the Supreme Court's pattern of treating age discrimination as a lesser form of discrimination than race, gender, and ethnic origin discrimination. They urged that any Congressional action clarify to the Court that this approach is contrary to Congressional intent.

On a related note, House Education & Labor Chair George Miller (D-CA) has announced his intention to hold a hearing on the *Gross* decision after the August recess.

EEOC's Proposed Rulemaking On The ADA Amendments Act Of 2008
At a Commission meeting on June 17, 2009, the EEOC voted 2-1 along party lines to approve a Notice of Proposed Rulemaking (NPRM) that would revise its regulations under the ADA. As the Commission explained in its press release:

> The [ADA] Amendments Act, which went into effect Jan. 1, 2009, states that Congress expects the EEOC to revise its regulations to conform to changes made by the Act, and expressly authorizes the EEOC to do so. The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

Because this NPRM is in the initial stage of the regulatory process, the Commission did not release a copy of the proposed rule. A transcript of the meeting, including a description of the NPRM by Chris Kuczynski, Assistant Legal Counsel in the EEOC's Office of Legal Counsel, is available on its website.

The NPRM now goes to the Office of Management and Budget, and then to federal agencies for review. The NPRM will be published for comment once these steps are completed.

Significant Developments Toward Banning Forced Arbitration

Huge Victory Against Forced Consumer Arbitration
Thanks to the hard work and persistence of NELA members such as Cliff Palefsky and our allies in the consumer movement, a huge blow has been dealt to forced arbitration in the consumer context. Earlier this month, the Minnesota State Attorney General sued the National Arbitration Forum (NAF) for fraudulently representing its neutrality in consumer debt collection arbitrations. Less than a week later, NAF agreed to *withdraw entirely from the consumer arbitration business* in settlement of that suit. On July 22, 2009, Representative Dennis Kucinich (D-OH), Chair of the Domestic Policy Subcommittee of the House Oversight & Government Reform Committee, held a hearing on this lawsuit and NAF's practices. Rep. Kucinich slammed what he called:

> ...mass-production arbitrations, where businesses file thousands of claims against consumers to obtain judgments on credit card debt; where the claims are assigned to arbitrators in "batches" of dozens; where the consumer almost never appears or even responds; and where the so-called hearing consists of nothing more than the arbitrator looking at a statement written by the creditor and awarding the amount that the creditor requests.

(Sound familiar?) Subsequently, the American Arbitration Association (AAA) announced that it, too, would suspend consumer debt collection arbitrations (albeit temporarily).

Consumer Protection Bills Ban Forced Arbitration
Two high profile bills related to the current financial crisis contain provisions that would prohibit forced arbitration:

- The Mortgage Reform and Anti-Predatory Lending Act, H.R. 1728, amends the Truth in Lending Act to prohibit the inclusion of pre-dispute arbitration clauses in certain types of mortgages and extensions of credit. This bill was sponsored by Representative Brad Miller (D-NC), and was passed by a vote of 300 to 114 on May 7, 2009.
- The Consumer Financial Protection Agency Act of 2009, H.R. 3126, creates a new Consumer Financial Protection Agency and allows that agency to prohibit pre-dispute mandatory arbitration from being imposed on consumers of financial products or services. This bill was introduced by Representative Barney Frank (D-MA) on July 8, 2009.

Inclusion of these provisions in these timely and important bills is another indication that policymakers - both in the Obama Administration and in Congress - are beginning to understand that forced arbitration is problematic and must be addressed legislatively.

Senate Marks Up Federal Government Whistleblowers Bill
On July 29, 2009, the Senate Homeland Security & Governmental Affairs Committee voted out an amended version of the Whistleblower Protection and Enhancement Act (WPEA), S. 372. Among other things, the bill as amended would provide for jury trials and (capped) compensatory damages for federal whistleblowers under somewhat limited circumstances. Whistleblower advocates have for the most part lauded this bill, but it's far from perfect and concerns have been expressed. In any event, the next step is likely to be action by the counterpart House Committee, which last Congress voted out a stronger version of the WPEA. Stay tuned!

Other Bill Introductions

- **FOREWARN Act, S. 1374, H.R. 3042**
  In last month's *On The Hill*, we reported that Representative Luis Gutierrez (D-IL) had introduced the Alert Laid Off Employees in Reasonable Time (ALERT) Act, H.R. 2077, to strengthen the Worker Adjustment and Retraining Notification (WARN) Act. On June 25, 2009, related bills were also introduced: the FOREWARN Act, S. 1374, introduced by Senator Sherrod Brown (D-OH), and the identical H.R. 3042, introduced by Representative George Miller (D-CA). The FOREWARN Act is very similar to the ALERT Act, except that it does not define a mass layoff as being a layoff that occurs at any of the employer's sites of employment. It does specify, however, that "site of employment" is not limited to only one facility or operating unit; rather, it would encompass all of the facilities and operating units encompassed by one site of employment.
- **Equal Opportunity For All Act, H.R. 3149**
  Introduced by Representative Steve Cohen (D-TN), this bill would amend the Fair Credit Reporting Act (FCRA) to prohibit employers from using credit checks as the basis for hiring or firing employees. The FCRA includes a private right of action for its enforcement.
- **Working for Adequate Gains for Employment in Services (WAGES) Act, H.R. 2570**
  Introduced by Representative Donna Edwards (D-MD), this bill would amend the Fair Labor Standards Act to raise the minimum wage for tipped employees.

Nominations & Appointments Update

- **Jacqueline Berrien, Nominated To Chair Equal Employment Opportunity Commission**
  Ms. Berrien is Associate Director-Counsel of the NAACP Legal Defense and Educational Fund (LDF) and former LDF Assistant Counsel. She is a former Program Officer in the Ford Foundation's Peace and Social Justice Program, and a former staff attorney with the Lawyers' Committee for Civil Rights and the American Civil Liberties Union.
- **Brian Hayes, Nominated To National Labor Relations Board (Republican Seat)**
  Mr. Hayes is the Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions. He was a management-side labor and employment lawyer for over 25 years.
- **Patricia A. Shiu, Named Director Of The Office of Federal Contract Compliance Programs, Department of Labor**
  Ms. Shiu is Vice President for Programs at the Legal Aid Society-Employment Law Center in San Francisco. She is a former member of NELA's Executive Board and a current member of the Board of The Employee Rights Advocacy Institute For Law & Policy, NELA's related public interest organization.

Washington Office News
As they prepare to leave us, I want to thank NELA's summer law interns - Maria Roeper and Eirik Cheverud - for their invaluable help on this edition of *On The Hill* as well as with the many projects they worked on for NELA this summer. Special thanks also to Alexandra Bradley and Colin Murphy, summer interns in NELA Vice President of Public Policy David Cashdan's office, for all their contributions. What a pleasure it has been to work with all of them!

Finally, Congress, *On The Hill* and I are all taking a vacation in August. Look for the next edition of *On The Hill* on September 17, 2009. Don't forget to mark your calendars to come to Washington, D.C. on October 8, 2009 for another fun-filled NELA Lobby Day!

Warmly,

Donna R. Lenhoff
Legislative & Public Policy Director