

employment law update

fall 2009

FORMER EEOC CHAIR PROVIDES CANDID VIEWS AT K&C SEMINAR

Newport News native, Naomi Earp, assumed the role of Chair of the U.S. Equal Employment Opportunity Commission (EEOC) on August 31, 2006. A Bush appointee, Ms. Earp left the EEOC in June of this year for a Director position with the Library of Congress. Drawing from her EEOC experience, Ms. Earp provided her candid views on EEOC trends and avoidance tips to attendees of K&C's July 23, 2009 showing of the 25th Annual Employment Law Update at the Hampton Roads Convention Center.

Ms. Earp suggested that employers could expect an increasing number of EEOC charges given high unemployment, new legislation, and the enforcement mind-set of the current EEOC. More specifically, she cited a trend of more age/generational issues for employers as "baby boomers" age in the workplace. Given the aging workforce and increased coverage of the Americans with Disabilities Act due to recent amendments, employers can also expect more disability claims. Since the EEOC is prioritizing retaliation claims, Ms. Earp urged attendees to keep supervisors from taking any action whenever an employee complains about possible discrimination which could "chill" the employee from filing a charge. She also reminded attendees that harassment claims continue to be on the rise and that this trend included all types of harassment, such as race, age, religion, national origin and disability, in addition to the more commonly-recognized sexual harassment claims.



Ms. Naomi C. Earp

Given the greater likelihood that employers might have to defend against an EEOC charge, Ms. Earp suggested that employers get to know the EEOC before there is a problem. She observed that one way to do this would be to check out the EEOC website from time-to-time to view EEOC priorities. Ms. Earp also advised that, should an employer be faced with an EEOC investigation, it should treat EEOC investigators with respect and try to cooperate as opposed to treating the investigator as an adversary. As a practical matter, this tactic can many times reduce an investigator's incentive to spend more time on a particular charge.

To help employers avoid problems, Ms. Earp concluded her talk by recounting a number of examples of managers who did not use common sense or good judgment which led to employer liability in cases she observed while with the EEOC. These scenarios led to employers sometimes inadvertently suffering negative results before her former agency. Ms. Earp urged employers to train their supervisors and to hire or promote only individuals with good judgment into supervisory positions to help avoid such bad outcomes.

PRACTICAL POINTER

With high unemployment, expanded anti-discrimination legislation, and the current administration's commitment to provide more financial support to the EEOC, employers are well advised to take Ms. Earp's comments and advice to heart. Training supervisors and reviewing hiring, promotion and discipline practices are very necessary to avoid the increasing risk of discrimination claims. For more information on EEOC trends, view the EEOC website at www.eeoc.gov.

UNEMPLOYMENT BY THE NUMBERS

Sometimes a picture is worth a thousand words. Sometimes numbers can be just as descriptive. This year Virginians have experienced unemployment at an all-time high since keeping of statistics began in 1950. This unemployment level correlates directly with an increase in not only claims for unemployment compensation, but wrongful discharge claims as well. Some of the most recent available figures (June 2009) appear below.

The standard measure of persons interested in and holding employment is the Civilian Labor Force. In Virginia, this number stands at an all-time high of 4.2 million persons. Of these, however, 308,142 (7.3 %) were unemployed in June 2009. Both the number and rate of unemployment substantially exceeded the most recent 12-month average of 233,818 persons (5.6%).

Not surprisingly, the Commonwealth's unemployment benefit claims have skyrocketed. In June 2009, the VEC reported that 40,911 claims were filed, up more than 4,000 from the previous month. Perhaps most telling is information about the duration of unemployment claims. More claimants (51.5%) are exhausting their unemployment benefits than ever before. This means that more than half of all claimants are remaining unemployed for the full length of their unemployment claim. Depending upon their earnings while last employed, their unemployment claim may run from 26 to 39 weeks. Nearly 30,000 Virginians are also receiving an additional seven weeks of federally funded emergency unemployment benefits, a program which is expected to be extended into 2010.

PRACTICAL POINTER

What does all this mean to Virginia employers? Since the Virginia unemployment compensation system is largely funded by taxes paid by employers, the immediate effect is that taxes will continue to rise. Another effect of rising unemployment which is not as obvious is that when employees remain unemployed, they are more likely to blame their former employer for their predicament and bring other claims such as wrongful discharge and discrimination lawsuits.

DOL TO HIRE 250 NEW INVESTIGATORS TO ENFORCE WAGE-HOUR LAWS

Following an undercover investigation, which found that the U.S. Department of Labor (DOL) mishandled numerous worker complaints about unpaid wages and other labor violations, the DOL announced the hiring of 250 new field investigators to reinvigorate enforcement of federal wage-hour laws, a national staff increase of more than one-third. The probe was conducted by the Government Accountability Office (GAO) from July 2008 to March 2009 and included investigators posing as workers and employees to test how DOL investigators processed wage-hour complaints. After results of the GAO investigation were made public, the Secretary of Labor, Hilda L. Solis, stated "I take the issues raised by the GAO investigation regarding past wage-hour enforcement very seriously. As Secretary of Labor, I am committed to ensuring that every worker is paid at least the minimum wage, that those who work overtime are properly compensated, that child labor laws are strictly enforced, and that every worker is provided a safe and healthful environment."

These developments substantially increase the likelihood that an employer will face a future audit by the Wage-Hour Division of the DOL. The wage-hour rules are fairly technical, and mistakes can be costly since an audit usually involves a number of employees and a review of payment practices for the previous two years. Employers are well advised to conduct a self-audit to ensure compliance with wage-hour laws and to review company policies to make sure they comply with recent changes to the law. Since most audits are a result of employee complaints, employers should also be sensitive to internal wage-hour complaints and try to resolve any such complaints before employees feel forced to go to the DOL. For help in structuring or conducting a self-audit to reduce potential liability, contact any member of the K&C Employment Team listed on the last page of this newsletter.

EEOC RAMPING UP FOR RISING CASELOAD

For its FY 2008, the U.S. Equal Employment Opportunity Commission (EEOC) received a record 95,402 discrimination charges, and the number of charges continues to rise. By FY 2010, charges filed with the EEOC are projected to reach a new record high of well over 100,000. The Obama Administration has proposed increases in the EEOC budget, and the agency is hiring more front line staff to cope with its workload. Speaking at the Annual Conference of National Industry Liaison Group on July 29, 2009, the Director of EEOC's Atlanta District Office, Bernice Williams-Kimbrough stated that her Atlanta District Office had gone from 25 investigators to 43 investigators in a matter of months. She stated that the EEOC aims to have 2,330 employees by the end of FY 2009 and about 2,470 employees by the close of FY 2010. Ms. Williams-Kimbrough indicated that this would represent an increase of almost 300 employees from FY 2008.

While the expansion in Virginia has not been as dramatic as the EEOC's Atlanta District Office, the EEOC's Richmond and Norfolk offices have also added new investigators recently. The Norfolk EEOC office has added three new investigators and the Richmond EEOC office has added two new investigators, and plans to hire a third by the end of the EEOC's current fiscal year. Even though these increases are smaller than the numbers in Atlanta, they reflect substantial increases on a percentage basis.

PRACTICAL POINTER

The rising number of charges and expanding number of EEOC investigators means that employers will be more likely to defend a charge of discrimination now than at any other time in recent history. As can be seen by our lead article, the former Chair of the EEOC, Naomi Earp, sees the trend of more charges and more investigators continuing. The new investigators should also reduce the backlog of EEOC charges, which was causing charges to take well over a year to investigate in many EEOC offices. Given this growing risk to employers, K&C will present a workshop on defending EEOC charges at its November 5, 2009 showing of the 26th Annual Employment Law Update, to be held at the Chesapeake Conference Center.

Kaufman & Canoles is pleased to announce the launch of our new website. Be one of the first to experience our new and more advanced website. Check often for schedules and updates for our educational seminars with the fall schedule now available. To view our new website, visit kaufCAN.com.

26TH ANNUAL EMPLOYMENT LAW UPDATE YOUR EMPLOYMENT LAW SURVIVAL KIT



On November 5th, the K&C Employment Law Team will host the first showing of the 26th Annual Employment Law Update: Your Employment Law Survival Kit at the Chesapeake Conference Center. The 26th Annual Employment Law Update is designed to provide employers with an employment law survival kit, particularly during these tough economic times. Anyone involved in employment decisions and/or practices should attend. In addition to a general update, all attendees will be given the opportunity to have specific employment law questions answered by specialists in the field.

Attendees will select their choice of several of our educational workshops. Topics include: Handling an E.E.O.C. or D.O.L. Investigation; Workers' Compensation; Performance Reviews; The FMLA, COBRA, and Stimulus Package Paper Trail; and more.

For more information, visit our website at www.kaufCAN.com or contact Kerry Martinolich at (757) 624-3232.

This program has been approved for 5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

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Visit our new website at www.kaufCAN.com
for timely updates or to register for our seminars.

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