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Employment Law Trends for 2005: Danger Zones Widen for Unwary Employers

By Michael W. Casey III and Raymond T. Mak

From changes in military leave rights and domestic partnership laws to the rise in wage and hour class actions and the ever-increasing legion of retaliation claims, employment law trends for 2005 graphically illustrate the breadth and complexity of the risk management challenges employers face in understanding and meeting their legal obligations to their employees and in attempting to avoid ruinous litigation.

The magnitude of this challenge is dramatically demonstrated simply by the numbers. The Equal Employment Opportunity Commission (EEOC) has not yet released its annual report on enforcement and litigation statistics for fiscal year 2004; however, statistics the commission unofficially disclosed reportedly show that approximately 80,000 charges of employment discrimination in the private sector were filed. Add to this number the thousands of charges and lawsuits brought under other federal, as well as state and local, employment laws, and the magnitude and severity of the litigation risks are clear.

Based on this reality of corporate life in 2005, we have identified an array of legal issues that represent both new and continuing employment-related trends, including important new federal and state legislation and court decisions. The following discussion by no means represents an exhaustive list. Rather, it should be viewed as merely a sampling of some of the most significant issues many employers will confront this year.

Retaliation: A Continuing "Hot" Charge

According to the most recent statistics available, retaliation complaints now constitute roughly 28 percent of all charges filed with the EEOC. Whereas the EEOC logged 11,000 retaliation charges (about 15 percent of all charges filed) in fiscal year 1992, the number of retaliation charges doubled to more than 22,000 in fiscal year 2003.

Many Laws Protect Employees Against Retaliation

One reason for the increasing number of retaliation claims is that virtually every antidiscrimination law on the books, from Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, to the Americans With Disabilities Act and the Family and Medical Leave Act, contains either an express or implicit antiretaliation provision. These laws make it unlawful to retaliate, that is, to take

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adverse employment action, against an employee who:

- Asserts a protected right, such as requesting a reasonable accommodation under the Americans With Disabilities Act;
- Takes part in protected activity, such as filing a complaint or charge, or participating in an investigation or proceeding; or
- Lawfully opposes what he or she in good faith reasonably believes is illegal employer activity, such as refusing to participate in a discriminatory employment practice or other illegal act.

In addition to the laws within the purview of the EEOC, retaliation claims may be brought under other statutes, such as the Family and Medical Leave Act, the Fair Labor Standards Act, and the Employee Retirement Income Security Act. The EEOC's statistics do not include the number of retaliation claims brought under those laws. Moreover, there are specific federal whistleblower protection laws, such as the Sarbanes-Oxley Act, as well as state statutes and common law principles, which protect employees from retaliation for a reason that is against "public policy." Again, retaliation claims brought pursuant to these laws, discussed later in this article, are not included in the EEOC statistics.

Retaliation Claims under FMLA

The Family and Medical Leave Act (FMLA) has in recent years become a significant source of retaliation claims. The FMLA permits covered employees to take qualified leaves of absence for various medical reasons or, under prescribed circumstances, to care for family members. The scenarios that can spawn an FMLA retaliation lawsuit are many. Consider a typical one: an employee who has recently returned from an FMLA leave is fired. If the employee suspects, rightly or wrongly, that he lost his job in retaliation for the taken leave, a lawsuit is likely to ensue.

Notably, the FMLA does not expressly ban discrimination or retaliation. Rather, a prohibition against discrimination was added by the U.S. Department of Labor in its regulations. In a recent decision, the U.S. Court of Appeals for the Second Circuit explicitly acknowledged that claims for discrimination and retaliation may be brought under the FMLA, and that they should be evaluated under the standards used to assess Title VII charges of discrimination and retaliation. *Potenza v City of New York,* 365 F3d 165 (2nd Cir 2004).

Liberally Interpreted Laws

Another significant explanation for the large number of retaliation claims is that they tend to be easier to prove, compared to discrimination claims. As one plaintiff's attorney recently acknowledged in a newspaper interview, "I would much prefer to have a good retaliation case than a discrimination case." This is not surprising considering that, unlike discrimination cases, retaliation claims tend to focus more on the timing of the adverse employment action than on the intent of the employer in taking the action. An adverse employment action taken relatively close in time after an employee has engaged in some form of protected activity is often enough to persuade a jury that the action was taken for retaliatory reasons.

In addition to the "intent-versus-timing" issue, the trend in the courts, especially among many of the U.S. Circuit Courts of Appeals, is to liberally construe the term "adverse employment action." The concept is generally defined as an action that significantly alters a term, condition, or benefit of the employee's job. Currently, only two circuits—the Fifth and Seventh—expressly require an adverse employment action to rise to the level of an "ultimate decision" in order to be actionable, such as a termination, demotion, or failure to promote.

Many more circuits, including the First, Fourth, Ninth, Eleventh, and most recently, the Sixth, have distanced themselves from the "ultimate decision" test and allow some adverse actions falling short of ultimate employment decisions to be actionable. For example, some courts have found changes in work assignments, transfers, and even "retaliatory harassment," or the creation of a hostile work environment, to be an unlawful adverse employment action.

See, e.g., *Marrero v Goya of P.R., Inc.,* 304 F3d 7 (1st Cir 2002). Thus, in the majority of jurisdictions, the issue of what constitutes an adverse employment action is viewed liberally and decided mostly on a case-by-case basis, thereby offering employers little concrete guidance.

Insufficient Supervisory Training and Employer Understanding of the Law's Reach

In addition to the fact that retaliation cases tend to be easier to prove than more traditional discrimination cases, employers should also look inward to determine if they are managing the risk of such claims as effectively as possible. Arguably, the profusion of retaliation claims suggests that too many employers fail to train their supervisors properly and/or do not appreciate the broad reach of retaliation law.

The case law repeatedly demonstrates that many retaliation cases arise out of improper conduct on the part of an immediate supervisor, who may not understand the consequences of his or her actions. Further, some employers are unaware of the extent to which liability for retaliation is independent of liability for discrimination. To successfully defend a discrimination claim, only to lose a derivative retaliation case, can truly be a Pyrrhic victory. Moreover, many employers may not realize that a retaliation charge can be brought under an antidiscrimination statute by someone who does not even claim to be the victim of discrimination. Consider some recent reported decisions that exemplify the reach of retaliation claims:

- ♦ A female pilot filed a lawsuit against her employer, alleging that she was sexually harassed and then fired after complaining about the harassment. The court decided that her sex harassment case was too weak to even present to a jury and dismissed it, but her retaliation claim was allowed to proceed. The jury awarded the pilot $3.5 million in punitive damages (an amount that probably will be reduced under federal caps, unless a state law applies that has no caps).
- ♦ During an internal investigation into an employee's EEOC charge of race discrimination and harassment, the company's representative interviewed a coworker of the complaining employee. The coworker told the interviewer that he had witnessed a supervisor using racial epithets directed at the complaining employee, and that he would testify in court in support of that employee's discrimination claim. A few months later, the employee who had complained withdrew his EEOC charge and subsequently left the company. The coworker, however, was thereafter fired. Claiming retaliation for supporting his former coworker, the fired employee sued for retaliation. The court permitted the suit to go forward, holding that Title VII's nonretaliation provision extended to an employee's participation in an employer's internal investigation of a pending EEOC charge, even if that employee himself was not the victim of discrimination.

Underscoring the reality that these cases are not mere exceptions to the "norm," a Florida appeals court ruled in December 2004 that an employee may bring a retaliatory discharge claim under state law for wrongful termination, alleging that he was unlawfully dismissed by the defendant employer because of a workers compensation claim he had filed with a previous employer. *Bruner v GC-GW, Inc.,* 880 So2d 1244 (Fla App Ct 2004).

The Flip Side: Case Law Supporting the Employer

But the news from the courts is not all bad for employers confronting retaliation claims. Some recent decisions reflect stricter adherence to various employee burdens of proof, such as proving: that the employer knew of the employee's protected activity before taking the alleged adverse employment action; that the disputed action truly met the requirement of "temporal proximity" (that is, it was reasonably close in time to the protected activity); and even, in at least one case — *Palmer v Regents of University of California,* 107 Cal App 4th 899, 132 Cal Rptr 2d 567 (2003) — that the employee has exhausted internal complaint procedures before filing an action for wrongful termination. Another positive development for employers is a recent court ruling that compensatory and punitive damages are not available for retaliation claims under the Americans With Disabilities Act (ADA) and, therefore, an ADA plaintiff has no right to a jury trial on a retaliation claim. *Kramer v Banc of Am. Sec., LLC*, 355 F3d 961 (7th Cir), cert denied, 124 S Ct 2876 (2004).

Employer Counterclaims and Countersuits

Another trend is the rise in retaliation claims against employers who respond to discrimination suits by filing a counterclaim against the employee, or who respond preemptively by seeking a declaratory judgment, under the Declaratory Judgment Act, that the employer has not discriminated.

The "Ultimate Decision" Test

The circuits are split on whether an employer's counterclaim or countersuit is actionable retaliation, depending on whether the circuit uses the "ultimate decision" test for determining when an adverse employment decision is actionable or whether it applies a more liberal test.

A recent decision by the Fifth Circuit, *Hernandez v Crawford Building Material Co.,* 321 F3d 528 (5th Cir), cert denied, 540 U.S. 817 (2003), is an apt illustration. In that case, the plaintiff sued the employer, Crawford, for race discrimination. The company counterclaimed for theft. The plaintiff then counterclaimed for retaliation based on the company's counterclaim. The trial judge dismissed Crawford's counterclaim for lack of proof. The jury decided that the company was not guilty of discrimination, but then concluded that the company was guilty of retaliation for filing the counterclaim and awarded the plaintiff compensatory and punitive damages. The Fifth Circuit, which, as discussed above, uses the "ultimate decision" test, reversed, because the filing of the counterclaim against the employee did not meet its strict definition of an ultimate employment decision.

But numerous courts, i.e., those employing a more liberal definition of adverse employment action, have held that the filing of a lawsuit or counterclaim can constitute an unlawful employment action if the suit or counterclaim was motivated by retaliation. Thus, employers need to know the status of the law in their jurisdiction when considering whether to file a counterclaim against an employee.

The Sarbanes-Oxley Act (SOX) and State Whistle-Blower Laws: Brewing Cauldron of Whistle-Blower Suits

Section 806 of SOX, known as the whistle-blower protection provision, protects corporate whistle-blowers of publicly traded companies who report or provide information concerning a possible violation of "any provision of federal law relating to fraud against shareholders." While there have been few court cases to date brought under SOX, the law is still quite new, and the Department of Labor's Occupational Safety and Health Administration (OSHA), which oversees enforcement of SOX's whistle-blower provisions, just issued its implementing regulations in August 2004.

In fact, notwithstanding the DOL's oversight responsibilities for numerous other whistle-blower laws, the Department reports that it now receives more SOX whistle-blower complaints than any other type of whistle-blower charge. Moreover, whistle-blower claims can lead to broader investigations by the Securities and Exchange Commission or a state attorney general, as happened to The Coca-Cola Company not long ago. Finally, the number of whistle-blower claims being brought under state laws is on the rise. Thus, the potential impact of SOX and other whistle-blower laws must not be ignored by employers.

Don't Underestimate the Potential Impact of SOX

Many publicly traded companies have focused most of their efforts on complying with SOX's myriad, often-confusing governance reforms and reporting requirements but may be ignoring the statute's whistle-blower mandates concerning codes of conduct and complaint procedures, as well as the growing number of state whistle-blower statutes.

Notably, in at least one respect, a SOX whistle-blower retaliation charge is harder to defend than one brought, for example, under Title VII. As explained in a recent SOX case, SOX defendants must show by "clear and convincing evidence that they would have [taken the adverse employment action] absent [the employee's] participation in protected activity." *Collins v Beazer Homes USA, Inc.,* 334 F Supp 2d 1365, 1380 (ND Ga 2004). This burden is considerably more onerous than a Title VII defendant's burden on a motion for summary judgment simply to articulate a nondiscriminatory reason for the action taken.

Citing SOX's "broad remedial purposes," the court in the *Collins* case denied the employer's motion for summary judgment. The court found that the plaintiff's evidence concerning the alleged connection between her complaints about company "cover-ups" and "corruption" and her termination 2 weeks later was sufficient to warrant a trial.

In another recent case before an administrative law judge, *Richards v Lexmark International, Inc.,* DOL ALJ No. 2004-SOX-00049 (Oct. 1, 2004), the heavy burden on a SOX defendant was even more vividly demonstrated. In *Richards*, the company failed on its motion for summary judgment, despite having substantial documentation of the employee's performance problems and of the likelihood that he would soon be fired, all recorded before he complained. The judge found the timing of the employee's firing so suspicious (one day after the employee complained) that he concluded that the company had failed to show by clear and convincing evidence that it would have fired the employee anyway.

The higher burden on defendants in a SOX case makes it all the more important for employers to document their actions carefully and thoroughly and to apply policies consistently.

State Whistle-Blower Laws: Adding Fuel to the Fire

Most states have some sort of statutory or common law "whistle-blower" or antiretaliation laws. Many states have explicit statutory protections for whistle-blowers, including California, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, and Washington.

A state whistle-blower statute can be quite broad. For example, New Jersey's Conscientious Employee Protection Act (CEPA) prohibits employers from taking retaliatory action against an employee who discloses, objects to, or refuses to participate in any activity, policy, or practice that the employee reasonably believes is incompatible with a clear mandate of public policy. Moreover, CEPA was recently amended to require covered employers to notify their employees annually of the employees' rights under the Act. Posting a notice is not sufficient; employers must distribute a written or electronic notice of employee rights and CEPA procedures, as well as the name of the person designated by the employer to answer CEPA-related questions.

Risk Management Approaches

While retaliation laws present many complex issues, an employer's best risk management strategies are fairly straightforward. Take all complaints seriously. Develop an effective grievance procedure to investigate complaints, communicate it clearly to all employees and managers, and apply it consistently. Any adverse employment action taken against an employee who has engaged in arguably protected activity should be well documented, justifiable based on company policy, and consistent with actions taken against other employees. Employers subject to SOX should also ensure compliance with the statute's specific complaint procedure requirements.

High-Stakes Wage and Hour Lawsuits Remain the Trendy Class/ Collective Action

In the last decade, high-profile, employment-related class actions, collective actions, and multimillion-dollar settlements have become an unfortunate but familiar occurrence. In recent years, however, the number of federal class actions involving discrimination claims has been falling somewhat. That's the good news.

The bad news for employers is that both federal and state class and collective actions over wage and hour issues have increased dramatically and now outpace discrimination class action lawsuits. For the last few years, issues involving employee claims under the Fair Labor Standards Act (FLSA), mostly related to the exempt/nonexempt status of employees and their possible entitlement to overtime pay, have been the leading employment-related civil action in federal courts. According to data tabulated by the Employment Policy Foundation, more than 2,250 FLSA cases were filed in the 12 months ending September 30, 2003, including more than 100 large class action cases. The number of collective action FLSA cases has tripled since 1997. And many suits have been brought in state courts pursuant to state wage and hour laws, although the precise numbers are difficult to track.

Despite their best intentions, even the most conscientious employers are vulnerable to making mistakes in determining their wage and hour obligations under the FLSA and state wage and hour laws. At congressional hearings last year on the then-proposed FLSA revisions, Ronald Bird, chief economist at the Employment Policy Foundation, offered some dramatic statistics that demonstrate why virtually every employer is a potential target for a wage and hour lawsuit: "According to [data from the Bureau of Labor Statistics], private sector employers made 45.6 million hiring decisions in 2002, despite a total employment level that was essentially unchanged…. Each of these hiring actions involves some degree of decision-making regarding FLSA coverage/exemption status of the job."

Distinctions between Collective and Class Actions

Technically, the FLSA allows plaintiffs to bring "collective," rather than "class," actions. Some of the differences between class and collective actions are significant. For example, once a class is certified in a class action, individual members of the class are permitted to "opt out" of the class. In a collective action, individuals must affirmatively opt into the lawsuit. Thus, the number of participants in a collective action usually is smaller than in a class action.

FLSA Collective Actions

Notwithstanding the potential limits on class size, however, FLSA collective actions can prove quite costly. Even when an action involves a relatively small class—and if the defendant has multiple sites, the class may not be so small—the potential award for each plaintiff includes up to 3 years of overtime pay and liquidated damages that can double the award. In addition, the class may be awarded attorneys' fees. It is not surprising then that an FLSA collective action can easily result in a multimillion-dollar judgment.

Indeed, as all too many employers have discovered, an FLSA collective action poses a triple threat: it is expensive to defend, exposes the company to the risk of an enormous class award, and threatens negative publicity that can have enduring economic repercussions. Not surprisingly, many employers decide to settle these imposing actions rather than risk ongoing litigation. As a result, DOL wage and hour settlements have reached an all-time high, with record increases in back-pay settlements and civil money penalties. In fiscal year 2004, the DOL collected nearly $197 million for some 288,000 workers.

And it appears that this year is off to a strong start for the DOL. In January 2005, Cingular Wireless entered into a settlement agreement with the Department, under which the company agreed to pay $5.1 million in back wages to its call center customer service representatives.

Moreover, it is highly debatable whether the new federal overtime regulations, which became effective in August of 2004, will either douse or add fuel to this firestorm of litigation. In fact, some experts believe that these new FLSA changes could well spawn more litigation.

Class and Collective Actions under State Law

Employees may decide to proceed with a suit under state law, or with a combined FLSA/state law class action. While many states do not have laws governing overtime compensation, others do, including California, Colorado, Minnesota, Nevada, New Jersey, New York, and Wisconsin, and the obligations they impose may be independent of the FLSA's. In addition, many states have specific laws governing minimum wage, the definition of compensation, and numerous other wage and hour issues. Because of the recent attention garnered by the new FLSA exempt/nonexempt rules, employers may not be keeping current with changes in applicable state wage and hour laws. They should: liability under a state wage and hour law is potentially just as costly as under federal law.

Wage and Hour Collective Actions Skyrocket in California

In California, which has especially strict wage and hour rules, the number and scope of high-stakes wage and hour collective actions—particularly those involving overtime pay—has risen dramatically in recent years. In January 2005, State Farm Insurance Companies reportedly agreed to pay $135 million to settle a suit alleging that the company failed to pay overtime to 2,600 California claims adjusters. In September 2004, Farmers Insurance agreed to pay up to $210 million to 2,400 California-based claims adjusters who sought back pay for overtime. Other major companies that have settled wage and hour collective actions in California include: Pacific Bell ($35 million); Radio Shack ($30 million); Rite Aid Corporation ($25 million); Bank of America ($22 million); and Starbucks ($18 million).

And the trend continues, with even more serious implications for employers. Last August, the California Supreme Court approved the certification of a collective action against Sav-On Drug Stores by store managers seeking overtime pay. Sav-On had unsuccessfully argued against the certification on the ground that each manager's status should be evaluated on a case-by-case basis to determine if a particular manager had been misclassified and that therefore a class action was inappropriate. In rejecting this argument, the appellate court emphasized the trial court's wide discretion in deciding the appropriateness of class certification. *Sav-On Drug Stores, Inc. v Superior Court,* 34 Cal 4th 319, 17 Cal Rptr 3d 906 (2004). In addition to encouraging more class actions, this ruling may now make it harder for employers in California to obtain appellate review of a trial court's certification decision.

Another emerging trend in California wage and hour class actions involves claims that employers made improper deductions from employee bonuses. Several class actions involving bonus calculations have recently been filed, ostensibly encouraged by a 2003 California Court of Appeal decision in a case involving Ralphs Grocery Company. In that case, the court ruled, among other things, that the employer could not make deductions in bonus calculations for workers compensation claims and that deductions from bonus plans for cash shortages and breakage or loss of equipment could be taken against exempt employees, but not against nonexempt workers. *Ralphs Grocery Co. v Superior Court,* 112 Cal App 4th 1090, 5 Cal Rptr 3d (2003).

Every Employer Is a Target

For multi-site employers, collective and class actions can have a dangerous domino effect. A Florida federal court recently granted collective status to a wage and hour suit filed by Starbucks store managers who are seeking overtime pay. In 2002, Starbucks paid a reported $18 million to its store managers in California who had made comparable allegations. Similarly, after RadioShack entered into a $29.9 million settlement with managers in California for alleged overtime nonpayment, a group of RadioShack managers in Pennsylvania brought an FLSA collective action for similar violations.

No employer, no matter how small, is immune. New York Attorney General Eliot Spitzer recently entered into a settlement with M&T Pretzel, Inc., under which M&T agreed to pay $450,000 in overtime pay and back wages to dozens of pretzel vendors who work for the company in New York City's Central Park.

Similarly, there are few if any "safe" industries. While certain sectors, such as retail, are popular targets, all industries are vulnerable. A Connecticut federal court recently certified a class of computer "help desk" technicians who allege overtime nonpayment.

Other Notable Employment-Related Class Actions

Finally, while there has been some decline in the number of discrimination class actions, the current focus on the wave of wage and hour class actions in no way diminishes the risk of facing a major class action discrimination lawsuit. In fact, the risk remains quite real. Consider these recent developments:

- In a settlement reached in January 2005, Consolidated Freightways agreed to pay

$2.75 million in a racial harassment case involving 12 African-American dockworkers at one of the company's facilities.

- In September 2004, Wachovia Corporation agreed to pay $5.5 million for alleged compensation discrimination against more than 2,000 current and former female employees.
- In July 2004, a settlement totaling a reported $54 million ended a class action sex discrimination lawsuit brought by the EEOC against Morgan Stanley on behalf of a class of female employees.
- Also in July, Boeing agreed to pay up to $72.5 million in a sex discrimination class action involving about 29,000 female employees. (Boeing's woes continued: in January 2005, a federal court certified a class of roughly 15,000 African-American employees who alleged discrimination in compensation and promotion.)
- In February 2004, a judge ordered United Airlines to pay $36.5 million to settle a sex discrimination lawsuit brought by 13 former flight attendants that involved the airline's maximum weight policy for attendants.

The Wal-Mart Case

Significantly, a new record judgment or settlement may be on the horizon. In 2004, a federal district judge in San Francisco certified a sex discrimination class action of unprecedented size against Wal-Mart Stores, Inc., consisting of 1.6 million current and former employees whose claims focus largely on promotion issues. The U.S. Court of Appeals for the Ninth Circuit recently agreed to review the trial court's class certification ruling. A similar suit was filed against Costco the following month.

Other Significant Class Actions

In addition, there have been a number of recent, significant class action lawsuits brought under other employment-related laws, such as the Employee Retirement Income Security Act (ERISA). IBM, Bank of America, Allied Waste Industries, Monsanto, and AT&T are, or have been, involved in ERISA class actions that challenge their use of the so-called cash-balance pension plan. Some of these cases, such as the recent, partially settled one against IBM (discussed below), involve "hybrid" claims of violations of both ERISA and the Age Discrimination in Employment Act (ADEA).

Thus, while wage and hour class actions may be the class action "du jour," employers would be wise to pay close attention to all employment-related areas of vulnerability and potential liability.

Age Discrimination: Important Court Rulings Expected

As the nation's roughly 80 million baby boomers grow older, the prospect of increasing age discrimination claims looms larger. The challenge to cash-balance pension plans, noted above, is but one example of the issues being raised by older workers. Another issue with the potential to have a huge impact—whether an age discrimination claim can be based on the theory that an employment practice or policy has a "disparate impact" on older workers—is currently before the U.S. Supreme Court. The court's ruling is expected this spring.

Disparate Impact on Older Workers

A petition for certiorari (i.e., a review of the case by the U.S. Supreme Court) has been granted by the Court in *Smith v City of Jackson,* 124 S Ct 1724 (Mar. 29, 2004). In this case, suit was brought by police officers and other employees against the city of Jackson, Mississippi. The plaintiffs allege that a Jackson Police Department performance compensation plan discriminated against older workers, and thus violated the ADEA, because the plan resulted in larger pay increases to younger employees with less tenure. The Jackson Police Department had offered larger raises to officers with less than 5 years' experience in an effort to recruit more officers.

The Supreme Court's ruling could be significant because, historically, the ADEA has not been interpreted as broadly as Title VII, under which a "disparate impact" theory is permissible. For example, instead of having to prove intentional discrimination (i.e., disparate treatment), an often-difficult challenge, a Title VII plaintiff may establish unlawful discrimination by using statistics to show that a particular employment policy, even if neutral on its face, in practice has a disparate, and therefore unlawful, impact on a protected group (e.g., women, minorities). A Title VII plaintiff can succeed on this argument even though the employer may not have intended to discriminate against that group. The plaintiffs in the *Smith* case are seeking the court's approval to use this "disparate impact" theory in their age discrimination case.

If the Court permits the use of the disparate impact framework in ADEA cases, the legality of various employment practices currently used by many companies, particularly those relating to reductions in force, and possibly promotions, training, and compensation as well, may be called into question.

The IBM Pension Plan Case

Under a cash-balance pension plan, the employer credits each employee's account on a regular basis, usually at some percentage of the employee's pay, and the account earns interest at an assigned rate. Unlike a traditional defined-benefit plan, which is tied to the employee's final average pay and years of service with the employer, cash-balance plans are better suited for mobile workers who can accrue more substantial benefits early in their careers and take their cash benefits with them as they move from job to job.

The pending IBM cash-balance plan case could produce another important ADEA ruling. IBM plans to appeal a federal district court's ruling that the plan discriminated against older workers. The district court concluded that the same dollar amount credited to an older and younger participant in any year is less valuable to the older participant because the pay credits to the younger participant accrue interest credits over longer periods. *Cooper v IBM Personal Pension Plan,* 274 F Supp 2d 1010 (SD Ill 2003). Other district courts, however, have reached a contrary decision (see *Eaton v Onan Corp.,* 117 F Supp 2d 812 (SD Ind 2000); *Campbell v BankBoston,* N.A., 206 F Supp 2d 70 (D Mass 2002), aff'd, 327 F3d 1 (1st Cir 2003)).

Following the district court's decision, IBM agreed this past September to a partial settlement of the lawsuit. Under the settlement, IBM will pay $320 million to current and former employees on their ERISA claims. The company's ADEA liability, however, could rise to an additional $1.4 billion if the appellate court upholds the district court's ruling.

If the U.S. Court of Appeals affirms the lower court's finding that IBM's pension plan violates the ADEA, and further, that cash balance plans are inherently unlawful under the ADEA, a number of the many other companies that currently offer similar plans could be affected as well. However, whichever side loses in the court of appeals is likely to seek review of the case by the U.S. Supreme Court.

The Americans With Disabilities Act (ADA): Recent Rulings Breed Greater Confusion

The scope of an employer's obligations under the ADA remained a source of much confusion—and litigation—in 2004. Judging from the conflicting decisions that continue to emanate from the courts, as well as the number of recently issued EEOC fact sheets on ADA issues, the outlook for 2005 is for another busy ADA litigation year.

The ADA prohibits employers subject to its provisions from discriminating against qualified individuals because of their disabilities. A disability is defined by the Act as (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such impairment; or (3) being regarded as having such impairment. Individuals who meet the Act's definition of disabled are entitled to a "reasonable accommodation" of their disability unless the accommodation would result in undue hardship for the employer.

Although the meaning of such terms as "substantially limits," "regarded as," "major life activity," and "reasonable accommodation" have been addressed many times by numerous courts, including, to some extent, the U.S. Supreme Court, it seems that more often than not, the courts' decisions raise more questions than they answer. Several recent rulings vividly illustrate this point and indicate that the likelihood of further litigation is substantial.

Is "the Ability To Get Along with Others" an ADA-Covered Disability?

One focus of ADA litigation in 2004 was the issue of whether "the ability to get along with others" is a major life activity. In its 1997 enforcement guidelines, the EEOC classified "the ability to get along with others" due to a mental impairment as a possible major life activity. Prior to the EEOC's guidelines, the U.S. Court of Appeals for the First Circuit had ruled that getting along with others, though a "skill to be prized," was not a major life activity. Subsequently, the Ninth Circuit Court of Appeals rejected the First Circuit's reasoning and followed the EEOC's guidelines that the ability to interact with others is a major life activity.

In 2004, the Second Circuit Court of Appeals, noting that most circuits have avoided the issue, initially agreed with the First Circuit's reasoning that "getting along with others" was too "unworkably subjective" to be considered a major life activity. However, the court also decided that a person could be protected by the ADA if a mental impairment, such as autism or depression, "severely limited the fundamental ability to communicate with others," a requirement that could be satisfied only if the individual was severely limited in his or her "ability to connect with others—at the most basic level of these activities." *Jacques v DiMarzio, Inc.,* 386 F3d 192, 203 (2nd Cir 2004).

Got that? Not likely. And while the Second Circuit shifted the focus from the Ninth Circuit's emphasis on an employee's *failure to communicate* (not in and of itself protected, according to the Second Circuit) to the employee's *ability to communicate* (potentially protected), as a practical matter, this "definition" is not likely to help the next employer that must decide whether it is obligated to accommodate a hostile or antisocial employee who claims that his or her objectionable behavior is a protected disability.

Perhaps even more troubling, how does an employer determine what constitutes a reasonable accommodation of an employee who is unable to get along with others? And what if the employee's "hostility" takes the form of making racially or sexually disparaging remarks to coworkers? How does the employer accommodate the employee without exposing itself to a hostile environment lawsuit? Surely, these are questions that the courts will be forced to revisit.

Rights of an Employee Who Is "Regarded as" Disabled

The term "regarded as" also has resulted in confusion and produced conflicting decisions. A person is "regarded as" having a disability if the individual has a physical or mental impairment that does not substantially limit a major life activity but is treated by the employer as being substantially limited. Recently, the U.S. Court of Appeals for the Third Circuit addressed for the first time in that jurisdiction whether an employee who is regarded as disabled by his employer is entitled to be reasonably accommodated. The court answered the question in the affirmative and held that the employer must engage in an "interactive process" to determine if such an accommodation is possible. *Williams v Philadelphia Hous. Auth. Police Dep't,* 380 F3d 751 (3rd Cir), *petition for cert filed,* No. 04–873 (Dec. 22, 2004).

The U.S. Court of Appeals for the First Circuit previously reached the same conclusion. The Fifth, Sixth, Eighth, and Ninth Circuits, however, have ruled that a "regarded as" disabled employee is not entitled to an accommodation, and the Second and Seventh Circuits so far have avoided the issue. Thus, this is another unresolved area that is ripe for further litigation.

Recent EEOC Guidance on the ADA

The EEOC recently issued three fact sheets that address three specific disabilities potentially covered by the ADA—diabetes, epilepsy, and intellectual disabilities. In general, the three fact sheets address (1) when these conditions qualify as disabilities under the ADA; (2) under what circumstances employers can ask applicants, employees, or third parties (such as family members) questions about an intellectual disability; (3) what types of reasonable accommodations may be needed by applicants and employees with these disabilities; (4) how to address safety concerns and conduct issues in the workplace; and

(5) how employers can prevent harassment of employees with these disabilities.

The EEOC has also recently issued guidance for the food service industry, advising that employers (1) may not ask questions about communicable diseases at the interview stage; (2) may require a current employee to report a disease that is transmissible through food; (3) cannot tell other employees the identity of an employee with a food-related disease that requires testing of the workforce; and (4) may not automatically refuse a request to use a service animal, such as a guide dog for the blind.

That the EEOC finds it necessary to issue guidance on specific disabilities and specific industry practices underscores the scope and complexity of ADA compliance requirements and the wide range of risk management issues facing employers.

Amendment Expands Employer Obligations to Employees on Military Leave

With more than 400,000 citizens called up for active duty by the Uniformed Services since September 11, 2001, many employers have confronted issues concerning their obligations with respect to employees who take military leaves of absence. The Uniformed Services Employment and Reemployment Rights Act (USERRA), which sets forth employees' rights and employers' responsibilities with respect to military leaves, was recently amended to expand protections and benefits for employees who are currently serving in the military as well as those returning from service.

New USERRA Requirements

Generally, USERRA requires employers to treat employees on military leave who meet certain requirements (including providing timely notice of the need for a leave and the intent to return to work and release from military service under honorable conditions) as if they had not been absent from their jobs. Specifically, a covered employee is entitled to:

- ♦ Reinstatement to the position he or she would have held if he or she had never been absent;
- ♦ Accrual of seniority for advancement and benefits purposes, including vacation, pension credit, and 401(k) contributions, as if he or she had been continuously employed;
- ♦ Other rights and benefits received by employees of similar status who were continuously employed;
- ♦ Optional continuation of medical benefits under terms similar to COBRA's; and
- ♦ Upon returning to work, protection from discharge for a prescribed time (determined by length of service), unless the employee was discharged for cause.

The Veterans Benefits Improvement Act of 2004 extends the period for continuation of health care coverage from 18 to 24 months. This requirement became effective December 10, 2004. The Act further requires employers to provide covered employees with notice of their USERRA rights, benefits, and obligations. Posting a notice where other employee notices are posted will satisfy this requirement. The notice provision is effective as of March 10, 2005. Other provisions of the Act address a variety of matters, including job training and apprenticeship programs. The DOL also recently drafted proposed regulations interpreting USERRA, so employers should be prepared for further changes in the law.

Recent USERRA Lawsuits

Disputes over USERRA's requirements can be expected as servicemen and servicewomen return from military leave and seek reemployment. Some litigation under USERRA and comparable state laws has already begun, including a current lawsuit involving a Marine who was laid off shortly after returning from military service. The Marine claims that the law protects him from layoff, even if, as the employer contends, his layoff was part of an overall reduction in force and unrelated to his military leave of absence.

In another case, an Ohio court has ruled that an employee is entitled to a trial on his claims that his employer violated USERRA and the FMLA by extending his attendance-related probationary period by the amount of time he spent on FMLA and USERRA leave and by firing him for an unexcused absence that occurred during that extension. The court ruled in part that a jury could find that since the employee's probation period would have ended sooner had he not been on military leave, the extension of the employee's probation period while on military leave could be considered a denial of a USERRA benefit. *Schmauch v Honda of Am. Mfg., Inc.,* 295 F Supp 2d 823 (SD Ohio 2003).

State Military Leave Laws

Some states have laws that grant employees on military leave greater rights and benefits than those they receive under USERRA. For example, New York and Illinois give employees a longer time to return to work upon completion of their military leave than the time dictated by USERRA. Certain states, such as California, New Jersey, and New York, protect all returning employees from discharge for 12 months, unless the discharge is for cause. Unlike USERRA, the scope of this right is not determined by the length of the leave. Thus, it is important for employers to know their state law obligations, if any, to employees on military leave.

Further, in response to the massive call-up of military personnel, some states have recently revised their antidiscrimination laws, including the following.

- Illinois: The Illinois Human Rights Act was amended to protect reservists from, among other things, discrimination in employment.
- Massachusetts: Effective December 22, 2004, the Massachusetts antidiscrimination statute was amended to protect members of the armed services, including National Guardsmen and reservists, from employment discrimination.

Hot Topics in Compensation and Benefits

New legislation and recent court decisions in specific areas of compensation and benefits will affect many employment-related decisions in 2005.

New Deferred-Compensation Rules

The recent enactment of the American Jobs Creation Act of 2004 (AJCA) made sweeping changes to the taxation of deferred compensation. Under the new law, all "nonqualified deferred compensation" is treated as income at the time of vesting, unless a specific set of conditions for exclusion is met.

The new rules broadly define "nonqualified deferred compensation" as any plan that provides for a deferral of compensation. Potentially, therefore, any arrangement under which compensation is paid later than the date on which it is earned or becomes vested is a "nonqualified deferred compensation plan."

These new rules affect all deferrals for amounts earned after December 31, 2004. Deferrals earned and vested before January 1, 2005, are grandfathered, and the new rules will not apply, unless the existing deferral plan has been "materially modified" (i.e., enhanced) since October 3, 2004.

Some of the common plans and arrangements that are affected by AJCA include salary deferral plans, supplemental employee retirement plans, restricted stock units, and phantom stock and stock appreciation rights. Specifically exempted deferred compensation includes tax-qualified retirement plans (e.g., 401(k) plans); tax-deferred annuities; simplified employee pensions; SIMPLE retirement accounts; nondiscounted options on employer stock; and bona fide vacation leave, sick leave, compensatory time, disability pay, and death benefit plans. Subject to certain restrictions, long-term incentive opportunities and annual or multi-year bonuses also are excluded from the new requirements. Notably, severance plans are not expressly excluded.

For a "nonqualified deferred compensation plan" to obtain favorable tax treatment, it must satisfy an array of requirements under the AJCA, including election time limits. With certain exceptions, an election to defer compensation for services performed during a taxable year must be made before the first day of that year. For plans that were in existence on December 31, 2004, deferral elections that are made by March 15, 2005, for amounts not yet paid (or payable as of the election date) will be exempt from the new timing rules.

If a participant fails to comply with the deferral election or distribution requirements, all amounts deferred will be taxed immediately, a 20 percent penalty will be assessed, and interest will be due. If a plan document is not in compliance, all plan participants could be subject to immediate taxation and penalties.

Obviously, plans should be operated in good faith compliance with the new rules. The good news for employers is that plans do not have to be amended, and initial elections as to time and form of payment do not have to be made until December 31, 2005, although the new rules will be generally retroactive to January 1, 2005.

In light of the new law, employers should (1) identify affected plans and arrangements; (2) review plan distribution and acceleration options and evaluate plan election provisions; (3) arrange for appropriate corporate or committee approvals; (4) examine foreign trusts and trusts with financial triggers; (5) consider the impact on equity compensation awards; (6) amend plan documents and forms in accordance with the new rules and communicate changes to affected employees; (7) modify payroll systems consistent with the new reporting and withholding requirements; and (8) for public companies, report plan amendments to the SEC and, where applicable, to the NYSE and NASDAQ.

Employee Benefits Affected by New Definition of "Dependent"

As of January 1, 2005, the Working Families Tax Relief Act (WFTRA) changed the definition of "dependent" used by the IRS. The change may have significant consequences for employee benefit plans, particularly with respect to who may receive favorable tax coverage. Employers who fail to abide by the new rules could face IRS penalties and sanctions.

The change creates a uniform definition of "qualifying child" for various purposes, including the federal dependency exemption, the child tax credit, the earned income credit, head of household filing status, and the dependent care tax credit. Generally, the old requirement that the taxpayer provide more than one-half of the dependent's support has been replaced with a residency requirement. Now, the child must have the same abode as the taxpayer for more than one-half of the taxable year.

Additionally, the child, unless disabled, must be under the age of 19 by the end of the calendar year, or age 24 if a full-time student. Moreover, the child must not have provided more than one-half of his or her own support for the taxable year.

The new definition of "qualifying relative" generally includes someone who does not meet the definition of "qualifying child" and who has gross income that is less than a defined amount ($3,200 for 2005). Hardship distributions from 401(k) and 403(b) plans may also be affected, as WFTRA limits hardship distributions to the participant or his/her "qualified children" or "qualified relatives." Regulations issued by the IRS on 401(k) and 403(b) plans subsequent to the passage of WFTRA indicate, however, that the old definition of dependent can apply if certain criteria are met.

Acknowledging that the statute is somewhat ambiguous, the IRS also asserts that the definition of dependent under the majority of health plans and health flexible spending accounts will not be affected by WFTRA. Further, a plan may still provide benefits on behalf of an individual who does not meet the new definition of dependent, but it would have to treat the value of that benefit as taxable income.

Employers therefore must review all health plan documents, plan descriptions, health savings accounts, dependent care accounts, and various other compensation and benefit plans to ensure compliance with WFTRA's new definitions where applicable.

Continuing Confusion over the Legality of Cash-Balance Pension Plans

According to the nonprofit Labor Research Association, in the last 10 years more than 300 companies with 8 million workers and $334 billion in plan assets have converted their defined benefit plans to cash-balance plans. As previously noted, these plans have come under increasing attack in recent years as violating both ERISA and the ADEA.

The prominent class action challenging IBM's cash-balance plan was settled on the ERISA claim in part and remains in litigation over the plaintiffs' ADEA allegations. Notably, IBM recently announced that it would no longer offer the cash-balance plan to new hires. Instead, the company will offer a 401(k) plan, matching employees' contributions dollar for dollar up to

6 percent of pay. In addition, Congress has been considering a legislative resolution offered by the Treasury Department but has yet to act.

According to a survey by benefit consultants Hewitt Associates, more than half of employers surveyed intend to revise their cash-balance or pension equity plan in 2005. The lack of a legislative solution, coupled with IBM's decision to drop the cash-balance plan for new employees, may further motivate the Hewitt survey respondents to take similar action.

Next, employers should continue to scrutinize and internally audit their pension plans, as the IRS's Employee Plans Team Audit Program (EPTA) has been stepping up its pension audits since late 2003, focusing on public and private companies running plans with more than 2,500 participants. The IRS has assessed individual companies hundreds of millions of dollars in additional taxes due to miscalculated pension benefits and underpayments.

Employers and plan sponsors should also monitor the comprehensive plan proposed in January 2005 by U.S. Secretary of Labor Elaine Chao to reform single-employer, defined benefit pension plans. The stated purpose of the proposal is to encourage and support defined benefit plans.

Domestic Partnerships: Trends in State Laws and Corporate Policies

Same-sex marriages, civil unions, and the rights of domestic partners were highly controversial issues in 2004. Massachusetts's highest court permitted same-sex marriages; California's did not. Amendments to state constitutions banning same-sex marriage passed in a number of states. Some state and local governments enacted laws granting limited rights to certain domestic partners. State courts made more rulings on same-sex marriage and civil unions than ever before. As a result of these events, many employers may have to reevaluate their current employee benefits programs.

First, some background. There is no federal law granting rights or benefits to domestic partners, and the federal Defense of Marriage Act (DOMA) allows each state to legally recognize or deny recognition to any marriage-like union between persons of the same sex where the union has been recognized in another state. DOMA also explicitly recognizes for purposes of federal law that marriage is "a legal union of one man and one woman as husband and wife." About 40 states have their own version of DOMA.

Currently, only Massachusetts recognizes same-sex marriages, and only Vermont permits "civil unions." Eleven states, the District of Columbia, and numerous municipalities offer domestic partner benefits to the same-sex partners of public employees. Three states—Hawaii, California, and New Jersey—have enacted laws that give domestic partnerships varying degrees of protections.

New State and Local Laws

California's domestic partnership law, which took effect in January 2005 and applies to properly registered same-sex couples and heterosexual couples over the age of 62, provides the most benefits and protections. Specifically, the Domestic Partner Rights and Responsibilities Act requires an employer who provides a particular right or benefit to employees with spouses to grant the same right or benefit to employees with domestic partners. The Act is currently being challenged in court.

In contrast, New Jersey's recently enacted domestic partnership law has a different, narrower focus. Like California's statute, it covers same-sex partners and opposite-sex couples over the age of 62, but it provides direct benefits for public employees only. However, the Act requires insurance companies and HMOs in New Jersey to issue policies that offer health care coverage to domestic partners. Thus, a private employer has the option, but not the obligation, to offer coverage to domestic partners under the employer's group health plans. Domestic partners must provide proof to get coverage, such as a New Jersey-issued "certificate of domestic partner relationship." (Maine has a similar law requiring health insurers to treat domestic partners as spouses when offering health insurance coverage.)

New York City also recently enacted an equal benefits law (effective November 2004). It also is being challenged in court. The New York City statute mandates that certain employers that contract with the city provide employees who have same-sex or opposite-sex domestic partners the same "employment benefits" that the employers provide to employees with spouses, including health, disability, and life insurance; retirement benefits; and medical and other leaves.

Confusion Reigns in Massachusetts

The implications of the Massachusetts Supreme Judicial Court's decision in *Goodridge v Department of Health,* 440 Mass 309, 798 NE2d 941 (2003), which legalized same-sex marriage, are—to say the least—unclear. Presumably, Massachusetts employers must treat same-sex spouses the same as opposite-sex spouses with respect to state employment laws, including civil rights protections and benefits. But *Goodridge* directly conflicts with DOMA. And, because state law governs certain aspects of the employment relationship and federal law governs other aspects, Massachusetts employers find themselves struggling to reconcile their conflicting obligations.

For example, in most instances, ERISA preempts the application of state law with respect to employee benefit plans. Thus, same-sex spouses in Massachusetts may not be entitled to spousal benefits arising under federal law because of DOMA. On the other hand, states retain the right to regulate insurance. Therefore, those plans and policies that are subject to state regulation in Massachusetts, including most insured group medical plans, presumably must afford coverage to same-sex spouses to the same extent coverage is offered to opposite-sex spouses. This is just the tip of the confusion iceberg; ambiguity reigns over other laws as well, including the possible applicability of the FMLA, even though it is a federal law. California's new law arguably poses similar issues.

Legal obligations aside, many private employers—more than 4,000 companies, including nearly half of all Fortune 500 concerns—voluntarily offer some domestic partner benefits. Underscoring the confusion, some employers in Massachusetts who offer benefits to same-sex partners reportedly are considering eliminating them as unnecessary, because those partners now have the option to marry.

Moreover, the impact of the Massachusetts decision allowing same-sex marriages is beginning to be felt in other states. In January 2005, in a ruling believed to be the first of its kind, a federal court in Florida decided against two women who had married in Massachusetts and sought to have their marriage recognized by the state of Florida. The court rejected the couple's argument that the federal and Florida laws banning same-sex marriage were unconstitutional because the DOMA laws discriminate on the basis of sexual orientation and deny a fundamental right to marry. The court refused to declare marriage a "fundamental right" and found instead that states have the right to regulate marriages. *Rev. Nancy Wilson and Dr. Paula Schoenwether v Richard L. Ake and John Ashcroft,* slip Op No. 8:04-CV-1680-T-30TBM (MD Fla Jan. 19, 2005) (Moody, USDJ).

Contractual Limitations on Dispute Resolution: An Important Trend in Risk Management Strategies

Ever-expanding employment laws and increasingly high jury awards are motivating more and more employers to think "outside the box" in terms of risk management strategies. For instance, in order to stem the tide of costly and time-consuming employment litigation, some companies now require employees to sign agreements to arbitrate employment-related disputes rather than litigate in court. Similarly, an increasing number of employers have implemented another type of employment agreement—one that shortens the statute of limitations; that is, abbreviates the amount of time under the law an employee has in which to file a lawsuit against the employer for employment-related claims.

Thurman v DaimlerChrysler, Inc.

Notably, just such a limitation was recently found to be lawful by the U.S. Court of Appeals for the Sixth Circuit. In the case before the court, *Thurman v DaimlerChrysler, Inc.,* No. 02–2474, 2004 WL 2649720 (6th Cir, Nov. 19, 2004), the automaker had included a provision in its employment application that stated:

> I agree that any claim or lawsuit relating to my service with Chrysler Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of

> the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

After more than 5 years on the job, an employee who had signed the application complained of sexual harassment. Dissatisfied with the company's response, she and her husband filed a lawsuit against DaimlerChrysler, alleging sex and race discrimination, as well as various tort claims. The company sought to have the suit dismissed, arguing that the employee had failed to file within 6 months of the alleged discrimination, as required by the clause in the job application.

The trial court agreed with DaimlerChrysler and held that the employee's claims were time-barred. In affirming that decision, the Sixth Circuit emphasized that "terms in an employment application constitute part of an employee's contract of employment." The Sixth Circuit also found that the agreement was not an "unconscionable contract of adhesion" (i.e., a "take it or leave it" contract), because it provided the plaintiff with sufficient time to investigate her claim, determine her damages, and file an action. And, while acknowledging that waivers in civil rights cases "must be carefully scrutinized for voluntariness," the court concluded that the disputed contract provision not only was "clear and unambiguous" but also that the plaintiff's own deposition testimony—that she read and understood the application before signing it—"refute[d] her argument." *Id.* at *6.

Significance of this Case

The ability to get a claim dismissed as untimely is obviously a huge advantage for an employer. Such a determination is made at a relatively early stage in the proceedings, thereby saving time as well as financial and human resources. Further, the court does not decide the veracity of each side's "facts," thus avoiding a potentially unjust or costly judgment against the company, as well as possible adverse publicity.

Importantly, however, in about a dozen states (including Florida, Missouri, New Hampshire, Oklahoma, and South Dakota), contracting parties are prohibited by statute from shortening the applicable statute of limitations. On the other hand, a few states (including Arizona, New York, and Pennsylvania) have statutes that permit parties to enter into contracts that abbreviate the limitations period, although it appears that, of these, only Pennsylvania courts have thus far approved a contractually shortened statute of limitations in the employment context.

The majority of states lack a statutory provision permitting or prohibiting contractual statutes of limitations, and courts in most of these states have not specifically addressed the issue in the context of employment contracts, although many have upheld contractual limitation of action clauses in other types of agreements. Federal and state courts have specifically approved such provisions in employment contracts in California, Illinois, Indiana, Michigan, Ohio, Oregon, and Pennsylvania.

Ensuring Enforceability

Even where such contracts are permissible, an employer may be forced to litigate the validity of the agreement itself. To help ensure that such employment contracts will be upheld in those states where they are not expressly prohibited, employers should heed a number of caveats:

- Obtain a valid "waiver" from the employee.
- Ensure that the shortened limitations period is reasonable.
- Consider making the shortened limitations period mutual.
- Avoid additional restrictions that could be viewed as "manifestly unfair," such as requiring employees to give written notice 10 days prior to suing.
- Avoid inadvertently lengthening a limitations period. An employment agreement that requires employees to bring all employment-related suits within, for example, 6 months of the alleged wrong could actually lengthen an employee's time to bring suit if the statutory limitations period is only 3 months.

Many of these caveats also apply to agreements to arbitrate. Courts have been sharply critical of arbitration agreements that are too one-sided in their rules, limiting the employee's rights and remedies, but not the employer's. Recently, a number of such agreements have been deemed unenforceable.

Fair, carefully crafted agreements that set forth some rules on potential legal proceedings can help to minimize the risk of costly employment-related litigation. As this area of law remains unsettled, however, employers need to proceed cautiously.

Conclusion

The scope and intricacy of the employment trends for 2005 underscore the formidable challenge employers face in minimizing their vulnerability to costly and time-consuming workplace disputes. But, unfortunately, there are no shortcuts in this area of risk management. To most effectively protect themselves, employers must be committed to keeping abreast of the constant changes in the law, to regularly reviewing their policies and practices and revising them accordingly, and to ensuring that their policies and practices are fairly and consistently applied by well-trained supervisors. Admittedly, such a commitment exacts a price in both time and money, but as too many employers learn each year, the costs of neglecting these obligations can be far greater. *EPLiC*

Michael W. Casey III *is a member of the firm in the Labor & Employment Practice in Epstein Becker & Green, P.C.'s Miami, Florida, office. He can be reached at* mcasey@ebglaw.com *or at (305) 982–1534.*

Raymond T. Mak *is a member of the firm in the Labor & Employment Practice in Epstein Becker & Green, P.C.'s New York City office. He can be reached at* rmak@ebglaw.com *or at (212) 351–4541.*