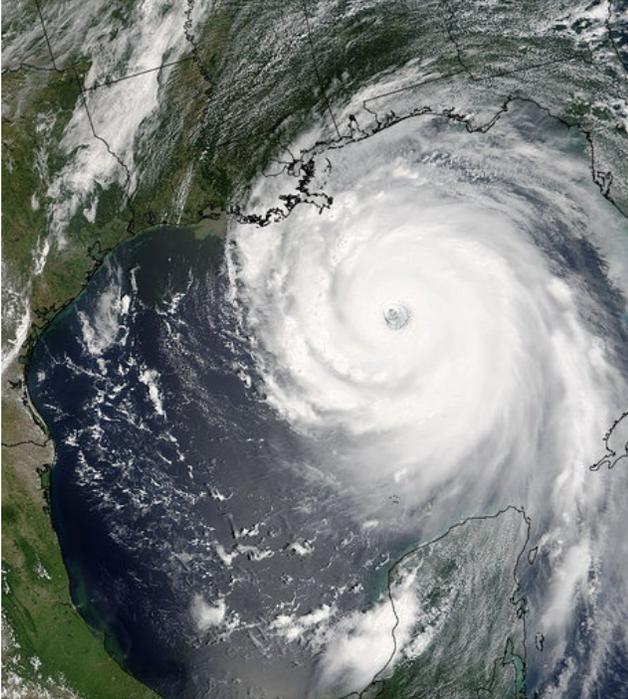

LABOR AND EMPLOYMENT LAW UPDATE



WORKPLACE ISSUES IN THE AFTERMATH OF KATRINA

Hurricane Katrina has had an impact upon workplaces located far from the Gulf Coast. Employees everywhere have been mobilized either by their employers or federal or state uniformed services to participate in relief efforts. Family members of victims are employed throughout the United States. Employers must be mindful of the legal challenges posed by these unique circumstances lest they become another victim of Katrina.

VOLUNTEERS: The Fair Labor Standards Act (“FLSA”) allows persons to volunteer or donate humanitarian services, without compensation, to public agencies and religious, charitable and other non-profit organizations. Entitlement to wages, including minimum and overtime pay, however, becomes an issue when for-profit private sector employers either use their own employees to engage in humanitarian efforts directly or require their employees to provide services to non-profit organizations.

FAMILY AND MEDICAL LEAVE: The Family and Medical Leave Act (“FMLA”) specifies the conditions under which leave must be provided to an employee (1) to care for a spouse, son, daughter or parent with a serious physical or mental health condition, or (2) because of a serious mental health condition that makes the employee unable to perform his or her job. The FMLA covers employers with 50 or more employees and prescribes leave of up to 12 weeks. Many states have similar laws which apply to smaller employers and which provide broader leave rights.

BEREAVEMENT LEAVE: Although neither the FMLA nor federal law directly addresses bereavement leave, an employee may nevertheless be entitled to such leave under state law, a collective bargaining agreement or a legally binding personnel policy. Texas law provides for up to 10 days of leave from work for bereavement for an immediate family member who is a crime victim.

MILITARY LEAVE: The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) requires all employers to provide certain leave and reemployment rights and benefits to employees who serve in the uniformed services. That an employee volunteered for military service does not affect entitlement to such rights and benefits. State law also safeguards employees who perform state military service.

MENTAL DISABILITIES: The Americans With Disabilities Act (“ADA”) mandates that the mental disabilities of qualified individuals be reasonably accommodated by private employers. Enforcement guidance provided by the Equal Employment Opportunity Commission (“EEOC”) defines a mental impairment as including major depression and such anxiety disorders as post-traumatic stress disorder. A mental impairment which substantially limits such major life activities as learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working can be a protected disability under the ADA. The ADA applies to employers with 15 or more employees.

IS THERE NEW LIFE FOR DISABILITY DISCRIMINATION CLAIMS?

In 2002, the U.S. Supreme Court in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, defined the term “disability” under the ADA so narrowly that many legal experts argued that the Court heightened the standard for determining when a person is disabled. The August 10, 2005 decision by the Seventh Circuit Court of Appeals in *EEOC v. Sears, Roebuck & Co.*, dismisses this argument.

TOYOTA: In *Toyota*, an employee with carpal tunnel syndrome claimed that she was disabled because she could not perform the manual tasks required of her job. The Supreme Court, however, said that the evaluation of a claimed disability under the ADA cannot be limited to a specific job. Rather, the analysis requires the consideration of the tasks which most people do in their daily lives and whether the disability is permanent or long term. In rejecting the disability claim, the Court found it significant that the carpal tunnel syndrome did not prevent the employee from brushing her teeth, washing her face, bathing, tending to her flower garden, fixing breakfast, doing laundry, and picking up around the house.

SEARS: In *Sears*, the employee claimed that neuropathy and diabetes prevented her from walking distances of one city block or more. The Seventh Circuit reviewed the *Toyota* opinion at length and determined that the decision was limited to disabilities which impaired the ability to perform manual tasks. The Court opined that disabilities which affect the ability to walk must consider the walking most people do in their daily lives. The ability to walk no farther than one city block was determined to be a sufficient impairment as to constitute a disability.

FUTURE IMPLICATIONS: The *Toyota* opinion presented a formidable legal hurdle which may have deterred many potential claimants from bringing lawsuits under the ADA. The decision in *Sears* provides a road map for avoiding this legal hurdle. Accordingly, it is likely that, absent a reversal of *Sears* or a rejection of its reasoning by other Circuits, disability claims will increase in the foreseeable future.

OCTOBER FIRM SEMINARS

TUESDAY, OCTOBER 11, 2005: “EPLI Claims” Seminar, sponsored by the Professional Liability Underwriting Society, Texas Chapter. Prestonwood Country Club, Dallas, Texas

TUESDAY, OCTOBER 25, 2005: “Emerging Exposures for Directors and Officers”, sponsored by Philadelphia Indemnity. Addison, Texas.

DISCLAIMER

This paper is not intended to provide legal advice in general or with respect to any particular factual scenario. Any such advice should be obtained directly from retained legal counsel.

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