LJN LAW JOURNAL NEWSLETTERS

Employment Law Strategist®

An ALM Publication

Volume 18, Number 9 • January 2011

Providing Leave As An Accommodation Under the ADA

The Employer's Responsibility

By Tina M. Maiolo and Alexander M. Gormley

Title I of the Americans with Disabilities Act of 1990 (the "ADA") requires an employer to provide reasonable accommodations to qualified individuals with disabilities ("qualified employees") who are employees or applicants for employment, unless to do so would cause undue hardship. Reasonable accommodations must be provided to qualified employees regardless of whether they work part-time or full-time, or are considered "probationary." There are a number of possible reasonable accommodations that an employer might be required to provide to qualified employees. Permitting the use of accrued paid leave or unpaid leave is one such reasonable accommodation, and the purpose of this article is to briefly explain an employer's responsibilities in responding to a qualified employee's request for leave.

What the ADA Says

Under the ADA, a qualified employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. Some examples of disability-related reasons for which a qualified employee may need

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UK Is Considering Abolishing Upper Age Discrimination Limit

By Stephen Brown, John Shyer and Kathryn Donovan

The new government in the UK has announced its intention to abolish the UK default retirement age of 65, effective as of October 2011, and is currently consulting about the impact that this will have on UK employers. The experience of the U.S. courts and employers under the U.S. Age Discrimination in Employment Act may prove useful in predicting the effect of the proposed change.

The UK Legal Changes

At present, the UK Employment Equality (Age) Regulations 2006 (the "Regulations") allow employers to set a company retirement age, and if this company retirement age is the same as the default retirement age of 65 in the Regulations, the required retirement of employees at that age is immune from age discrimination claims (provided that the retirement procedure stipulated in the Regulations is followed). Employers view this as a valuable protection, as employees in the UK are not employed at will. Employees may only be dismissed if three conditions are met:

1. The dismissal is for one of the six potentially fair reasons (one of which, at present, is retirement);
2. The employer has acted reasonably in treating that reason as sufficient to justify dismissing the employee; and
3. The employer has followed a fair dismissal process.

Failure to comply with these three requirements may expose a UK employer to unfair dismissal liability, which is currently capped at £65,300. However, if the dismissal is connected to some form of prohibited discrimination (which includes age discrimination), the cap is inapplicable and the liability is unlimited. The majority of UK employees gain unfair dismissal protection when they have accrued 51 weeks of service with the same employer.

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For older employees and their employers, all this is set to change as the new UK government is presently consulting on proposals to abolish the default retirement age in October 2011. The abolition of the default retirement age will mean that employers will need to justify any forcible retirement of their UK employees, or else face potential costly claims for unfair dismissal and age discrimination.

Existing UK Case Law

Compulsory retirement is, *prima facie*, age discriminatory, because the reason for the employee's dismissal is his or her age. The UK, as a member state of the European Union and a signatory to a number of its treaties concerning equal treatment, passed the Regulations in order to implement the provisions of the EC Framework Directive (the "Directive") with regard to age discrimination. The Directive permits, but does not require, member states to set national retirement ages. The UK national retirement age was subject to a prolonged legal challenge by a charity established to benefit older people, a dispute that ultimately reached the European Court of Justice (*The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07). The Court determined that a national retirement age of 65 could, in principle, be justified, although it emphasized that it is for national courts in each member state to determine whether the facts and circumstances in the relevant member state support the national retirement age.

Currently, UK employers with company retirement ages set lower than the default retirement age of 65 must justify that retirement age in order to avoid liability for age discrimination. They must be able to demonstrate that the retirement age "constitutes a proportionate means of achieving a legitimate aim" (Section 13(2), Equality Act 2010). On the abolition of the default retirement age, all company retirement ages (or individual retirements in the absence of a company retirement age), will need to satisfy the following test:

- **Legitimate Aim**: UK case law and government guidance indicate that legitimate aims include retaining employees, creating a career route, facilitating employment planning, contributing to a congenial and supportive workplace culture by limiting scrutiny of older employees' work performance, allowing people to retire with dignity, and the need for a reasonable period of employment before retirement.
- **Proportionality**: When considering whether the discriminatory effect is proportionate to the legitimate aim, the UK courts will consider whether the legitimate aim could be furthered by less discriminatory means, whether the legitimate aim is actually furthered by the discriminatory means, and whether the progress towards the legitimate aim is sufficient to justify the discriminatory consequence (the cases of *Seldon v Clarkson Wright and Jakes* ET/1100275/2007 and *Baker v National Air Traffic Services Ltd.* ET/2203501/2007 exemplify this approach).

Age Makes a Difference

The UK case law on justifying compulsory retirement has, so far, been concerned with employers justifying compulsory retirement ages that are lower than the default retirement age of 65, or have concerned compulsory retirement of non-employees such as partners. These decisions indicate

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John D. Shyer, a member of this newsletter's Board of Editors, is a Labor and Employment Law Partner in the New York office of Latham & Watkins LLP. **Stephen Brown** is an Employment, Benefits and Compensation Partner in the firm's London, UK, office, and **Kathryn Donovan** is an Associate in that office.

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Employment Law Strategist® (ISSN 1069-3741) is published by Law Journal Newsletters, a division of ALM. Telephone: (877) 256-2472
Editorial e-mail: wampolsk@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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Old Law, Partisanship Pose Challenges for NLRB

Is the Board in Danger of Becoming Irrelevant in a Changing Environment?

By Marcia Coyle

The National Labor Relations Board (NLRB), in Democratic hands for the first time in almost a decade, is preparing to steer the nation's labor laws in a pro-union direction. But lawyers on both sides of the partisan divide say this NLRB is driving the labor law equivalent of a Packard — at a time when it needs a Prius to cope with the fast-changing global economy. The National Labor Relations Act (NLRA), which the board administers, was 75-years-old last year, and has not been changed significantly in more than 60 years. The law and the board are in danger of becoming irrelevant as the world changes around them, labor law experts argue.

"I think the Act is badly tattered and in disarray as it is written today," said former board Chairman William Gould IV of Stanford Law School, a Clinton appointee. "The board has fallen into disrepair. There isn't any doubt about the fact that the board has become kind of a sideshow in the labor law arena."

Partisan battles over appointments to the five-member board, lengthy board vacancies, delays of five years or more in decisions, and flip-flopping of precedents are forcing workers to seek other avenues through which to deal with employers, he and others said. But Gould and some union supporters said the board is trying to breathe new life into the Act, which was designed in 1935 to encourage collective bargaining. That "new life" is evident, they said, in a series of rulings since last summer led by the board's three Democratic members and opposed by its now lone Republican member (a second Republican seat became vacant in August).

The board, for example, has announced it will reconsider three major rulings by the prior Republican-led board. The rulings include one that held that graduate students are excluded from the definition of "employee" under the act. Another held that, when a new employer takes over a company that has a union, the union's majority support can be challenged by employees, the employer or a rival union. The third ruling found that an employer's voluntary recognition of a union, based on the union's showing of majority status, does not bar a rival union's decertification petition. The petition must be filed within 45 days of employees getting notice of the employer's voluntary recognition. The finding applies even if the employer and the union have signed a collective-bargaining agreement.

Protecting Core Rights

NLRB Chairwoman Wilma Liebman, a Clinton appointee in 1997, said the nation's labor law, while dated in some respects, still protects core rights that are vital. She also rejected the dire forecast of the business community that the board is on the verge of radical change. However, "in terms of decision-making itself, there will definitely be a different approach to this law than existed during the Battista board," she emphasized, referring to former chairman Robert Battista, appointed by former President George W. Bush.

Partisan Divide

President Obama's three appointments to the board last spring ended a 27-month period in which Liebman and Peter Schaumber, whose term expired in August, were the only board members. The partisan stalemate in the Senate over filling the board's vacancies is just one example of a system "beyond broken," said John Raudabaugh, counsel to Nixon Peabody and a former George H.W. Bush appointee to the board. "It is moribund at this point. We're not pointing fingers at any individual or political parties. It's just not meaningful."

Changes to the NLRA are just as politically divisive as changes in board membership and always have been, said Charles Craver of George Washington University Law School. "I think the statute really is broken and it does have to be changed," he added, but changes are always "left wing and right wing," and labor versus management.

The Act, he said, was designed for an industrial economy in which big unions went into the steel and auto industries. "I don't think it takes into account a 21st-century economy, which is global and more service and white-collar."

The Act also is somewhat at war with itself. When it was enacted, the statute encouraged collective bargaining and established unfair labor practices by employers. The last major change to the act — the Taft-Hartley amendments of 1947 — was a response to a series of strikes. The amendments established unfair labor practices by unions and protection of a right to refrain from joining a union equal to protection of the right to join one.

"Is the board to be totally neutral or to encourage collective bargaining?" Liebman asked. "The Battista board said the free choice, the right to refrain, has statutory pre-eminence over the general policy to encourage collective bargaining. I took pretty strong issue with that. In my view, you have to balance both."

The tension exists in many of the board's cases. How it is resolved often appears to depend on whether the board's majority has a labor or a management bent. Frequent turnover on the board as each new president gets to fill vacancies creates the flip-flopping on precedent that bedevils both unions and management.

Flip-Flops

The tension Liebman described is present in one of the board's recent and most controversial actions: calling for reconsideration of a 2007 decision known as Dana Corp. A divided board in Dana drastically reduced the window in which a union, voluntarily recognized by an employer based on signed authorization cards, can negotiate a contract before there is an election to decertify the union or support a rival union.

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Marcia Coyle is a reporter for the *National Law Journal* , an ALM sister publication of this newsletter. This article also appeared in *The Legal Intelligencer*.

NLRB

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"Dana is a set of rules the Battista board created, and the rules were completely novel," said Liebman. "Dana itself overturned a 40-year-old precedent. I dissented in the Dana case. We're asking for briefing. Who knows what we'll do with it."

But the flip-flopping is also because the nature of board appointments has changed in the past 40 years, according to Gould, Craver and others. "It's a political agency," Craver said. "Always when you have a new administration, the president will name three people. Richard Nixon started appointing advocates for management. Prior to that time, they tried to have more neutral appointees. Now it goes back and forth between labor and management."

Gould added: "These kinds of appointments have produced more polarization. The fundamental problem is the political parties themselves have become more polarized, and labor and management have become more polarized as labor's influence in the economy has so precipitously declined."

But it is "the nature of the beast," Liebman said. "For better or worse, the statute created a structure in which one board member's term expires every year. Whoever the president is gets the chance to appoint a majority of board members. Both sides would probably acknowledge it's not the ideal situation. Neither side wants to be the one to call a truce."

Time for Change?

Nixon Peabody's Raudabaugh and others believe it is time for a new model in labor law that does not focus solely on third-party union representation. Some experts say labor law is dead and the focus should be on employment law. "We see in this country a 50- to 60-year decline in union density," Raudabaugh said. "Not everyone wants a union. The question is: Are we, in this complicated world, only concerned about legitimatizing voices through this union representation system? Not that it's bad, but should it be 'it's this way or no way'?"

Raudabaugh has proposed replacing the NLRB with an Article III workplace court that also would hear wage-and-hour, equal employment opportunity and Occupational Safety and Health Administration (OSHA) claims.

Stanford's Gould noted that a number of workers and employers are turning to private "machinery," such as neutrality agreements or card-check mechanisms for organizing, to circumvent the board. Gould himself has been serving as an independent monitor for a very large British multinational corporation that has about 100,000 employees in the United States. "Anytime a complaint comes up that would ordinarily go the NLRB, it comes to me, not as final arbiter, because the board is always there. But most complaints this company has had about union-organizing disputes have been resolved through this kind of mechanism."

Liebman, whose term expires next August, is ready, if not to trade in the Packard, then to seriously consider a Prius. She and the new board have been holding a series of discussions across the country this year about the law and the board's future. "Business and labor have serious concerns," she said. "This warrants a very serious policy discussion of how do you have a labor policy that protects workers in this competitive environment but doesn't strangle business' ability to operate, to compete."

The discussion should take place in Congress, but is unlikely, she said, adding, "I think the climate today is probably as polarized as I've ever seen it, and probably as much as it was in 1947."

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that in order to defend discrimination claims based on retirement after October 2011, an employer will need to adduce evidence of why a particular retirement age rather than any other age is a proportionate means of achieving the legitimate aim, and will need to point to statistical evidence of the impact of the particular retirement ages on the workforce as a key element of justifying the retirement age it has applied.

Upon the abolition of the default retirement age, it will be important for UK courts and employment tribunals to take a pragmatic approach to developing principles concerning the justification of retirement ages. UK employers will need certainty that they will not face litigation every time they retire employees. Employers hope that they will be allowed to use a uniform retirement age for all their employees, or all their employees who perform a similar kind of work, rather than requiring detailed justification on each and every occasion that an employer seeks the retirement of one of its employees. The U.S. experience will be particularly valuable in this regard.

Could the U.S. Experience Aid UK courts?

Upon its enactment in 1967, the federal Age Discrimination in Employment Act ("ADEA") prohibited discrimination in employment against a class of older employees, defined to include those between the ages of 40 and 65. The ADEA was later amended on two occasions, first to increase the upper limit of the class to age 70, and then to eliminate the limit altogether (except with respect to a limited subset of executive employees).

The experience of employers and statistics available from the U.S. Equal Employment Opportunity Commission ("EEOC") suggest that factors other than the elimination of the upper age limit on the defined class have had a greater impact on the number of age discrimination charges filed with the EEOC. (The filing of a charge of discrimination with the EEOC is an administrative prerequisite to the commencement of a lawsuit accusing an employer of age discrimination.)

For example, data available from the EEOC's Web site (www.eeoc.gov) shows that from fiscal year 1997 through fiscal year 2007, the number of charges of age discrimination charges filed with the agency fluctuated in a band of between approximately

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Second Circuit Strips Pharmaceutical Sales Reps of Their Exempt Status

By Neil V. McKittrick and Rachel Reingold Mandel

The Second U.S. Circuit Court of Appeals recently held in *In re Novartis Wage and Hour Litigation*, No. 09-0437 (2nd Cir. July 6, 2010), that pharmaceutical sales representatives do not fall under any of the exemptions to overtime payment requirements under the Fair Labor Standards Act ("FLSA"). The court's decision exposes the two defendant pharmaceutical companies to significant damages in unpaid overtime as the result of having misclassified the employees and significantly impacts the classification of pharmaceutical sales representatives in the industry.

Background

Pharmaceutical sales representatives ("reps") at Schering-Plough Corp. and Novartis Pharmaceutical Corp. brought two separate class actions in which they claimed that the companies had misclassified them as exempt employees who were not entitled to overtime pay. The reps claimed that they did not actually sell the companies' products, because medical professionals did not commit to purchasing or even prescribing the products in question, and the reps merely marketed the products according to a rote, highly standardized process. As a result, the reps claimed, they are not covered by either the "outside sales" or "administrative employee" exemptions to the FLSA overtime requirements.

In a consolidated opinion addressing both cases, the court held that the reps did not fall under either exemption and, therefore, had been misclassified and were entitled to unpaid overtime. The overtime payments could be significant, because the reps typically work 12-hour days, travel for their jobs, and attend after-hours events as part of their marketing efforts. The cases were remanded for a determination of the amount of unpaid overtime that is due.

The Second Circuit's Rejection of the Companies' Classifications

Novartis argued that its reps were covered by either the outside sales exemption, because they are marketing and selling products, or the administrative employee exemption, because they are highly compensated and exercise sufficient discretion and independent judgment in their jobs. The court rejected both arguments. It concluded that the reps do not qualify for the outside sales exemption because they never actually sell their product; rather, they provide information about the product and encourage doctors to prescribe it. Because they do not sell their product (*i.e.*, by making a deal that results in the transfer of the item in exchange for money), the reps cannot qualify for the outside sales exemption. Novartis argued that physicians are asked to "commit" to prescribing a specific drug, but the court said that, by definition, physicians do not commit to buy a Novartis product because physicians are required to prescribe drugs appropriate for their patients, and they cannot make binding commitments. The court was further influenced by the fact that there is no real way to correlate the reps' compensation to drug sales. Although Novartis uses pharmacy prescription drug sales information to project how many physicians in a region have likely prescribed the drug, which helps determine reps' bonus payments, it is a rough system in which it is difficult to tie reps' compensation directly to the results of their marketing efforts. After considering these various factors, the court determined that the reps do not qualify for the outside sales exemption.

The court also rejected Novartis' argument that the reps are exempt administrative employees because the reps have little discretion over their sales strategy or methods. The reps are trained in the preferred method of questioning physicians to determine why the physicians may be hesitant to prescribe certain drugs, they are taught four "social styles" to use depending on a physician's response to a sales call, and they are provided with very specific "core messages" to convey during each sales call. Novartis also dictates the number of times per trimester that reps must visit each physician and how often they must promote each drug. The reps play no role in formulating the core messages, written marketing materials, or advertising messages. They are specifically instructed not to deviate from the core message or company-provided written materials. The court was particularly persuaded by one rep's testimony that Novartis expects the reps to act like "robots." If a physician asks a rep a question not covered by the Novartis prepared materials, the rep must refer the physician to the company's medical department. In light of the evidence that the reps' jobs are highly formulaic and lack independent discretion, the court rejected the notion that they are covered by the administrative exemption.

Practical Impact

The Second Circuit is only the second federal appellate court to address the classification of reps under the FLSA. The Third Circuit previously ruled that reps do exercise sufficient discretion and independent judgment to qualify for the administrative exemption. There is currently a rep classification case pending in the Ninth Circuit, and other appellate courts may soon be

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Neil V. McKittrick, a member of this newsletter's Board of Editors, is a shareholder and **Rachel Reingold Mandel** is an associate in the Boston office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Pharma. Sales Reps

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asked to consider the question as well. The disagreement among the circuits may bring the issue before the Supreme Court within the next few years. In addition, the U.S. Department of Labor ("DOL") does not consider reps working for pharmaceutical companies to be exempt, so the DOL may increase enforcement of overtime payments to reps in the wake of the Novartis decision as well.

While the Second Circuit held that neither of the requested exemptions applied to the Novartis reps, the administrative employee exemption may apply to reps at other companies that allow or encourage their reps to exercise more latitude and independent discretion in the performance of their jobs. As a practical matter, however, pharmaceutical companies face a unique challenge that inhibits them from permitting reps to exercise autonomy while still complying with the strict federal regulations that govern pharmaceutical marketing. Therefore, companies may not be able to continue to classify reps as exempt while still complying with other regulatory pressures.

Conclusion

If companies are unable to provide their reps with more autonomy, and they have no choice but to classify them as non-exempt employees, the industry will likely see companies begin to severely limit reps' travel time and after-hours work to cut down on the potentially high exposure to overtime payments. As other circuits, and possibly the Supreme Court, consider this issue, the pharmaceutical industry may see significant changes in the structure of reps' jobs and compensation.

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ADA

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leave are to obtain medical treatment for a disability, to recuperate from an illness stemming from a disability, and to train a service animal (*e.g.*, a guide dog). "Undue hardship" means significant difficulty or expense, and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.

An Employer's Obligation

While an employer is under no obligation to provide a qualified employee with paid leave beyond that which is provided to similarly situated employees, the employer must grant the individual unpaid leave if the paid leave is insufficient to cover the entire period. This rule rebuffs the common assumption that qualified employees are no different from other employees in their entitlement to additional leave. In providing additional unpaid leave to a qualified employee, employers should allow the individual to exhaust accrued paid leave first, and then use unpaid leave. For example, if an employer's policy is that all employees get 10 days of paid leave, and a qualified employee needs 15 days of leave related to his/her disability, then the employer should allow the individual to use 10 days of paid leave and five days of unpaid leave. Even if employers have a "no-fault" leave policy under which employees are automatically terminated after they have been on leave for a certain period of time, they are still required to provide the additional leave to qualified employees unless they can show that: 1) there is another effective accommodation that would enable to the person to perform the essential functions of his/her position; or 2) granting additional leave would cause an undue hardship. Additionally, an employer cannot penalize a qualified employee for work missed during leave taken as a reasonable accommodation, since doing so would be considered retaliation for the qualified employee's use of a reasonable accommodation to which he/she is entitled under the law.

The Metrics

There is no specific metric for how long an employer must keep a qualified employee on unpaid leave. Rather, the standard is that employers are required to hold a qualified employee's job open as a reasonable accommodation unless it can show that doing so causes undue hardship. If an employer cannot hold a position open during the entire requested leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and then reassign the employee to that position to begin working at the end of the leave period. If an equivalent position is not available, the employer must look for a vacant position at a lower level. If a vacant position at a lower level is also unavailable, the employer is not required to provide continued leave as reasonable accommodation.

The ADA and the FMLA

Finally, employers should be aware of the interaction between the leave requirements under the ADA and the Family Medical Leave Act (FMLA). For the most part, employees eligible for leave under the FMLA will not be entitled to leave as a reasonable accommodation under the ADA, either because they do not meet the ADA's definition of disability, or the need for leave is unrelated to their qualifying disability. However, when an employee's request for leave does qualify under both the ADA and FMLA, the employer should consider the individual's rights under both statutes and provide leave under whichever statutory provision provides the greater rights to employees.

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Tina Maiolo is a Member of Carr Maloney, PC., Washington, DC. She specializes in the areas of employment and labor law, immigration law, civil rights law, business law and commercial litigation, and regularly manages legal matters specific to nonprofit and charitable organizations as well as religious institutions. **Alexander M. Gormley** is an Associate at the firm.

Responding to Regulatory Agency Complaints

A Practitioner's Perspective

By Charles A. Krugel

For business owners, one of the most troubling aspects of management is receiving an employment-related complaint from a governmental regulatory agency. Such agencies include the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), the U.S. Department of Labor (DOL), the Federal Trade Commission (FTC) or any of the similar state, local and municipal equivalents to these agencies.

Preparing a response is an onerous task. The process leaves a business wondering who is really in charge; what exactly are our tax dollars paying for, and why would we ever want to employ someone again?

Questions to Ask

Since America's inception, business owners and government entities have engaged in a balancing act of regulation and free enterprise. Lately, due to increasing government intervention in private sector business operations, and due to our economy's shortcomings, this balancing act seems swayed in government's and big business' favor. Big business has an advantage because small- to medium-sized businesses usually do not have the same resources (money, manpower, time, energy) to devote to responding to these complaints and charges. Consequently, some of the most important questions for smaller business owners and managers include:

- Are we being judged guilty before being proven innocent?
- How do we respond to a regulatory agency complaint?
- What information is necessary to give them without jeopardizing our operations or finances?

What to Do

When a business receives a complaint, it must first determine whether the complaint is official, *i.e.*, real. Many complaints are unofficial threatening letters or allegations, not sent by the controlling agency, but sent by the actual employee or his/her representative. If the complaint is not sent from the actual agency, it may not be official; therefore, a response may be unnecessary. Often, these unofficial complaints are "shakedowns" because it is evident that the complainant, or representative, is just looking for some easy money. (These unofficial complaints are similar to nuisance lawsuits.)

Once it is determined that the complaint is official, the business owner must ascertain the nature of the allegation. That is, what law or regulation is cited in the complaint? Also, what is the potential punishment or the amount of damages that can be awarded if the company loses the investigation? After this has been determined, it will be easier for the company to figure out how to respond and what evidence should be included with the response.

A third factor to consider is the deadline for response. Obviously, a company does not want to miss a deadline, but if pressed for time, some agencies (not all) permit additional time for a response. Note that a request for additional time has to be made by the company — it is never implied or otherwise understood that the company needs additional time to respond.

The 'Statement of Position'

Generally, the company's response is an informal statement of its position on the allegation (often called a "position statement" or a "statement of position"). The statement is informal because it is usually not written in a legalistic or official format similar to court filings. However, this does not mean that the business should be casual about its response. In a very detailed and organized fashion, the company should explain the what, why, when, who, where and how of what transpired.

Regarding the position statement: In addition to providing a written narrative of what occurred, the company should include any documents, recordings and files (*i.e.*, exhibits) that support its contentions. All exhibits should be referred to in the statement. If there are more than a few exhibits, or if exhibits have numerous pages or subparts, it is helpful to include some sort of index or table of contents. Essentially, anything that helps an average reader understand the position statement, and anything that clearly and completely explains the company's position, should be included or referred to in the statement. It is acceptable to remove any privileged or confidential information such as attorney-client communications, Social Security numbers and birth dates. However, it is essential not to appear as if you are hiding something. Consequently, the reasons for redacting information should be explained if they are not obvious (*e.g.*, why the redacted information is protected or proprietary business information, personal employee information, patented or trademarked information).

In addition, sending a very detailed response is better than sending a general and bureaucratic-sounding one. With recent advances in communications and technology, transparency (*i.e.*, openness, honesty, forthrightness) is a hot topic and an important consideration when responding to an agency. The less it looks as if you are trying to hide something, and the more you appear to be taking a respectful, problem solving approach to the matter, without admitting guilt or being overly aggressive, the better the chance that the agency will rule in your favor. Otherwise, the agency or decision-maker, at this first level of dispute resolution, will summarily kick the complaint to the next level or rule against your business.

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Charles Krugel is a management-side labor and employment attorney in the Chicago area and has represented businesses in negotiations and disputes for over 16 years. In addition to his J.D., he has a Master of Arts in Industrial/Organizational Psychology. Krugel is also a published author and a frequent subject of media interviews regarding his field. Phone: 312-804-3851. E-mail: cak1@charlesakrugel.com.

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DISCLOSURE

How much and what to disclose are key considerations. This brief article cannot summarize all of the factors to consider in determining what to reveal in the position statement. Sound business judgment and common sense might help to resolve these concerns. Competent legal or business counsel can also help. As a general rule, stick with the facts, *i.e.*, what can be proven with sufficient and reasonable evidence, and what can be disclosed without compromising any business secrets and other confidential information.

The position statement is used by the agency to decide whether or not to investigate the charges further or whether to pursue some other form of dispute resolution such as mediation, settlement discussions — or even whether to file a more formal complaint or lawsuit against the company.

The agency representative making the decision is usually an appointed official, who may be an attorney. In many instances, the agency official is an experienced and competent official who is able to comprehend nuanced information. However, there are exceptions; not all decision-makers are experienced or competent. Moreover, the decision-maker may not be making a decision based on all the facts. The decision is usually based either on whatever information is available, or on the decision-maker's perception of the response and evidence.

Often, at the investigatory stage of dispute resolution, the agency may request additional information, beyond that which is indicated in the position statement. Or sometimes, after the submission of the position statement, new information surfaces. In either instance, the company should not hesitate to send additional information to the agency. Think of it as engaging in an ongoing dialogue with the agency about the circumstances surrounding your case. Just make sure that whatever additional information is sent does not contradict anything stated in the position statement and is easily integrated into the statement.

THE NEXT STEP

Once the position statement has been ruled upon, the complaint will either be dismissed or will proceed ahead to some sort of trial or other dispute resolution procedure (*e.g.*, mediation or arbitration).

Although it is not always necessary for a responding company to utilize legal or business counsel for the response, if the company is not attuned to the specific regulatory agency's style or the alleged violations, and it does not have the benefit of counsel to assist in its response, it could adversely affect its chance of receiving a favorable ruling. It is not wise to use the position statement as a means to test how whether you are adept at dealing with agency complaints. This is not the time for experimentation or chance because it could cost your business plenty.

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Age Discrimination

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14,000 and 19,000 per year — and never exceeded 20,000 in any year. However, with the start of the steep recession in 2008, the number of age discrimination charges filed with the EEOC skyrocketed to 24,582 that year, and remained at an elevated level of 22,778 in fiscal year 2009. As a percentage of all charges, the number of age discrimination charges rose from 21.8 in 2006 to 25.8 in 2008, while during the same period, there was no similar increase in the percentage of race, sex, national origin, religion, disability or equal pay charges. Many corporations implemented substantial headcount reductions in response to the recession, and it is plausible that the impact of these programs on employees in the age-protected class led to an increase in the number of charges filed.

The data does not suggest that in times of economic stability, the elimination of the upward limit on the age-protected class has materially impacted the number of age discrimination charges filed with the EEOC. It is likely that most employers have adjusted their policies to prohibit mandatory retirement of employees, and human resource managers in most companies probably scrutinize decisions related to older workers to assure that such actions are defensible on grounds unrelated to the employee's age. Moreover, the fact that an employee in the United States cannot be forced to retire does not necessarily mean that most employees will alter their retirement plans. Such plans are influenced by many factors other than the definitions of the ADEA — such as family financial circumstances, health, availability of other opportunities both in an out of the workforce, desire for additional time for non-work-related pursuits, etc.

CONCLUSION

The U.S. experience of the abolition of an upper age limit on age discrimination claims may give UK employers some comfort. However, the fact that an employee in the UK can avoid the cap on the value of unfair dismissal compensation if that dismissal is related to age discrimination is likely to prove a significant incentive both for employees to try to connect their retirement to unlawful age discrimination, and for employers to take additional steps to justify such retirements. UK employers will have to learn to function without a compulsory retirement age that is immune from legal challenge. The best practice guidance from the U.S. indicates that HR managers should be prepared to scrutinize dismissals of older employees, and should make certain that such decisions are defensible on grounds unrelated to the employee's age.

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