What’s New in Employment Law and How Much Is It Going to Cost?

by Betty Southard Murphy

Editor’s Note: Following is an edited version of a presentation made at AWCI’s 75th Convention in Washington, DC.

I am delighted to be at your annual convention once again, particularly since there are so many hot issues involving construction and employment law in the changing workplace.

My topic is “Employers’ Rights.” However, in today’s excessively litigious society, employees have more rights, know of their rights and are willing to assert their rights than ever before. As a result, companies increasingly find themselves in courts resolving disputes with their employees or before one administrative agency or another.

Employment litigation is costly for employers, disruptive of the workplace, and harmful to morale. The more we know about what’s going on, the more we can prevent problems.

I’ve been asked specifically to speak about the Americans with Disabilities Act, the new Civil Rights Act of 1991, Workers’ Compensation, the Construction Regulations which the Department of Labor sent to OMB and which OMB sent back, sexual harassment lawsuits filed primarily by women, wrongful discharge, and similar matters. Obviously, each of these topics could take the entire time for this presentation, but I will try to give you an up-to-date view on what’s out there.

It goes without saying that it is becoming more and more difficult to avoid employment lawsuits.

In the last two years Congress has passed legislation that will change the way contractors and other employers operate. In addition, the regulations seemed to spew out faster than ever.

As you may be aware, the huge Construction Regulations were finally sent to the Office of Management and Budget (“OMB”) in February. By letter dated March 10, 1992, OMB “suspended review on the construction regulations” and sent them back to the Department.

Specifically, OMB has requested a study or analysis that OSHA cannot, according to them, legally do. The regulations, which would cover more than 6,000,000 workers in the construction, maritime and agricultural industries, were sent back on the theory that less protection by OSHA may save more lives than the addition of regulatory costs to employers.

This novel theory argues that added regulatory costs could force employers either to lower wages or to cut the number of employees. If this happens, OMB asserts, it could have a negative impact on workers’ health. In other words, if an employer is forced to cut construction crews, the unemployed construction worker won’t be able to pay for health insurance.

The proposed standards which OMB returned set permissible exposure limits (PELs) for more than 1,000 substances used in construction, maritime and agriculture. The standards which were approved nearly four years ago for all other industries are designed to protect workers from excessive exposure to hazardous substances in the work place.

OMB’s letter said it would not consider the proposed regulations until the Department completes an analysis showing whether the new rules would have an adverse effect on wages, employment, and health.

The OMB directive came after the White House had declared a 90-day moratorium on new federal regulations and Labor Secretary Lynn Martin indicated that this moratorium would not apply to health standards.

The proposed OSHA regulations would add an estimated $163 million in annual employer costs for the three industries. OSHA estimates the new regulations would save 8 to 13 lives a
year but James B. MacRae, Jr., OMB’s Acting Administrator of the Office of Information and Regulatory Affairs, said more employees would die for lack of adequate health care if they lost their jobs. As a result, he said the new rules could result in an additional 22 deaths—a net increase of 8 to 14 deaths a year over the lives which the regulations would save.

What makes OMB’s position a little curious is that in a 1981 Supreme Court decision in American Textile Manufacturers Institute, Inc. v. Secretary of Labor, OSHA was prohibited from promulgating a health standard by weighing the costs and benefits of the rule, and then choosing some level of protection that was “less” than the most protection possible. The Supreme Court held that OSHA must promulgate “the most protective regulation it can, bound only by technological and economic feasibility.” Therefore, the Department’s position is that it cannot legally decide to offer less protection on grounds that a terminated employee would not be able to afford health care.

Fortunately, when Mr. MacRae went before Congress last week, he did say that the Department could request that the proposed regulations move forward at OMB while the Department’s analysis is being completed. That is where it stands on Tuesday, March 24, 1992.

Another new law that became effective in November 1991, immediately upon passage—which will cost a great deal of money—is the Civil Rights Act. The Act specifically overturned parts of Seven Supreme Court decisions which made it more difficult for plaintiffs to recover damages from contractors and other employers.

In Wards Cove Packing Co., v. Antonia, 49 FEP Cases 1519, the Supreme Court limited workers’ ability to sue employers for indirect discrimination against minorities or women. Under this decision, it was more difficult for minorities and women to prove disparate impact since the Supreme Court’s decision required them to show that a particular practice or process was responsible for a statistical minority imbalance in the work force, but did not require employers to prove that the challenged practice was justified by business necessity. Under Wards Cove, employers only had to prove evidence of a business justification.

Under the new law, an employment practice that results in a disparate impact on a protected class is unlawful if the employer cannot “demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity.” A plaintiff can now prove disparate impact by showing that a less discriminatory practice is available but that the employer refuses to use it.

In Patterson v. McLean Credit Union, 49 FEP Cases 1814, the Supreme Court restricted previous protections against race discrimination in hiring, promotion, firing and harassment to hiring only. In other words, the statute was limited only to the hiring process, but did not apply to on-the-job harassment or other post-hiring conduct. This too was overruled by Section 101 of the new Civil Rights Act, which redefines the phrase “make and enforce contracts” and includes “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” That takes in just about everything.

In Lorance v. AT&T Technologies, 49 FEP Cases 1656, the Supreme Court severely restricted the time during which certain discriminatory practices can be challenged. The Su-
The Supreme Court held that the time period for filing a challenge to an intentionally discriminatory seniority system begins to run as of the date the system is adopted, not the date when the system adversely affects a plaintiff. The new law provides that a seniority system that intentionally discriminates—regardless of whether such discrimination is apparent or not—may be challenged (1) when the system is adopted; (2) when an individual becomes subject to it, or (3) when a person is actually injured by it. This also just about covers everything.

In *Price Waterhouse v. Hopkins*, 49 FEP Cases 954, the Supreme Court had held that in mixed motive cases, if an employer could show that it would have made the same decision based on non-discriminatory grounds, then the plaintiff would lose the case. The new Civil Rights Act provides that if a plaintiff shows that one of the prohibited factors motivated an employment action—it is unlawful even if it is established that other lawful factors also motivated the action.

In *EEOC v. Arabian-American Oil Co.*, 55 PEP Cases 449, the Supreme Court held that Title VII did not apply outside the territorial jurisdiction of the United States, and therefore Title VII did not protect U.S. citizens working abroad from racial, religious and ethnic bias which occurred in a foreign country. Section 109 of the new Civil Rights Act provides that U.S. citizens employed in foreign countries by American-owned or American controlled companies are covered by both Section 701(f) of Title VII and Section 101(4) of the ADA. A narrow exception applies, and that is if compliance with Title VII or the ADA would cause the company to violate the law of the foreign country in which it is located.

Similarly, in *Martin v. Wilks*, 49, FEP Cases 1641, the Supreme Court held that white firefighters could bring an independent action challenging a consent decree years after its approval by the court. The Supreme Court had held that the challenge could have been prevented if the firefighters had been joined as a party in the initial suit. Section 101 of the new Civil Rights Act adds a new subsection (N) to Section 703 of Title VII (42 U.S.C. § 2000 (e) (2) barring challenges to consent decrees by persons who had actual notice of the proposed judgment and a reasonable opportunity to present objections. It also bars challenges by those whose interests were adequately represented by another person who challenged the decree on the same legal ground and similar facts, unless there has been an intervening change in the law or facts. Under the new law, therefore, the firefighters could not have brought their action before the Supreme Court.

And finally, in *West Virginia University Hospitals v. Casey*, 55 FEP Cases 353, the Supreme Court had held that attorneys’ fees and expert witness fees are separate elements of litigation costs. Section 113 of the new law adds a new subsection (c) to the Attorneys’ Fee Awards Act, (42 U.S.C. § 1988) to provide that expert fees may be included as part of the attorneys’ fees awarded under § 1981 of the 1866 Civil Rights Act.

Thus these seven Supreme Court decisions were effectively overruled by the new Civil Rights Act. New restrictions were placed on employers, and more remedies were available to alleged victims.
Act of 1964, punitive damages were not covered. The new Civil Rights Act extends such damages to victims of intentional sex, race, and disability discrimination. Jury trials are also permitted for the first time.

Congress even decided how much punitive damages contractors and other employers should pay. The cap for intentional discrimination varies by the size of the employer. If you have 100 or fewer employees, punitive damages which can be assessed against you can range up to $50,000; if you have more than 100 but fewer than 201 employees, up to $100,000 in punitive damages can apply; employers who have between 200 and 501 employees can have $200,000 assessed against them; and for employers with over 500 employers, $300,000 in punitive damages can be set against them under the statute.

In addition to punitive damages, back pay, interest on back pay, front pay and recovery for medical bills can be awarded.

What do these changes mean to you? It is obvious that employees are going to have an easier time getting into court, an easier time getting decisions in their favor, and an easier time collecting money.

The potential for jury trials and the expense of litigation will persuade many contractors to settle cases of alleged discrimination rather than risk a large jury verdict. Effective training of both your inside employees and your supervisors and foremen on the job site is absolutely necessary when one misstep or even a perception of misstep could cost from $50,000 up in punitive damages alone plus back pay and all the other points I have already mentioned.

I want to emphasize that jury trials under the new statute will be permitted if there is intentional discrimination on grounds of race, sex or disability. What I recommend you do is to have an Internal EEO Self Audit prepared as soon as possible. We have done this for our clients. If you have an Internal Self-Audit prepared, this will help to prove that you have no intention to discriminate and, hence, a jury trial and all that it entails might be avoided.

It is very important to get your Personnel Manuals up to date. Make sure that your application forms and procedures do not unintentionally violate the new laws.

There are also new rules concerning employment-related tests and limitations in medical examinations. I am sure you have better use for your resources than defending lawsuits. The best way to avoid lawsuits is to look at what your statistics are now, to clean up any possible problems you have, and to establish by the Internal Self-Audit--that your intention is, as I am sure it is, to obey these new laws 100%.

Another law that will affect the way you do business is the Americans With Disabilities Act (“ADA”) which was enacted on July 26, 1990. This law—which comes into effect this year—establishes a clear and comprehensive prohibition against discrimination based on concerning disability. Specifically, the ADA prohibits discrimination on public transportation, public accommodations and services offered by private entities, telecommunications, and employment. I will just address the employment part now.

The ADA has been characterized as the most sweeping piece of civil rights legislation ever passed by Congress. One of the interesting aspects of the law is the degree of specificity in the statute itself. Just about everything is defined.

For example, the statutory definition of an individual with a disability includes any individual who has a physical or mental impairment that substantially limits one or more major life activities; an individual with a record of such impairment, or an individual regarded as having such an impairment. 42 U.S.C. § 12102(2).

Since there is no laundry list of disabilities or disabling conditions in the ADA, your supervisors and foremen will need training to ensure compliance with the ADA. While many disabilities may be readily detectible, others are
To understand the meaning of the term disability, it is necessary to understand the meanings of the terms “physical or mental impairment,” “major life activity,” and “substantially limited.”

According to the EEOC’s Final Regulations, a physical impairment is any psychological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one’s neurological, sense organs, cardiovascular, reproductive, digestive, or other endocrine systems. 29 C.F.R. § 1639.2 (h) (1). A mental impairment would include any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. 29 C.F.R. § 1630.2(h) (2).

The major life activities include such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1639.2 (i). The EEOC’s Interpretations recognize that this list is not exhaustive and suggest that other activities, such as sitting, standing, lifting and reaching are also major life activities.

An individual is substantially limited if he or she is unable to perform a “major life activity” that the average person in the general population can perform, or is significantly restricted in the manner, condition or duration under which he or she can perform a particular major life activity. 29 C.F.R. § 1630.2(j).

According to the Interpretations put forward by the EEOC, some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder. The HIV disease, for example, is considered to be inherently substantially limiting. Temporary impairments of short duration, such as a broken leg or broken arm or the flu, are usually not considered to be disabilities.

Interestingly enough, the Final Regulations promulgated by the EEOC also give a comprehensive definition of what it means to be substantially limited in the major activity of working. Under that definition, an employee must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes-again, as compared to the average person having comparable training, skills and abilities. Although someone in a wheelchair could not climb a pole, that same person might be able to work on the tool shed or keep records at the construction site.

Under the statute, contractors may not discriminate against a qualified individual with a disability. 42 U.S.C. § 12111 (8). A qualified individual with a disability is one who--with or without reasonable accommodation--can perform the essential functions of the employment position sought or held. The ADA specifically states that an employer’s judgment as to what functions of a job are essential will be given “consideration.”

Accordingly, a written job description will be considered evidence of the essential functions of a job if it is prepared before the employer begins advertising or interviewing applicants for the job. Therefore, the importance of preparing a written job description before the employment title becomes effective in July, is extremely important. The Act does not require job descriptions, but if you have them, you are better protected, because you can show and prove that the individual could not perform the essential job functions and hence was not qualified for the position.

In addition to the general prohibitions against discrimination contained in the ADA, the statute specifically makes it an unlawful discriminatory practice to fail to make reasonable accommodations to a known physical or mental limitation of an otherwise qualified individual with a disability who is either an employee or an applicant.

The employer need not make such accommodations, however, if it can demonstrate that the accommodation required would impose an “undue hardship” on its operation. 42 U.S.C. § 12112 (b)(5)(A).

According to the EEOC’s Interpretations, there are three categories of reasonable accommodations: (1) those required to ensure equal opportunity in the application process; (2) those enabling an employee with disabilities to perform the essential functions of the position held or desired; and (3) those enabling employees with disabilities to enjoy equal benefits and privileges of employment as those enjoyed by employees without disabilities.

The type of reasonable accommodations could range from providing a ramp for an employee with a wheelchair, to

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modification of equipment or devices, to modifications of training materials or policies, to providing qualified readers or sign language interpreters. There are other similar accommodations. 42 U.S.C. § 12111(9).

To determine whether an accommodation is necessary in a given situation, employers must look at the particular facts of each individual case. Reasonable accommodation, therefore, is an individual-specific concept, and this is an important distinction. The best source to find out what accommodation is reasonable is to ask the employee directly, and the regulations provide for this. 29 C.F.R. § 1630.2 (o).

But employers must also be careful not to cross the line which turns lawful pre-employment inquiries into unlawful ones-specifically regarding the existence of or nature or severity of an individual’s disability. Employers should not ask this type of question until after an offer of employment is made.

But what an employer can do is to show the applicant the job description and ask the applicant whether there is anything in that job description he or she cannot do. An employer can ask an applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

The EEOC’s Interpretations adopt a four-step problem-solving process as a guide to providing a reasonable accommodation. The first step is to identify barriers to performance that make it difficult for an employee or applicant to perform his or her job.

One quick example involves the space provided. A reasonable change in the work area is required to be made, if necessary, so that the space is readily accessible to and usable by the employee. The changes need not be made, however, if it would result in undue hardship for the employer. So this step includes the identification of the essential and nonessential elements of a job. To comply, nonessential elements would be transferred to other employees, if those elements pose problems.

Step 2 would identify all possible accommodations. In addition to asking the employee, other potential sources are the State Vocational Rehabilitation Agencies and the Job Accommodation Network operated by the President’s Committee on Employment of People With Disabilities, (800)526-7234.

The reasonableness of each possible accommodation should be assessed in terms of effectiveness and equal opportunity as the third step.

An employer will not be required to provide an accommodation that imposes an undue hardship on the employer’s business. The statutory definition of undue hardship is “an action requiring significant difficulty or expense.” 42 U.S.C. § 12111 (10) (A). This definition is far from clear, but the ADA specifically delineates factors to be used to determine whether the accommodation imposes an undue hardship or not. For example, the nature and cost of the accommodation needed; the overall financial resources of the facility or facilities involved; the number of persons employed at each facility; the overall financial resources of the entire covered entity; and the type of operation of the covered entity, including the composition and functions of the work force.

With these factors in mind, it is important for employers to understand that the concept of undue hardship is not limited to financial difficulty. The EEOC’s interpretations state that “undue hardship refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.”

As I indicated, there is no inclusive list of what disabilities are covered. The ADA does exclude certain individuals from protection, including: transvestites, transsexuals, pedophiles, exhibitionists, voyeurs, individuals with gender identity disorders not resulting from physical impairments, compulsive gamblers, kleptomaniacs or pyromaniacs. 42 U.S.C. § 12211 (b).

Homosexuality and bisexuality are not impairments under the Act. 42 U.S.C. § 12211 (a) but having HIV or AIDS is. Also, pregnancy by itself is not an impairment and therefore is not a disability.

Individuals who are currently engaged in the illegal use of drugs or those who are alcoholics are not entitled to protection under the ABA. 29 C.F.R. § 16303(a). But individuals who have successfully completed supervised drug rehabilitation programs and who are not currently engaged in illegal drug use or who are recovering alcoholics are protected against discrimination by the ABA.

Employers in construction always ask
what will happen to Workers’ Compensation costs? Don’t forget that the moment an employee goes on Workers’ Compensation, he or she transfers to the “disabled” category and is covered by the ADA. But the EEOC did not address issues concerning Workers’ Compensation as fully as one would hope.

The ADA also requires the employer to take “reasonable steps” to accommodate the individual with a disability. If a warehouse worker’s injury prevents lifting of goods from the ground up, perhaps stocking duties could be found that allow the employee to remain upright instead of lifting. Reasonable accommodation could mean reassigning an injured employee elsewhere in the company if there is anything else he or she can do.

What is absolutely out is any inquiry during the employment process of an applicant’s prior Workers’ Compensation claims. Some of the unanswered questions deal with what a company is permitted to do with medical facts about an employee, whether inquiry about an applicant’s prior claims is ever permissible.

The EEOC did not answer all of the questions it asked about Workers’ Compensation. It did say—and I emphasize this—since it’s important—that a contractor may not inquire about an applicant’s Workers’ Compensation history at the pre-offer stage.

You should also be aware that the EEOC has approved the use of testers. Testers are individuals who apply for jobs in your company even though they have no intention of accepting the jobs, if hired. Their purpose is to determine whether you discriminate between a disabled applicant and a nondisabled applicant.

That is why it is important to train everyone in your company who answers calls directly from the public or who deals with the public. The treatment that one may give an applicant who telephones and who had a bad stuttering problem may cost you a lot of money. A little training goes a long way in helping you accomplish two things: obeying the law and not getting sued.

The EEOC recently granted a $1 million training contract to the Disability Rights Education and Defense Fund to educate individuals with disabilities regarding their protection under the law, not only in employment but also in connection with public services and public accommodations.

About 400 individuals nationwide are expected to participate in the training program, and the attendees are expected to duplicate the training they receive within their own communities and their own organization. In fact, the grant requires that all participants return to their own communities to train employers as well as person with disabilities.

And finally, as the July 26 effective date for the employment provision of the ADA approaches, the cost of insuring employees with disabilities and the uncertainty about what the law actually requires adds to the concern.

The EEOC released a technical assistance manual in late January which states that employers must offer health
insurance to employees with disabilities “on the same basis that it offers insurance to other employees. “But the EEOC manual contained no discussion about rising costs and did not mention cafeteria benefits plans, from which employees could choose the insurance coverage they want, or other options. The manual also does not address problems such as are associated with mental health, AIDS, and neonatal care.

Suppose, for example, at some future time you wish to reduce health care benefits. Certainly you would be well advised to consider the effect, if any, the reduction in health benefits would have on your disabled employees. For some of the disabled, benefits may even be more important than the salary.

I have mentioned only a few items in connection with the new laws, but don’t forget the old ones—with no pun intended—the Age Discrimination and Employment Act, Title VII itself, the Equal Pay Act, the many, many decisions which affect your work place under the wrongful discharge case law, sexual harassment and the like.

In addition to federal laws you must also obey state laws, county laws and city human rights ordinances, which in many cases are even tougher than the federal laws. The best thing to do, and I repeat my advice, is to conduct an EEOC Self Audit now to prove that you have no intention of discriminating. The Internal Self Audit will also, of course, point out to you any problems you have which you may not know about now.

I am sure that no one in this room wants to discriminate against qualified individuals on artificial grounds of race, creed, color, sex, national origin, age, or disability. Although no one can guarantee lawsuits won’t get filed, you can take steps to make sure you are in compliance.

All of us want qualified people—as well as individuals in protected classes—to be able to work at jobs for which they are qualified, to be able to earn their livelihood, to be able to contribute to our economy and to lead dignified and meaningful lives. By learning about these laws and the new regulations and what they mean to your workplace, we will all help to make this happen.

About the author:
Betty Southard Murphy was Chairman of the National Labor Relations Board and Administrator of the Wage & Hour Division of the U.S. Department of Labor. She has had five additional Presidential appointments to special commissions. Mrs. Murphy is now a partner in Baker & Hostetler, one of the oldest and largest national law firms in the U.S. She has handled all types of employment law cases both in the United States and abroad, and is recognized as one of the top employment lawyers in the country. She received her B.A. degree from The Ohio State University, studied in Paris, and obtained her J.D. degree from The American University.

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