

# Executive Briefing

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## U.S. Supreme Court Decides Age Must Be "But For" Cause of Employment Decision to Prevail on ADEA Claim

The United States Supreme Court issued a management-friendly decision on June 18 in an age discrimination case. In [Gross v. FBL Fin. Serv., Inc.](#), a closely divided Court held that an employee suing an employer for age discrimination must prove by a preponderance of evidence that age was the "but-for" cause of the challenged employment action. Importantly, the Court rejected the burden-shifting analysis used in Title VII cases in its 5-4 decision.

Jack Gross began working for FBL Financial Services, Inc. in 1971. When Gross was 54 years old, FBL changed his position and reassigned some of his prior duties to a younger employee. Although Gross' compensation was not affected, Gross considered the reassignment a demotion and filed a lawsuit claiming FBL discriminated against him because of his age. FBL denied Gross' claim and claimed the reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills. At the end of the trial, the trial court instructed the jury that it must find for Gross if he had proved that FBL demoted him and that his "age was a motivating factor" in FBL's decision. The trial court further instructed the jury that it must find for FBL if the company had proved that it would have demoted Gross regardless of his age. The jury found for Gross.

On appeal, the Eighth Circuit Court of Appeals reversed the trial court on the grounds that the lower court had given erroneous jury instructions. Gross had argued that his claim under the Age Discrimination in Employment Act should be treated the same as a Title VII case (a case alleging discrimination on the basis of race, color, sex, national origin or religion). In Title VII cases, when an employee presents evidence that the employer's decision was based on both legitimate and discriminatory reasons, the burden shifts to the employer to show that the employer would have made the same decision regardless of the improper discriminatory reason, and the trial court must instruct the jury to find for the employee if the discriminatory reason was a "motivating factor," unless the employer proves it would have made the same decision without regard to the discriminatory reason. The Eighth Circuit agreed, but said in such "mixed motive" cases, the employee's evidence of discrimination must be "direct evidence" – evidence that shows a specific link between the discriminatory animus of the employer and the employment decision. The Eighth Circuit determined Gross was not entitled to the mixed motive jury instructions because he had not produced any direct evidence of discrimination.

On appeal to the Supreme Court, the question presented to the Court was whether Gross was required to present "direct evidence" of age discrimination before the trial court could instruct the jury to find for him if it found that his age was a "motivating factor" of FBL's employment decision. The Supreme Court did not reach the question presented, however, because it decided that the

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language of the ADEA did not allow courts to apply the burden-shifting framework available in Title VII cases. Instead, the Court held that the burden remains on the employee to prove to the jury that the employer made the adverse employment decision because of the employee's age. In other words, the employee must show that *but for* his age, the employer would not have taken the adverse employment decision. Thus, it may be more difficult for an employee alleging age discrimination to prove his case than it will be for employees claiming other types of discrimination.

Although the majority opinion is favorable to employers, it is important to note that four justices dissented in two separate opinions. Stay tuned for any actions by Congress in reaction to this decision.

For more information related to this article, please contact [Pat Konopka](#).

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## Stimulus Bill May Require Amendments to Business Associate Agreements

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act (ARRA), which is better known as the "Stimulus Bill." Contained within ARRA is the Health Information Technology for Economic and Clinical Health Act (HITECH). HITECH modifies the HIPAA privacy and security requirements affecting "covered entities" - such as health plans and health care providers – and business associates.

HITECH, which becomes effective on February 17, 2010, sets forth the following as it pertains to business associates:

- HITECH applies the HIPAA Security Standards, as well as the civil and criminal penalties for violating those standards, to business associates directly, similar to the standards that apply to covered entities. Business associates will now be subject to enforcement by HHS if they fail to so comply.
- HITECH creates a direct statutory obligation for business associates to comply with the restrictions on use and disclosure of protected health information (PHI).
- HITECH makes clear which organizations are considered business associates. Covered entities must ensure that business associate agreements are in place with all entities that qualify as business associates.

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**Bottom Line:** Existing agreements with business associates may need to be amended (further guidance is expected on this issue later this year). The privacy and security rules newly applicable to business associates must be incorporated into these existing business associate agreements and into new business associate agreements executed from this point forward.

For more information related to this article, please contact [Tom Dowling](#) or [Michael Gilley](#).

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## Supreme Court Rules in Firefighter Testing Case

In a 5-4 decision issued on June 29, 2009, the United States Supreme Court in the case [Ricci v. DeStefano](#) reversed the lower court and remanded the case ruling that the city's action in discarding test results of firefighters applying for promotion because all but one of the top candidates was white (the exception was Hispanic) violated Title VII of the Civil Rights Act of 1964. The Court found that a "race-based action like the city's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." The Court found that the city failed to meet this threshold requirement and that the fear of litigation alone could not justify the city's reliance on race to the detriment of employees who passed the examinations and should have been qualified for promotion.

The Court rejected the city's argument finding that no substantial evidence existed in the case that the city would be liable for disparate impact discrimination. Such liability would only attach if the exams at issue were not job-related and consistent with business necessity or if there existed an equally valid, less discriminatory alternative that served the city's needs but that the city refused to adopt.

**Bottom Line:** This case strengthens the ability of employers to rely on tests that are job-related and that have been properly validated without fear of being subjected to disparate impact claims. Testing procedures, however, need to be monitored for the potential of disparate impact to ensure legal compliance. Simply the appearance of disparate impact alone is not a sufficient basis to discard a test.

For more information related to this article and test validation requirements, please contact [Stephanie Scheck](#).

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## Reduction in Force Legal Pitfalls

Due to the economy, many employers are continuing to face, or are facing for the first time, the need to reduce their workforce. Aside from the practical business considerations that influence which positions a business eliminates and which it retains, there are a number of legal issues employers should carefully consider when planning and implementing a reduction in force (RIF).

Contractual obligations can exist under individual employment contracts, collective bargaining agreements and, in some states, written policies such as employee handbooks. As a result, all such contracts should be reviewed to ensure that contractual obligations, such as requirements to give a certain number of days advance notice of termination, to pay severance, or that limit an employer's freedom to terminate employment, are not breached. This is particularly critical if an employee's contract contains post-employment restrictions, such as a non-compete clause. If an employer is the first to breach such a contract, in some states the employee is thereby freed from the post-employment restrictions.

In addition, there are a number of statutes that may come into play. Discrimination claims under federal and state laws are the most frequent legal claims raised by employees and former employees. To minimize the chances that a RIF will lead to such claims, employers should analyze the demographic composition of the individuals selected for the RIF, and those retained, both within each affected job classification and company wide, to ensure that no group protected by anti-discrimination statutes is being disproportionately or adversely impacted by the RIF. In general, the more objective and job related the criteria used in making RIF selections, the greater the likelihood of successfully defending any such legal claim that may arise. Regardless of whether selections are based on objective or subjective criteria, an employer should check the work record of both those selected for the RIF and those to be retained within a particular job classification in order to confirm that the records are consistent with and supportive of the desired selections. Typically, such an analysis involves a review of, at the least, recent compensation history, performance evaluations and disciplinary action.

Consideration should also be given to whether other statutory or common law claims are likely by anyone selected for termination. Such claims could be based, for example, on an employee recently having suffered a workers' compensation covered injury, having taken a leave of absence under the Family and Medical Leave Act, or having made a whistleblower report about the employer.

An employer also should consider whether the federal plant closing/mass layoff statute, known as the Workers Adjustment Retraining and Notification Act (WARN), or any similar state law,

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will be triggered by its RIF. WARN applies to employers with 100 or more employees, and generally requires at least 60 days advance written notice to employees, their representatives and certain governmental officials if, within a 30-day period, at least 33% of the active employees (excluding part-time employees) and at least 50 employees (excluding part-time employees) will lose employment at a single site of employment.

Depending on the size of an employer's workforce and the number of employees being terminated, a RIF may also trigger a partial termination of a profit-sharing or 401(k) plan. Similarly, if the employees terminated in a RIF are covered under a union's multi-employer pension plan, a RIF may trigger the employer's obligation to pay withdrawal liability under that plan. In addition, if affected employees or their dependents had any insurance coverage through the employer, the employer will likely have contractual and/or statutory obligations to provide written notice about the right to continue group coverage at the employee's/dependent's cost, or to convert to an individual insurance policy. Any such notice about group health insurance would need to be updated (if not already done) to include information about the continuation coverage premium subsidy created earlier this year by the American Recovery and Reinvestment Tax Act of 2009.

If an employer intends to offer some sort of severance package to terminated employees that it is not otherwise obligated to provide, it must be careful to craft its offer so as not to unintentionally create a severance plan covered by ERISA, for which certain notices and a summary plan description must be provided. When severance not otherwise owed is offered, an employer should also consider conditioning receipt of the severance package on the terminated employee signing a separation agreement that contains a full waiver and release of all legally waivable claims. Along these lines, employers should be aware that form releases they may have used in the past, in conjunction with individual terminations, may not be sufficient for use in a RIF. Under the federal law known as the Older Worker Benefit Protection Act, which establishes the criteria for a valid release under the Age Discrimination in Employment Act (the federal law prohibiting employment discrimination against individuals 40 years of age and older), a valid release must, among other requirements: (1) advise the recipient to consult with an attorney prior to signing the agreement; (2) give the recipient at least 45 days within which to consider the agreement; (3) give the recipient at least seven days following execution of the agreement to revoke the agreement, and specify that the agreement will not become effective until the revocation period has expired; and (4) if the waiver and release is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees:

- provide an explanation of the group of individuals covered by that program, any eligibility factors for the program and any time limits applicable to the program; and

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- provide a list of the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Additionally, employers should be aware that withholdings from severance pay may need to be different than those from regular pay. For example, if severance pay is paid in a lump sum and is significantly more than an employee's normal wages, generally a flat withholding of 25% is used. Similarly, an employee's voluntary contributions to a 401(k) plan cannot be withheld from severance pay.

The foregoing are just some of the legal issues that can arise in any RIF. While each situation is different, they illustrate the importance of careful planning and consultation with legal counsel before implementing a RIF.

For more information related to this article, please contact [Laura Kipnis](#).

\* \* \* \* \*

### **IRS Changing Employer Provided Cell Phone Rules . . . Oh, Never Mind!**

On June 8, 2009, the Internal Revenue Service issued [Notice 2009-46](#), which requested comments on possible alternatives to current requirements that employers maintain substantiation that cell phone usage by employees was business related. This was interpreted by news and commentary sources as the IRS seeking more taxes from employees (see *The Wall Street Journal* article on June 12, 2009, which was picked up and posted on the Huffington Post Web site).

On June 16, 2009, the IRS Commissioner issued a [statement](#) denying any "crackdown" on employee use of employer provided cell phones and requested Congress to act so employees will have no income tax consequences from employer provided cell phones.

Under current law, there is a substantiation requirement underlying both the employer's deduction as a business expense and the employee's exclusion of any income based on the employer provided cell phone. The amount, date and business purpose of cell phone usage is to be substantiated. On failure to substantiate, the entire cell phone expense might be includible in the employee's income.

The IRS's Notice 2009-46 proposes alternatives that could simplify the substantiation requirement and requests comments by September 4, 2009. One alternative would permit the employer to deem the entire usage of the employer provided cell phone as employer related if

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the employee could demonstrate that the employee uses a personally paid cell phone for personal use during the employee's work hours. A second proposal would permit disregarding a "minimal" amount of personal usage of the employer provided cell phone. A third alternative would be a 'safe harbor' method whereby a specified percentage (possibly 75%) of the cell phone expense is deemed employer related and the remaining expense considered personal usage (and thus a taxable fringe benefit). The fourth alternative would permit a statistical sampling technique to be used to govern the business – personal usage split.

There is no further public information to date whether the IRS will continue with the rule making process started by Notice 2009-46 if Congress does not act.

For more information related to this article, please contact [Terry Ahern](#).

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## Recent Developments in 401(k) Plan Fee Cases

Several years ago, similar lawsuits were filed against a number of Fortune 500 type companies claiming a breach of ERISA fiduciary duty arising from the mutual fund fees incurred by 401(k) plans. Some in the 401(k) plan community were predicting that if the plaintiffs succeeded with that wave of lawsuits, more waves of lawsuits would follow, with other plaintiffs' lawyers pursuing similar claims against many other companies. One of the first cases ([Hecker v. Deere & Co.](#)) was resolved by the Federal Circuit Court of Appeals for the 7<sup>th</sup> Circuit a few months ago.

In *Hecker v. Deere & Co.*, the 401(k) plans of Deere & Co. permitted plan participants to choose among 20 Fidelity mutual funds and, through a brokerage account, among 2,500 other retail mutual funds. The plaintiffs asserted that the 401(k) plan offered mutual funds with excessive fees and that the excessive fees were shared by Fidelity among its affiliates providing recordkeeping and trustee services to the 401(k) plan. The plaintiffs asserted Deere failed to monitor Fidelity and inform participants of the fee sharing by Fidelity. The total mutual fund fees charged were disclosed in that participants were directed to the mutual fund prospectuses; how Fidelity (or any other mutual fund) used or divided the fees charged was not disclosed. The plaintiffs asserted that how the disclosed total fee was divided and shared by Fidelity should have been disclosed.

The appellate court held the fee disclosure (directing participants to the mutual fund prospectus which described the total fees charged) was sufficient. "The total fee, not the internal, post-collection distribution of the fee, is the critical figure ...".

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The appellate court also rejected the plaintiffs' claim that Deere breached fiduciary duties by selecting funds with excessive fees. With a brokerage account alternative that made 2,500 mutual funds available to plan participants, along with the 20 Fidelity funds, the court reasoned that the available mutual funds had a variety of expense ratios which were set against "the backdrop of market competition." No breach of fiduciary duty could be found on those facts.

As an alternative ground, the appellate court concluded the defendants were protected by ERISA section 404(c) that states plan fiduciaries are not liable for losses resulting from participant direction of the investment of their own accounts. With the availability of 20 Fidelity mutual funds and 2,500 other mutual funds, any losses by plaintiffs were attributable to their individual choices among funds.

Notwithstanding an employer victory in *Hecker v. Deere & Co.*, other cases are proceeding toward trial. In *Abbott v. Lockheed Martin Corporation*, a district court opinion (written after the *Deere* decision) dismissed the claim of a failure to disclose a division of the mutual fund fee but permitted some other plaintiffs claims to proceed toward trial. Claims proceeding toward trial included a claim that the plan's investment and administrative fees were unreasonably high.

With one case resolved, it currently appears that claims alleging that such nondisclosure (of the manner in which mutual fund fees are used and divided) is a breach of fiduciary duty will fail, but other claims based on allegations of excessive plan investment and administrative fees (and other claims that are fact specific to particular plans) may proceed to trial. Thus, with one case resolved, the extent of the litigation risk to the rest of the 401(k) plan community from plaintiffs' lawyers pressing these theories remains to be determined.

For more information related to this article, please contact [Terry Ahern](#).

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## An Ounce of Prevention: H1N1 Flu Virus and Discrimination

The Equal Employment Opportunity Commission (EEOC) recently provided a reminder to employers that, despite the threat posed by the H1N1 virus and the desire to take steps to ensure employees' health, federal discrimination laws may not be ignored.

Specifically, the EEOC cautions employers that the Americans with Disabilities Act imposes restrictions on medical examinations of both employees and applicants. In practical terms, this means that for current employees, medical examinations arising out of H1N1 concerns must be related to the employees' job and consistent with business necessity.

Also, employers should be mindful of not violating Title VII of the Civil Rights Act. Because the H1N1 flu virus is believed to have originated in Mexico, employers must be careful that employees of Mexican descent or origin are not being singled out and treated unfavorably because of their ethnicity or national origin. Discriminating on the basis of national origin also includes adversely treating an employee based on their marriage to, or other types of relationships with, individuals of a certain nationality.

Bottom line: While the recent outbreak of the H1N1 flu virus has resulted in employers taking action to protect themselves and their employees from infection, employers must be careful that their actions are uniform, grounded in business necessity, and do not discriminate.

For more information regarding this article, please contact [Eric Tiritilli](#). Thank you to Lisa Peters, a summer associate in our Omaha office, for her contributions to this article.

## Inside Washington

### *New Laws, Regulations and Agency Guidance*

**ADA . . .** On June 17, 2009, the EEOC [approved](#) a notice of proposed rulemaking under the ADA Amendments Act of 2008 allowing for the proposed regulations to be reviewed by the White House Office of Management and Budget, an initial step in the regulatory rulemaking process. Text of the proposed rule is not yet available.

**DOL . . .** The Department of Labor is [publishing a final rule](#) suspending the H-2A Final Rule published on December 18, 2008, and in effect as of January 17, 2009. The DOL reported that to "ensure continued functioning of the H-2A program, the department is republishing and reinstating the regulations in place on January 16, 2009, for a period of nine months, after which

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the department will either have engaged in further rulemaking or lift the suspension. The suspension is effective June 29, 2009" . . . The Wage Hour Division (WHD) of the DOL has also [released guidance](#) concerning implementation of Section 1606 of the American Recovery and Reinvestment Act of 2009 (ARRA), which provides for application of Davis-Bacon labor standards to certain federal and federally-assisted construction work funded in whole or in part under provisions of ARRA. In addition, WHD has launched a [new Web page](#) with ARRA-related compliance information.

**FMLA** . . . On May 29, 2009, the Domestic Violence Act of 2009 was introduced in the U.S. House of Representatives ([H.R. 2515](#)). The bill would amend the FMLA to allow leave for employees to address domestic violence and sexual assault or stalking, and also leave for employees to care for family members who are affected by these issues. Also introduced in May in both the House ([H.R. 2460](#)) and Senate ([S. 1152](#)) was the Healthy Families Act that would require employers to provide employees with up to 56 hours of paid sick leave. The paid sick time could be used for the employee's own medical needs or to care for a child, parent, spouse or any other blood relative, or for an absence resulting from domestic violence, sexual assault or stalking.

**OSHA** . . . On June 18, 2009, OSHA [announced](#) that it will address problems identified in its Voluntary Protection Programs (VPP) in response to a new GAO report titled "OSHA's Voluntary Protection Programs: Improved Oversight and Controls Would Better Ensure Program Quality." The report "recommends improved oversight and additional controls to ensure participating companies maintain effective workplace safety and health management systems." . . . In response to the recent heat wave across the U.S., OSHA issued a [release](#) offering tips on working safely in hot weather, which includes links to several fact sheets including "Protecting Workers from the Effects of Heat."

**WARN** . . . Bipartisan legislation was introduced on June 25, 2009, to amend the Worker Adjustment and Retraining Notification (WARN) Act to allow for broader protection for employees and to enhance penalties for violations of WARN. The proposed FOREWARN Act (H.R. 3042) provides for double back pay remedies, reduces the mass layoff coverage from 50 to 25 employees, reduces employer size coverage from 100 to 75 employees, and extends the length of notice period required from 60 to 90 days.

For more information regarding "Inside Washington," please contact [Stephanie Scheck](#).