

U.S. Supreme Court Rules On Age Discrimination

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The *Age Discrimination in Employment Act of 1967* (ADEA), the federal law protecting employees 40 years of age or older from employment discrimination, has recently been the focus of two U.S. Supreme Court cases. The Supreme Court has rendered two opinions, one narrowing and one expanding the types of permissible ADEA cases.

In *General Dynamics Land Systems v. Cline*, a group of employees ages 40 to 49 filed a lawsuit claiming their employer discriminated against them in favor of employees 50 years and older. The employer's labor agreement with a representative union eliminated the employer's obligation to provide health benefits after retirement to employees (including those between 40 and 49 years old), but not eliminating this same benefit to co-workers ages 50 and older. The Supreme Court found the employer's elimination of benefits for workers 40 to 49 did not violate the ADEA.

The Court ruled that "the [Equal Employment Opportunity Commission] is clearly wrong" in asserting the ADEA protects both the older from arbitrary favor for the younger and the younger from arbitrary favor for the older. The Court held that the history of the ADEA clearly "show[s] that the statute does not mean to stop an employer from favoring an older employee over a younger one." This decision is pro-business because it gives employers the freedom to make certain business decisions, such as reducing retirement benefits to younger employees according to age, without violating the ADEA.

In *Smith v. Jackson, Mississippi*, the Supreme Court—for the first time—recognized a theory of discrimination under the ADEA through which employers can be found in violation of the age discrimination law despite having no intent to discriminate. Under the theory of "disparate impact," all an employee must show is that a neutral policy of the employer negatively affects individuals 40 and over to a greater degree than those under 40.

In the *Smith* case, a group of city police officers and dispatchers over 40 years of age filed suit claiming the City's neutral performance pay plan violated the ADEA. The City's pay plan was implemented in an effort to increase retention rates by providing larger raises to lower ranking employees. Under this pay plan, officers and dispatchers with five years or less of tenure received proportionately greater raises than those with more than five years of tenure. The officers and dispatchers alleged the plan resulted in higher pay increases to officers under 40 than those over 40. In rejecting the employees' claims, the Court found that the City's reliance on seniority and rank was "unquestionably reasonable" under the circumstances and "responded to the City's legitimate goal of retaining police officers."

Although the Court in *Smith* found the particular facts did not support a disparate impact theory claim, it opened the door for employees to bring these types of claims in the future. This decision most likely will lead to an increase in age discrimination lawsuits. Moreover, employers attempting to address issues, such as favoritism of long-term employees or years of mismanagement, may run into new legal challenges. Given the Court's decision in *Smith*, employers would be well-served by reviewing their current employment policies and practices for unintentional negative impacts on workers 40 and over and by carefully assessing implementation of future employment policies and practices to avoid instances of unintentional age discrimination.

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With the mass exodus from the State Capitol May 28 following the FBI sting operation, there has been little happening in the marble halls of Nashville. A few TennCare protestors have taken up residence in the Governor's office, the media is writing reams of copy about legislator-lobbyists relationships and the need for ethics reform, and most legislators are back in their districts riding out the firestorm in Nashville and the early summer heat.

While we can enjoy a break from legislative mischief in Nashville, it is not the same in Washington where Congress is frenetically working to finish up several major initiatives prior to its August break.

During the last week of June, the Senate passed comprehensive energy legislation, S. 10, by a vote of 85-12, (both of Tennessee's senators voted "Yes"). The bill, like the House-passed bill, offers a strategy to reduce the growing U.S. dependence on foreign sources of energy, promote renewable fuels without mandates, enhance efficiency and conservation and improve infrastructure. The next goal is for a House-Senate conference committee to reconcile differences between the two bills, and to have a final bill on President George Bush's desk by the August recess. There are a number of other major bills that Congress will likely deal with prior to the August recess.

□ The Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) will likely have cleared the Senate before the July 4 recess with hopes for a House vote in early July.

□ Senate Judiciary Committee Chair Arlen Specter (R-PA) took to the Senate floor in late June and updated his colleagues on his and Sen. Patrick Leahy's (D-VT) efforts to fashion an asbestos trust fund bill. After laying out the case for a legislative solution—including the length of time that the issue has been before the Senate—Sen. Specter said, "It is my hope that this bill will come to the Senate right after the Fourth of July recess." Sen. Specter recognizes the caveats that several Republicans expressed when voting S. 852, the *Fairness in Asbestos Injury Resolution (FAIR) Act*, out of the Committee in May, as well as the divisions among key stakeholders. Nevertheless, he says he thinks he's close to satisfying concerns.

□ Conferees are nearing agreement on H.R. 3, the surface transportation bill. Confer-ees appear to have settled on \$286.5 billion through Fiscal Year 2009. The White House slightly modified its comments by refusing to say that it would veto the bill—which exceeds the White House number by just under \$3 billion—instead noting that the White House expects that the Congress will not send the President a bill he would veto. Law-makers also agreed on a formula that provides 60 percent of earmarked funds to the House and 40 percent to the Senate. There is not agreement on the funding allocation formula and a number of other issues. Conferees are meeting and House Speaker Dennis Hastert (R-IL) has indicated that if conferees are close, an extension of one week should be developed; if they are not, then another one-month extension would be necessary.

□ The Senate adopted, by unanimous consent, S. 714, a bill that would overturn Federal Communications Commission's "Do Not Fax" rules that go into effect July 1. Because the House approved similar legislation in 2004, it should follow quickly by passing the newer version. The bill would allow "established business relationship" (EBR) exceptions to the ban on unsolicited commercial faxes and there would be time limit definition of that EBR. It will allow organizations like the Tennessee Chamber to be able to communicate with its members by fax.



Annual Conference and Awards An Opportunity for Tennessee Businesses

Tennesseans treasure their state. From the mountains in the East across the rolling hills and valleys to the plains of the West, our citizens have historically drawn their livelihood and quality of life from the environment.

The Tennessee Chamber's environmental awards are presented annually to recognize those companies that care for our environment and heritage through environmental management and sustainable initiatives. The environmental awards acknowledge those who conserve and enhance the natural environment and publicly recognize a company's concern for its community through environmental improvement.

The awards are presented in the areas of Air Quality, Water Quality, Solid Waste Management, Hazardous Waste Management and Environmental Excellence and are based on a company's size. The deadline for applying for the 2005 awards is August 31. The nomination form is available at the Chamber's website (www.tnchamber.org) or by calling the Chamber at 615-256-5141.

The awards will be presented at the 23rd Annual Environmental Awards Conference at Montgomery Bell State Park in Dickson October 20-21, 2005. Make sure you mark your calendar now. This conference is an opportunity to showcase environmental accomplishments by the business community as well as providing access to information and

speakers that will help participants better manage their environmental responsibility.

This conference also provides us the opportunity to demonstrate to TDEC that we the business community want to be partners in all aspects of the regulatory process, ensuring that the regulations under which companies must operate are designed to

...an opportunity to showcase environmental accomplishments by the business community

...help participants better manage their environmental responsibility

encourage compliance and to conserve our environment in a way that benefits both economic growth and quality of life.

While the program is not finalized, the Chamber has extended an invitation to an Assistant Administrator of the U.S. Environmental Protection Agency in Washington, D.C., as well as to the new leadership team at TDEC. This conference will provide an opportunity to meet Deputy Commissioner Paul Sloan and hear of his plans and progress. Commissioner Jim Fyke has also been invited to attend.

The Air Pollution Control

program is continuing to receive a lot of attention due to the changes by EPA in air quality standards for ozone and particulate matter. Implementation plans by the state for the NSR rules and other changes are due shortly and we need to stay current on the state's commitments. The Chamber believes that the business community—and manufacturing, in particular—should not be expected to bear the total burden of compliance with the changing standards. Compliance should require all citizens of the state to share the burden.

The biennial review of streams is directing attention to Tennessee's water quality issues and may result in permit holders having to do more for future compliance. Remediation of contaminated properties is a challenge, and the conference will also focus on any changes or experiences which might present obstacles to efforts for developing property and creating jobs.

Additionally, the conference provides time for attendees to meet with their peers, as well as the speakers, to exchange ideas and gain new ones.

Mark your calendar to be at the 23rd Annual Environmental Awards Conference October 20-21 and visit our website now to get a copy of the environmental awards nomination form. Make sure your company earns the recognition it deserves by completing the form and returning it to the Chamber by August 31. To make your room reservations at Montgomery Bell, call 615-797-3101 or 1-800-250-8613.



New TDEC Permit Requires More Coverage

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On March 31, 2005, the Tennessee Department of Environment and Conservation (TDEC) released a notice of public hearings for its new draft General National Pollution Discharge Elimination System (NPDES) Permit for Storm Water Discharges Associated with Construction Activities (the permit or new permit). In early April, TDEC placed a draft of the new permit on its website that includes revisions to existing permit language as well as adding certain terms and requirements to the permit. The draft requires smaller construction sites to obtain coverage under the permit and adds numerous requirements for new and existing sites to maintain coverage. The public comment period ends on May 29, 2005. The new permit is effective July 1, 2005.

The number of construction sites that require coverage under the new permit will increase. The draft requires all point source discharges of storm water from construction activities that result in the disturbance of one acre or more of total land area to obtain coverage under the permit. Discharges of storm water from construction activities that result in the disturbance of less than one acre are required to obtain coverage if the activities at the site are part of a larger common plan of development or sale. The existing permit requires discharges from construction activities that result in the disturbance of five acres or more to obtain coverage. Thus, the new permit will require storm water management for smaller construction sites.

The draft adds limitations to coverage under the new permit. It denies coverage to discharges into "Outstanding Natural Resource Waters." It also denies coverage to: discharges into "High Quality Waters"; discharges and storm water discharge-related activities not protective of "Species Deemed in Need of Management or Special Concern Species"; and, discharges of pollutants of concern to waters of which there is an EPA-approved total maximum daily load (TMDL) unless measures or controls that are consistent with the assumptions and requirements of such TMDL are incorporated into the site's Storm Water Pollution Prevention Plan (SWPPP).

The draft requires that an applicant now submit the SWPPP with its notice of intent for coverage. Further, the draft adds numerous requirements to what must be included in a site's SWPPP. The additional inclusions are as follows:

- *A description of the topography of the site including a calculation of the percent slope and the variation in percent slope found on the site;*
- *Identification of any stream or wetland on or adjacent to the project, a description of any anticipated alteration of these waters and the permit number or the tracing number of the Aquatic Resources Alteration Permit or Section 401 Certification issued for the alteration;*
- *If applicable, the identification and outline of buffer zones established to protect waters of the state located within the boundaries of the project;*
- *For projects which will be subdivided, such as residential developments or industrial parks, the developer/owner must describe how he will prevent erosion and/or control any sediment from portions of the property that will be sold prior to completion of construction; and,*
- *For projects of more than 50 acres, the construction phases must be described; and if only a portion of the total acreage of the construction site is to be disturbed, then the protections employed to limit the disturbance must be discussed (i.e., caution fence, stream buffer zones, etc.).*

The draft adds several other requirements for coverage and makes other changes to existing requirements. Because TDEC's draft adds several requirements and obligations to obtain and maintain coverage, both new and existing construction sites will be affected in the way that storm water management is planned for, conducted, and documented.

Site operators, including the developer, general contractor and some subcontractors are responsible for ensuring permit coverage has been properly obtained and that a SWPPP is in place and in compliance with all existing and new requirements. Finally, the draft makes clear that special attention will be required for sites that affect waters of the state that are impaired, high quality, or outstanding national resource waters.



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Outplacement Firms Offer Option for Employers

Judy Cline, Senior Vice President, General Manager ★ Lee Hecht Harrison

Outplacement firms have a wealth of knowledge about best practices. Because career transition is their business focus, they are working with organizations and the people affected by these changes on a daily basis. From planning the logistics of the event, to training managers to deliver the notification, to providing support to the affected employee throughout the transition, to helping the remaining employees to deal with change and manage their own careers, outplacement firms are the experts in ensuring that these events can occur with minimal disruption and risk to your business.

Helping a displaced employee to focus on his or her future is a cost effective business practice. You may think that this is an area in which to save money, but are you really saving money? Employees who are provided with an appropriately designed career transition

assistance program can cut their job search time by up to half, which reduces unemployment payments, likelihood of legal action, and feelings of insecurity in your remaining workforce which can reduce productivity.

Providing career transition assistance is a recruiting tool. It is a known fact that the best companies have to let employees go from time to time for a variety of reasons. What makes these companies rank as desirable employers is not that they never let people go; rather, it is how they treat the employees that they have to terminate. Treating all employees professionally throughout the entire employment cycle from recruitment to termination sends a signal to the best and brightest that your company is a desirable place to work.

A concern when working with an outplacement firm is confidentiality and responsiveness. It is standard practice

for outplacement firms to assume and maintain strictest confidentiality when working with an organization during a downsizing event. It is also the case, more often than not, that there is very little lead time to plan events—from one-to-two person terminations to large scale reductions in force. Do not let this prevent you from contacting a firm for advice and counsel.

Outplacement firms consider it part of the solution to be able to respond to your need regardless of the lead-time. A quality outplacement firm should be able to give you specific, demonstrable answers to these questions. Using a reputable outplacement firm is not just a best business practice, it should be a standard operating procedure.

Ten Questions to Ask When Evaluating an Outplacement Firm:

- ✓ What is their experience in working with companies and employees like yours, in terms of level in the organization and other demographics?
- ✓ How will they help your former employees target potential employers and actually connect to job opportunities?
- ✓ What is their capacity, both locally and in all the areas in which you do business, in terms of staff and resources (including field/remote/global locations and onsite career centers)?
- ✓ How flexible can they be in designing special programs, pricing, and reporting?
- ✓ What consulting and technological methods are used to meet the needs of the various learning styles of people in transition?
- ✓ In addition to training in job search, what skill-based training do they offer to your former employees?
- ✓ What services are available for those wanting to consider changing careers, explore entrepreneurial options or nontraditional careers, or retirement?
- ✓ How do they help your former employees to maintain productivity throughout the transition?
- ✓ What kind of progress reporting will you receive?
- ✓ How do they measure quality and what are their quality results?

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Rights Protect Sales Representatives

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Independent commissioned sales representatives have undeniable benefits for Tennessee-based manufacturing companies. They can develop sales in territories unfamiliar to the manufacturer, they may have contacts with purchasers unknown to the manufacturer, and they can be paid based upon their production. What many Tennessee manufacturers do not realize, however, is that independent commissioned sales representatives enjoy special rights, not only here in Tennessee but, possibly more important, in most other states, where the sales representatives are likely to be located.

These special rights may increase the sales representatives' bargaining power or, worse, create unexpected liabilities for the manufacturer. Before deciding to use an independent commissioned sales representative, it is important for manufacturers to understand how the law of the state where the representative is located governs such dealings. If a manufacturer already uses such a sales representative but is thinking of terminating the relationship, it is particularly important to understand how these laws regulate termination and create liabilities for improper termination.

Laws that protect independent commissioned sales representatives vary markedly from state to state, but their most alarming feature is also one of the most common. Such laws typically provide for the awarding of exemplary damages—in many states, up to triple the outstanding commissions—and attorney's fees and costs to the aggrieved sales representative for a manufacturer's "willful" failure to pay commissions timely, particularly for the final commission after the termination of the relationship. Since these exemplary damages are in addition to the outstanding commissions, a manufacturer may find a manageable liability has ballooned to more than quadruple in size.

While such exemplary damages are limited to willful failures, there is little court guidance as to what constitutes a "willful" failure. "Willful" may mean nothing more than "intentional." In the ordinary course of business, manufacturers might intentionally withhold commissions for what seem like legitimate reasons: the parties may be in dispute as to the amount, the manufacturer may be demanding the return of consignment inventory or some other contractual performance in exchange for a commission check, or the manufacturer may be aware that commissions are due but simply cannot pay timely under the circumstances. Even if a failure to pay commissions is not intentional, it may be portrayed as vindictive and intentional to a court or arbitrator if there are already hard feelings between the manufacturer and the sales representative over termination or performance.

These laws also commonly forbid oral agreements between manufacturers and independent commissioned sales representatives. In some states, the existence of such an oral agreement might subject the manufacturer to the exemplary damages described above. In any event, the sales representative, but not the manufacturer, would probably be able to void an oral agreement at the sales representative's convenience—a situation that leaves the sales representative holding most of the cards. Further, many states will impose contractual terms for timing of commission payments in the absence of a written agreement. Clearly, the best practice is to make sure that all agreements with independent commissioned sales representatives are in writing—but even here the manufacturer must take care. Some states require that the written agreement address certain issues, such as how commissions are to be computed, when commission payments are to be made, the term of the agreement, the sales representative's geographical territory or specific accounts, and the manner in which expenses are to be reimbursed. Such laws also often require that a copy of the written agreement be provided to the sales representative.

There are, in addition, many other less common features of state laws that protect independent commissioned sales representatives—too many to be detailed here. Though they are less common, they are not necessarily less onerous to manufacturers. For example, under the laws of at least one state, independent commissioned sales representatives may be terminated for "just cause" only.

As one might expect, there are plaintiffs' attorneys who see cases involving exemplary damages for untimely or unpaid commissions as "easy pickings." Because these laws are not widely known and vary from state to state, it is easy for out-of-state manufacturers to run afoul of them. Before engaging independent sales representatives or materially changing the terms of an agreement you presently have with such representatives, you should consult with legal counsel, or at a minimum, familiarize yourself with the relevant state laws.



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Tennessee Scholars Program Growing

Since the Tennessee Scholars initiative began in July 2003, it has grown from two pilot communities to 25 counties that have chosen to implement the Scholars program in their schools. (Visit www.tennesseescholars.org for a list of these communities.) Other communities are working toward the goal of implementation. In 2005, almost 900 students graduated as Tennessee Scholars. Some of the many benefits for those students who take the more challenging coursework that leads to becoming a Scholar include:



- Full scholarship at Cleveland State Community College in Cleveland, Tennessee.
- \$1,000 is now offered—as an addition to the Pell Grant—for Scholars.
- Scholars are scoring higher on national SAT and ACT achievement tests.
- Scholars are less likely to need remedial classes.
- Businesses such as Maytag Cleveland Cooking Products (Cleveland) and Kraft CPA (Nashville) now ask the question “Are You a Tennessee Scholar?” as part of their employment applications.

As the program grows, so will the rewards for being a Tennessee Scholar. If your community has not adopted this initiative for its schools, please contact Ruth Woodall, Director of the Tennessee Scholars, at the Tennessee Chamber of Commerce & Industry. Your local community’s students could graduate as Tennessee Scholars as soon as May 2006. In addition to the rewards the students receive, the community will reap the benefits of a better prepared workforce.

Notice to Employers: I-9 Form Updated

U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE) recently announced that they have updated the Employment Eligibility Verification Form (Form I-9) to eliminate outdated references to the former Immigration and Naturalization Service (INS) and its parent agency, the Department of Justice.

On March 1, 2003, the Homeland Security Act of 2002 (Public Law 107-296) transferred the functions of the former INS from the Department of Justice to the Department of Homeland Security (DHS). USCIS, an entity within DHS, presently maintains many of the immigration forms that USCIS and ICE inherited from the former INS. USCIS is currently rebranding these forms, including the I-9, to reflect the transfer to DHS. Aside from replacing outdated references to the Department of Justice and the former INS with references to DHS and its components, the current edition of Form I-9 is the same as the 11/21/91 edition.

The edition date on the rebranded Form I-9 reads “(Rev. 05/31/05)Y.” Employers may meet their employment verification requirements under the law by completing a Form I-9 that has an edition date of either “(Rev. 5/31/05)Y,” “(Rev. 05/31/05)N,” or “(Rev. 11/21/91)N” in the lower right corner of the form. DHS is currently in the process of making substantive changes to the Form I-9 in connection with previous rulemakings and plans to introduce a new Form I-9 at the end of this process.

More information about the employment verification process and other employer-based immigration topics is available from USCIS’ Office of Business Liaison at <http://uscis.gov/graphics/services/employerinfo/eibulletin.htm>.

Fall 2005 Schedule of Events and Seminars

<u>Date</u>	<u>Topic</u>	<u>Location</u>
August 3	Maintenance-Related TOSHA	Morristown
August 9	Maintenance-Related TOSHA	Cleveland
August 11	Maintenance-Related TOSHA	Jackson
August 18	Maintenance-Related TOSHA	Nashville
September 8	Basic Safety	Dyersburg
September 15	Basic Safety	Cookeville
September 20	Basic Safety	Chattanooga
September 27-28	10-Hour OSHA Compliance	Jackson
September 29	Basic Safety	Johnson City
October 5-6	10-Hour OSHA Compliance	Cleveland
October 12	Basic Safety	Memphis
October 14	Business Tax Update	Nashville
October 18-19	10-Hour OSHA Compliance	Nashville
October 27-28	Environment Conference & Awards	Dickson
November 2	Safety Programs	Morristown
November 8-9	Manufacturing Summit and Shingo Conference	Nashville
November 15-18	30-Hour OSHA Compliance	Murfreesboro
November 30	Safety Programs	Nashville
December 1	TOSHA 101	Chattanooga
December 14	TOSHA 101	Cookeville



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