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RECENT CHANGES UNDER THE CIVIL RIGHTS ACT OF 1991*

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ABSTRACT

The Civil Rights Act of 1991 provides for a number of significant changes affecting individuals who allege unlawful discrimination in employment. This article describes the changes, and outlines what these new provisions mean to employers in terms of increased litigation and employment challenges. Employers will need to review personnel policies and practices to reduce the risk of litigation from the greatly-strengthened antidiscrimination laws.

On November 21, 1991, President Bush signed the Civil Rights Act of 1991 (CRA '91), a law that amends Title VII, Section 1981 of the Civil Rights act of 1866, the American With Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). The new law was passed in response to and overturning several United States Supreme Court decisions over the past few years that significantly reduced the ability of an individual alleging unlawful discrimination in employment to successfully bring an action under Title VII or the other antidiscrimination acts. This article highlights the changes CRA '91 has wrought and what it means for employers.

The new law provides for increased damages (including punitive); jury trials in Title VII cases; broader scope of attorneys' fees; realignment of the burdens of proof; and broader protections with regard to on-the-job bias. It extends coverage of Title VII and ADA to United States citizens employed abroad. Mixed motive is no longer relevant to the fact of violation but rather goes to the remedy. The law also establishes a "glass ceiling" commission, as well as other changes involving

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filing claims against the federal government and expansion of protection to certain government employees. Employers will be confronted with increased litigation and employment challenges as a result of the enactment of CRA '91. Now is the time to review personnel practices and policies and take preventive steps to reduce the risk of costly litigation.

DISPARATE IMPACT ANALYSIS

CRA '91 amends Title VII so that it is less difficult for a plaintiff to meet his or her burden of proving that an employment practice or policy has a disparate impact. A disparate impact exists when a neutral employment practice or policy has a disproportionate adverse effect on minorities or women, usually by screening them out on the basis of allegedly neutral or objective criteria.

The new law implements a major change in Title VII that acts to overturn the Supreme Court decision in *Wards Cove Packing Co. v. Atonio* [1]. Prior to CRA '91, plaintiffs had to show that a particular practice or decision-making process was responsible for a minority imbalance in the workforce, but employers were not required to prove that the challenged practice was justified, only that there was evidence of a business justification for such a practice. Now an employment practice or group of practices that results in a disparate impact on minorities or women is unlawful if the employer cannot "demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity" [2]. Thus, the burden of proof, after the plaintiff has demonstrated a *prima facie* case of disparate impact discrimination, is shifted to the employer, who has an affirmative duty to prove that the practice or policy is job-related, and that it is consistent with business necessity.

In *Griggs v. Duke Power Co.* [3], the Supreme Court ruled that proof of business necessity requires the employer to show that the challenged practice "bears a demonstrable relationship to successful performance of the jobs for which it was used" [3]. Whether an employer has established a business necessity for its practice will be determined by the courts on a case-by-case basis.

CRA '91 further provides that even if an employer can prove its practice or policy is job-related and justified by business necessity, plaintiffs may prevail if they establish that: 1) an alternative practice is available that would have less disparate impact; and 2) the employer refused to adopt such an alternative practice.

Compensatory and Punitive Damages

Victims of intentional race, sex, religious, and disability discrimination under Title VII, ADA and the 1973 Rehabilitation Act may now receive *compensatory* and *punitive damages* in addition to the traditional remedies of reinstatement, back pay, and front pay. Compensatory and punitive damages are defined to

include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses" [4]. Punitive damages may be recovered, but only upon proof that the employer acted with "malice or reckless indifference to" the rights of the employee. This amendment vastly expands the remedies available to a discriminatee, and should act as an additional incentive to employers to carefully monitor their employment practices. It will also act as an impetus for increased filings of lawsuits under Title VII and the ADA.

Interestingly, CRA '91 places a cap on the amount a plaintiff may recover for compensatory and punitive damages in Title VII and ADA cases. The limits apply to the combined total of compensatory and punitive damages awarded in each case and vary with the number of employees (Table 1). Note that back pay, interest on back pay, front pay, and past pecuniary losses, including medical expenses, are not included in compensatory damages and are therefore not subject to the cap limitations.

Jury Trials

One of the most significant changes under CRA '91 is the provision for jury trials under Title VII and ADA in cases alleging discrimination on the basis of race, color, religion, national origin, disability, and sex. Prior to CRA '91, jury trials were generally not permitted under Title VII or the ADA. Now employers must contend with the difficulty of a jury being sympathetic to out-of-work employees, and will examine whether the employee was treated fairly by the employer. The availability of jury trials for claims under Title VII and ADA will undoubtedly increase the number of lawsuits filed, and increase the potential for greater liability for employers.

On-the-Job Bias

CRA '91 amends Section 1981 of the Civil Rights Act of 1866 to extend protection to employees who, after being hired, are subject to on-the-job harassment or other post-hiring adverse conduct. Section 1981 covers employers too small to be covered by Title VII, and has a longer limitation for filing suit without having to file with the EEOC first.

Table 1. Limits on Damages

Number of Employees	Maximum Award
15-100	$50,000
101-200	$100,000
201-500	$200,000
501 or more	$300,000

Mixed Motive Cases

Prior to CRA '91, an employer was not liable for violating Title VII if it could establish that it would have made the same decision, absent any discriminatory motive. Thus, even if the plaintiff successfully established that the adverse employment action was motivated in part by impermissible discriminatory factors, he or she did not recover for such discrimination if the employer showed that the action it took would have been taken with or without the discriminatory factors. However, this view was reversed by CRA '91, which states that an employer will be held liable for discrimination if the employee can prove that the employer's discriminatory reason was a motive in its employment decision, even if other lawful nondiscriminatory factors also played a part in the decision-making process.

On such claims involving mixed motives, where the employer can prove that the same action would have been taken even absent the discriminatory motive, the court may not award damages ore require reinstatement, hiring, or promotion. However, the court may prohibit the employer from considering discriminatory factors in the future, and award declaratory relief, attorney's fees, and costs. Thus, these types of cases are a question of remedy rather than of whether there was a violation of Title VII.

Seniority System Changes

Title VII is amended to provide that a seniority system that intentionally discriminates, regardless of whether that discrimination is apparent, may be challenged:

- when the system is adopted;
- when an individual becomes subject to it; or
- when a person is actually injured by it.

Prior to CRA '91, the period for filing a challenge to an intentionally discriminatory seniority system began to run on the date the system was adopted, not when the system adversely affected an individual. This change only applies to claims brought under Title VII. Under ADEA, it remains that the triggering event for an age bias claim occurs when the employer adopts a benefits plan (such as a seniority system), not when older workers are denied benefits.

Finality of Consent Judgments

Another change to Title VII is designed to bar challenges to consent decrees by persons who had actual notice of the proposed judgment and a reasonable opportunity to present objections, and those whose interests were adequately represented by another person who challenged the decree on the same legal grounds and similar facts, unless there has been an intervening change in the law or facts.

An action not precluded by the new provision is to be brought in the same court and, if possible, before the same judge who entered the original judgment.

Americans Working Abroad

The protections of Title VII and the ADA have been extended by CRA '91 to United States citizens working in foreign countries for American-owned or controlled companies. There is an exemption if compliance with Title VII or ADA would cause the employer to violate the laws of the country in which the employer is located. The ADEA currently protects employees over the age of forty working abroad for American companies.

Expert Witness Fees

CRA '91 provides that expert witness fees are now recoverable by the prevailing party as part of attorneys' fees awarded in Section 1981 and Title VII cases.

Right-to-Sue Letter and ADEA

The only substantive change that the CRA '91 makes to ADEA is that litigants under ADEA must now obtain a right-to-sue letter from the EEOC before they can commence a suit in the courts. A right-to-sue letter requires a litigant to institute a court action within ninety days of receipt of the letter from the EEOC. This change now makes a right-to-sue letter a uniform prerequisite for instituting a civil action under Title VII, ADA, and ADEA.

"Race Norming" Employment Tests

Title VII was further amended to prohibit the adjusting of scores, using different cutoff scores, or otherwise altering the results of employment-related tests on the basis of race, color, religion, sex, or national origin. This change addresses the issue of "race norming"—hiring and promotion tests to assure that a minimum number of minorities are included in the application pool. Actual scores must be recorded and reported.

Suits Against the Federal Government

The Title VII provision that authorizes suits against the United States government, 42 U.S.C. Section 2000e-16, is amended in two ways. First, the time for filing a suit after an agency final action is increased from thirty to ninety days after receipt of a notice of right to sue. This change makes the ninety-day filing period the same for suits against federal and private employers.

The second change to this section of Title VII permits payment of the same interest accrued due to delay in payment of awards by the federal government as already provided for in cases involving private employers. However, this

amendment does not explicitly address interest on attorney's fee awards, and the issue of the government's sovereign immunity from such interest on such awards remains an open issue.

Federal Government Employee Rights Extended

The protections of Title VII, ADEA, and the Rehabilitation Act (Section 501) are extended by CRA '91 to thousands of Senate employees and to political appointees in the executive branch. However, factors such as political affiliation, domicile, and political compatibility used in employment decisions are not subject to attack as unfair discriminatory employment actions.

With regard to the Senate employees, the Office of Senate Fair Employment Practices is responsible for administering the complaint resolution process, including counseling, mediation, formal hearing, and review. Judicial review may be requested by either party before the U.S. Court of Appeals for the federal circuit.

Senate and executive branch employees are entitled to compensatory damages, attorney's fees, and other remedies authorized under the various statutes, with the exception of punitive damages. The individual party responsible for an unfair employment practice must reimburse the U.S. Treasury within sixty days for any damages paid for by the government.

In addition, employees of the House of Representatives and legislative branch agencies are covered by the protections of Title VII. Each such agency establishes its own remedies and procedures for enforcement. For example, House employees already have a review board that handles complaints. These same rights and remedies discussed herein are available to employees of state elected officials. They may file complaints with the EEOC.

Technical Assistance Training Institute

CRA '91 directs the Equal Employment Opportunity Commission (EEOC) to set up a Technical Assistance Training Institute. This program is to enable the commission to provide technical assistance and training to covered employers regarding the various laws enforced by the EEOC. However, the failure of the EEOC to provide technical assistance to an employer will not excuse the employer from compliance with the anti-discrimination laws.

"Glass Ceiling" Commission

CRA '91 authorizes the creation of a "Glass Ceiling" Commission to study and prepare a report making recommendations to eliminate artificial barriers to the advancement of women and minorities in the workplace. One goal of this provision is to increase the advancement of women and minorities to management and decision-making positions.

CONCLUSIONS

Congress expressed its displeasure with the Supreme Court's recent interpretations of the various laws that had reduced an individual's ability to successfully prosecute a claim of discrimination. Thus, CRA '91 results in greatly strengthened and anti-discrimination statutes. The addition of jury trials, and permitting compensatory and punitive damages, give an extra bite to the enforcement of the anti-discrimination laws. The amendments provided by CRA '91 increase employer liability and ease the individual's burden in establishing a claim of discrimination.

The CRA '91 became effective upon its enactment. Employers must quickly adapt to the new provisions and make the appropriate changes in their personnel practices and policies. It is likely that plaintiffs' attorneys will attempt to apply the new law to pending litigation. However, employers may prevent lawsuits and reduce their liability through proper planning and the consistent application of appropriate employment policies.

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REFERENCES

1. *Wards Cove Packing Co. v. Antonio*, 109 S.Ct. 3151 (1989).
2. 42 U.S.C. Section 2000e-2 (lc)(1)(A)(i).
3. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
4. 42 U.S.C. Section 1977A (b).

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