An Excerpt From:

K&L Gates Global Government Solutions℠ 2011: Annual Outlook

January 2011

K&L GATES

Employers Face Scrutiny in 2011: Systemic Litigation and Fair Labor Standards

With the Obama administration's legislative agenda on labor and employment law largely stalled, enforcement efforts under existing statutes are expected to expand and accelerate in 2011. The Equal Employment Opportunity Commission ("EEOC" or "Commission") and the U.S. Department of Labor ("Department" or "USDOL") have both announced aggressive enforcement and litigation goals for which employers should be prepared.

At the EEOC, Chairman Jacqueline Berrien has vowed to reduce the Commission's backlog in charge processing and to reinvigorate its Systemic Litigation Initiative. With increased funding and 383 new employees, including 41 attorneys, the agency is poised to do both. According to the Commission's report for fiscal year 2010, which ended on September 30, systemic litigation will be a top priority. It points to 20 such suits filed in the past fiscal year. Even more telling for the year to come, it discloses that 465 systemic investigations were in process at year-end.

Of particular import for employers is the Commission's stated intent to focus systemic litigation on "policies and procedures, employment actions, or practices in particular industries that may have a significant or adverse impact on protected groups." The emphasis on adverse impact claims can be particularly difficult for employers, because those claims do not involve discrimination in the traditional sense of intentionally treating employees differently because of a protected characteristic, such as race, sex or national origin. Rather, disparate impact claims attack facially neutral – and often well-intended and longstanding – policies because they may affect protected employees disproportionately. Among the facially-neutral policies identified by the EEOC as possible targets of disparate impact suits are the use of credit reports in hiring or other employment decisions, the use of arrest or conviction records, employment tests, subjective decision making, and exclusions based on names, zip codes or geographic areas.

The use of credit reports is a particular target of the Commission in litigation and was addressed in a recent public meeting. Although various employer representatives presented arguments in support of the use of credit checks, the position of the Commission appears clear. According to Chairwoman Berrien, the practice fails as a matter of law and policy. She cites it as unfair to individuals whose credit slipped after layoff during the economic downturn. She cites it as potentially illegal because it may impact protected groups such as African Americans, Hispanics, women and the disabled disproportionately. The chairwoman's willingness to address whether certain employment practices are fair (and not just whether they comply with the statutes she is charged to enforce), along with the suggestion that "subjective decision-making" may be a target of agency litigation, is a clear signal to the business community of the current EEOC's perception of the scope of its role.

Any doubt as to the EEOC's intent to litigate is dispelled by a note in connection with its E-RACE initiative (Eradicating Race And Colorism from Employment). In what could be interpreted as pressure to compel regional offices to file suit, the Commission states that regional offices will be reviewed to determine whether the number of cases filed is "reasonable" when compared with the number of meritorious charges processed.

Like the EEOC, the USDOL under the Obama administration has adopted an operational approach that should cause great concern for employers. The USDOL is engaging in a publicity campaign focused on alleged "wage theft" and the wrongs suffered by low-wage workers. It has abandoned its historic role of providing fact-specific guidance to employers on how to comply with the Fair Labor Standards Act ("FLSA"); it is hiring a broad range of new investigators; and it has promised an aggressive litigation-first approach to enforcement. Although it is uncertain whether the USDOL's approach will increase compliance with the FLSA, there can be no doubt that every employer will face greater scrutiny from the department and the plaintiffs' bar in an effort to identify wage violations.

Spurred on by a 2009 GAO Report that concluded that the Bush administration "left thousands of actual victims of wage theft … with nowhere to turn" and a 2009 National Employment Law Project study that indicated 68 percent of the low wage workers surveyed reported that they were denied minimum wage or overtime, Secretary of Labor Hilda Solis has repeatedly committed to address "wage theft" issues. Thus, in April 2010, USDOL launched its "We Can Help" initiative. This initiative involves a public outreach program for low wage workers, especially illegal aliens, and is aimed at encouraging employees and community groups to report "suspected" wage violations. One of the cornerstones of the initiative is a commitment that complaining employees will not suffer retaliation, which seemingly includes a

commitment that the USDOL will not take any action to report or deport illegal aliens for whom it seeks wages.

At the same time that the USDOL is encouraging complaints about non-compliance, it has dramatically reduced the avenues through which employers may obtain compliance assistance. The department historically provided detailed opinion letters in response to inquiries from employers and other interested parties that addressed difficult compliance issues based on the specific facts presented by the requesting party. Thus, an employer that wanted to comply with the law could outline an approach or issue and obtain a determination from the USDOL as to whether the approach complied with the law. Unfortunately, in March 2010, the USDOL announced that it would no longer issue such opinion letters. The department indicated that responding to compliance inquiries absorbed too many resources that could otherwise be redirected to investigations and enforcement activities.

With additional appropriations as well as the funds that the USDOL has saved by minimizing its compliance guidance, the department is in the process of hiring hundreds of new investigators. A large group of these investigators is tasked with addressing contract compliance issues under the Davis-Bacon Act, which covers public works and construction projects, and the Service Contract Act, which covers services contractors who receive federal funds. Other new investigators are focusing on the perceived misclassification of employees as independent contractors, and still others are focusing on USDOL-designated high-risk industries, such as construction, health care, transportation, janitorial, and personal services.

In light of these steps by the USDOL, it should be no surprise that Labor Solicitor M. Patricia Smith has emphasized that the department intends to achieve legal compliance through use of a big stick. In a recent speech, she argued that "a few well-placed criminal cases are the best deterrent we can have" and explained that her goal is to make USDOL enforcement "more aggressive, creative, and effective." Although it is difficult to assess the impact of such attitudes both within and outside of the Department, a review of federal court dockets suggests that there has been more than a 10 percent increase in FLSA lawsuits filed when comparing 2010 with 2009. There are now an average of 33 such matters filed every day. As new USDOL investigations move forward and as plaintiffs' counsel continue to be emboldened, those numbers are certain to increase further.

Rosemary Alito (Newark)
rosemary.alito@klgates.com

Patrick M. Madden (Seattle)
patrick.madden@klgates.com

K&L GATES

Anchorage Austin Beijing Berlin Boston Charlotte Chicago Dallas Dubai Fort Worth Frankfurt Harrisburg Hong Kong London Los Angeles Miami Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco Seattle Shanghai Singapore Spokane/Coeur d'Alene Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of 36 offices located in North America, Europe, Asia and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information, visit www.klgates.com.