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Employment Law Outlook

Summer 2019

Supreme Court Weakens Important Employer Defense

David A. Kushner

Employers are sometimes faced with discrimination lawsuits in which the employee attempts to raise discrimination claims that the employee failed to raise in his/her EEOC charge. Until this summer, courts disagreed about whether the requirement that an employee exhaust claims with the EEOC was "jurisdictional" (meaning that such a failure rendered the court without jurisdiction to even decide the claim), or instead, whether such failure merely gave rise to a technical employer defense that can be waived if the employer does not raise it.

On June 3, 2019, the U.S. Supreme Court settled this disagreement in the case of *Fort Bend County v. Davis*. The Supreme Court held that the plaintiff's failure to raise a claim with the EEOC is not "jurisdictional." Thus, the employer will waive this argument by not raising it early in litigation.

Background

Title VII requires that a potential plaintiff must first file a charge of discrimination with the EEOC or an applicable state or local agency. The EEOC then provides the charge to the employer and investigates the claims. If the EEOC determines that there is no reasonable cause to believe that discrimination occurred, it then issues a right-to-sue letter to the plaintiff, who then has 90 days to file suit. If an employee only raises (for example) an age discrimination claim in his/her charge with the EEOC, the employee generally may not file a lawsuit that also alleges gender discrimination.

The plaintiff in *Davis* filed an EEOC charge alleging sexual harassment and retaliation against her employer. She then attempted to supplement the charge by handwriting "religion" on the EEOC intake questionnaire,

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New Virginia Statute Requires Employers to Provide Employment Records to Current and Former Employees

William M. Furr

In its 2019 Session, the Virginia General Assembly enacted a state statute that requires employers to provide current and former employees with certain employment records. The new requirements went into effect on July 1, 2019.

Under the statute, upon the written request of a current or former employee, the employer must provide copies of all records or papers retained by the employer in any format reflecting: 1) the employee's dates of employment; 2) the employee's wages or salary during the employment; 3) the employee's job description and

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Two New Health Reimbursement Arrangements (HRAs) Available For Employers In 2020

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Effective January 1, 2020, two new tax-free Health Reimbursement Arrangements (HRAs) – the Individual Coverage HRA (ICHRA) and the Excepted Benefit HRA (EBHRA) – are available to employers.

Individual Coverage HRA (ICHRA)

The ICHRA is unique because the Affordable Care Act (ACA) previously prevented integrating HRAs with individual health insurance. The new regulations allow employees to purchase individual health insurance on their own and to receive tax-free ICHRA reimbursements (funded by their employer) to help pay for the premiums (including Medicare and Medicare supplemental premiums) and any other qualified medical expenses.

Below is a brief summary of the most significant ICHRA requirements:

- Before receiving an ICHRA reimbursement, employees must provide proof of enrollment in an individually purchased health insurance plan (whether purchased on the Exchange or not), including Medicare and student health insurance, both initially and thereafter each time expenses are submitted for reimbursement. The regulations include a model form for participant attestation.

- The employer generally cannot offer a traditional group health plan and an ICHRA to the same class of employees (other than a traditional group health plan limited to excepted benefits, such as dental or vision care). The final rule permits employers to distinguish between certain classes of employees, including full-time and part-time employees, salaried and hourly employees, employees working in the same geographic location, employees who have not met a waiting period, collectively bargained employees, seasonal employees, temporary employees of staffing firms, and non-resident aliens with no U.S. source of income. If an employer offers a traditional group health plan to a class of employees and an ICHRA to another class of employees, certain minimum class-size requirements may apply, with minimums ranging from 10-20 employees depending on employer size.

- There is no minimum or maximum dollar reimbursement for an ICHRA, but the HRA must be offered on the same terms to all participants within a class of employees, except that an employer may vary reimbursements based on the number of dependents, the age of the participant or pro-rated based on their date of hire or the addition or deletion of dependents.

- The employer may determine the plan design. This includes the contribution amount, the maximum reimbursement per month, and the eligible expenses. The employer may choose to reimburse premiums only, qualified medical expenses only, or both.

- Employees must be allowed to opt out of the ICHRA before each plan year and also upon termination from employment (if remaining amounts are not forfeited). This allows an HRA participant to preserve eligibility for a premium tax credit for coverage purchased on an Exchange, which may be more cost effective for the participant.

- The ICHRA will be subject to COBRA if the loss of ICHRA coverage is due to a qualifying event. An employee's failure to maintain individual health insurance is not a qualifying event.

Employers that are subject to the ACA mandate must provide minimum essential coverage (MEC) that is available to at least 95 percent of their employees and is affordable. Employers offering an ICHRA do not need to be concerned with the MEC requirements: employees must certify that the individual health insurance they purchase meets those requirements.

Employers considering offering an ICHRA do need to consider whether the ICHRA is "affordable" under the ACA standards. An employer that is subject to ACA and sponsors an ICHRA that is not deemed affordable for enough employees could be subject to penalties. Determining affordability for individual employees could be burdensome to an employer because it would require a calculation based on each employee's household income compared to the lowest cost silver plan in the employee's rating area. The final regulations issued by the IRS specify that more guidance will be provided, which should make the affordability determination even more straightforward for employers.

We think the ICHRA may be particularly appealing to a small employer not subject to the ACA with employees who have individual health insurance. Compared with the qualified small employer HRA, the ICHRA allows for greater employer personalization and employees are

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Two New Health Reimbursement Arrangements (HRAs) Available for Employers in 2020

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allowed to opt out of the ICHRA if they qualify for premium tax credits.

Excepted Benefit HRA (EBHRA)

The EBHRA can be used to reimburse medical expenses generally (such as co-pays, deductibles, and other expenses not reimbursed by other coverage) and COBRA, dental or vision premiums, but cannot be used to reimburse premiums for individual or group health coverage or Medicare. The EBHRA is subject to an annual maximum reimbursement of $1,800 (indexed for inflation beginning in 2021).

EBHRAs must comply with these main requirements:

- The employer must offer group health insurance, but an employee does not have to enroll in the group plan. The employer must have a waiver of coverage on file for each employee that is enrolled in the EBHRA.
- Employees may carry over unused EBHRA amounts to the following plan year (these amounts will not count toward the annual contribution limit).
- EBHRAs generally cannot reimburse premiums for health insurance (an exception applies for COBRA or other coverage continuation premiums). Employees may receive EBHRA reimbursements for all other qualified medical expenses—including premiums for excepted benefits like vision or dental insurance and short-term limited duration insurance.
- Employers must offer an EBHRA on the same basis to all "similarly situated individuals"; the employer can treat separate groups of employees differently, but they must be grouped based on bona fide employment-based classifications and not on factors like medical history or health status.

Compared with the ICHRA, the EBHRA is not appealing to small employers unless they offer a group health plan. Employers should also take into consideration the risk that healthy employees will opt out of the group health plan, leaving the group plan with an increased number of employees who tend to be more "costly," which can result in increased premiums and/or deductibles for the remaining participating employees.

If you are considering offering an ICHRA or EBHRA, you should consult your ERISA counsel for a full analysis of your particular situation.■

Supreme Court Weakens Important Employer Defense

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but did not amend the formal charge itself. After receiving a right-to-sue letter from the EEOC, the employee filed suit, alleging sexual-harassment and religion-based discrimination. Years after answering and defending the lawsuit, the employer moved to dismiss the employee's remaining religion claim, arguing that she failed to exhaust her administrative remedies since she did not include religious discrimination in her formal EEOC charge. The employer claimed that it did not matter how long it waited to raise this defense, because the charge filing requirement was allegedly "jurisdictional," meaning that the defense is non-waivable and can be raised any time. The district court agreed with the employer but the case was appealed, ultimately reaching the Supreme Court.

Supreme Court's Decision and Implication for Employers

In a unanimous opinion, the Supreme Court held that exhausting remedies with the EEOC is not a jurisdictional prerequisite to filing suit in federal court. Instead, the Court held that the EEOC requirement is a mere "claims processing rule" (albeit a mandatory one) that creates a waivable defense that claims not raised with the EEOC should not be allowed in federal litigation.

As a result of this decision, employers will no longer be able to argue the defense of failure to exhaust administrative remedies at any point throughout litigation, and instead must do so in a timely manner. Prudent employers will raise this defense in the initial answer to a plaintiff's complaint, even though the employer may not yet have access to the employee's entire EEOC file.

In a footnote that has caused heartburn for many employment law practitioners, the Supreme Court noted that it was not ruling on whether, as a non-jurisdictional defense, the EEOC filing requirement was potentially subject to equitable defenses. We expect plaintiffs to attempt to use this footnote to argue that their failure to raise a specific claim with the EEOC was really the fault of the EEOC investigator, and thus should not be a bar to such claims.■

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Return Service Requested

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job title; and 4) any injuries sustained by the employee during the course of the employment with the employer.

If the employer is unable to provide such records or papers within 30 days, the employer shall notify the employee or former employee the reason for the delay and shall provide the documents or records within 30 days of such notice. If an employer willfully refuses to comply with a written request made in accordance with the statute either by 1) failing to respond to a second or subsequent written request without good cause or 2) by imposing a charge in excess of the reasonable expenses of making the copies and processing the request, a court may award damages for all expenses incurred by the employee to obtain such copies, including a refund of fees paid for such copies, court costs and reasonable attorneys' fees.

The statute provides that records may be withheld only under narrow circumstances in which the employee's treating physician or clinical psychologist states in writing that furnishing the records to the employee will be reasonably likely to endanger the life or physical safety of the employee or another person.

Employers in Virginia should develop a protocol for responding to requests for records by employees and former employees within 30 days of the request. However, employers should note that the statute does not necessarily require production of the entire personnel file and employers should carefully review documents before producing them. ■

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