



DATE: June 3, 2010
TO: Our Valued Client Partners & Friends
FROM: HIB Account Team
RE: **EMPLOYER ALERT 2010-09**
U.S. Supreme Court Announces Indefinite Right to Sue

We are pleased to bring you our **Employer Alert 2010-09: U.S. Supreme Court Announces Indefinite Right to Sue**. This Alert addresses issues which may effect employers who administer pre-employment tests. If you do, please take the time to read the following Employer Alert.

We hope you find this useful and please, if you have any questions, contact your HIB Account Team for assistance.

U.S. SUPREME COURT ANNOUNCES INDEFINITE RIGHT TO SUE

In a case that the U.S. Supreme Court admits could "result in a host of practical problems for employers and employees alike" the High Court recently issued a unanimous opinion allowing unsuccessful job applicants to sue for race discrimination years after they took a hiring test to join the Chicago Fire Department (CFD).

Ordinarily, applicants (and employees) who want to sue for bias under Title VII of the Civil Rights Act have just 300 days after the discriminatory event to file a claim with the Equal Employment Opportunity Commission (EEOC). However, if an employer ranks applicants using a screening test that turns out to disqualify one minority group more than another (i.e. the test has a "disparate impact"), then applicants may sue for bias **any time the test results are used**, even if it's years after the test was given.

BACKGROUND OF THE CASE

The case involved a test administered by the CFD in July 1995. In May 1996, the CFD hired the first group of applicants from that test batch with the highest test scores (above 89). During the next six years, the CFD hired nine more groups of applicants, based on their 1995 test scores.

In 1997 – well over 300 days after the test was administered and scored – six African-American applicants filed a claim with the EEOC, asserting that the test was unfairly race biased. The CFD argued that the claim was filed too late (beyond the statute of limitations), but the US Supreme Court ruled that the lawsuit could proceed.

The Court wrote: "Title VII [prohibits] not only overt discrimination but also practices that are fair in form, but discriminatory in operation. Thus, [employees may sue for discrimination whenever] the employer uses a particular employment practice that causes a disparate impact on one of the prohibited bases."



EMPLOYER ALERT 2010-09: U.S. Supreme Court Announces Indefinite Right to Sue

June 3, 2010

Page 2

"[This case] satisfies that requirement," the Court declared. "The City 'used' [the 1995 test scores] in each round of selection [and excluded] those who scored 88 or below each time it filled a new class of firefighters."

The Court admitted that due to its decision, "Employers may face new disparate-impact suits for practices they have used regularly for years."

However, the Court concluded, "It is not our task to assess the consequences. If that effect was unintended, it is a problem for Congress, not one that federal courts can fix." [*Lewis v. Chicago* (US SupCt 2010) no. 08-974].

WHAT EMPLOYERS SHOULD DO

Employers who administer pre-employment tests and use those test results to make hiring decisions would be well advised to seek the advice of counsel regarding whether the tests could have a disparate impact on a protected class.

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