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# Save The Date

**FIDUCIARY SUMMIT**
**LEXINGTON, KENTUCKY**
**June 7, 2018**

**ANNUAL EMPLOYEE BENEFITS SEMINAR**
**KNOXVILLE, TENNESSEE**
**August 14, 2018**

**ANNUAL EMPLOYEE BENEFITS SEMINAR**
**NASHVILLE, TENNESSEE**
**August 16, 2018**

**MORE DETAILS TO COME!**

# EMPLOYERS TAKE NOTE!
# NEW DEVELOPMENTS UNDER THE ADEA AND THE ADA

Sarah R. Johnson

# Are Your Job Postings in Violation of the ADEA?

On April 26, 2018, the U.S. Circuit Court of Appeals for the Seventh Circuit that covers the courts located in Illinois, Indiana and Wisconsin became the first federal appellate court to extend the disparate impact theory under the Age Discrimination in Employment Act ("ADEA") to *job applicants*. Previously, courts only applied this theory to current or former employees in ADEA cases. What do we mean by "disparate impact"? Under the ADEA disparate impact is a legal term that refers to discriminatory practices in the workplace,that result from application of policies, practices, rules or other systems that appear to be neutral to a group of individuals resulting in a disproportionate and adverse impact on people age 40 years or older.

In *Kleber v. CareFusion Corp.,* 888 F.3d 868 (7th Cir. 2018), an attorney with decades of legal experience, Kleber, age 58, applied for a position as senior counsel with CareFusion. There was no question that Kleber had strong qualifications and significant work experience in relevant positions for thirty years.

CareFusion's job posting required that applicants have no more than seven years of relevant legal experience. Of the one hundred and eight applicants ten were interviewed for the position all of which had seven years or less of legal experience. CareFusion ultimately hired an applicant who was age 29. Kleber did not receive an interview because his level of experience far exceeded the stated requireements of the job posting, thus making him "overqualified" in the eyes of the prospective employer. The Appeals Court ultimately determined that the seven year experience cap violated the disparate impact provisions of the ADEA.

Does this mean that an employer must always hire the most experienced applicant even if such experience is not required to perform the job? No, not necessarily. In its opinion reversing the district court's dismissal of the claim, the Seventh Circuit Court of Appeals made clear that its ruling does not address possible affirmative defenses that the employer may have such as the challenged practice is based on "reasonable factors other than age." What it does mean is that employers should be able to explain why any limit placed upon work experience for an open position can be justified for reasons "other than" simply to exclude someone of a certain age group, notably individuals age 40 or over who are covered by the ADEA. As a practical matter, this may be difficult to prove in many cases, thus having this court ruling significantly influence an employer's future job postings, interview questions, and ultimate hiring decisions.

Although this court ruling only affects the law governing employers located in Illinois, Indiana or Wisconsin, as the first of other challenges expected across the country employers should be prepared to modify their hiring and recruiting practices to conform with this expanded interpretation of the ADEA that covers job applicants. For more information on this subject please contact one of the attorneys at Holifield Janich Rachal Ferrera, PLLC.

# How Much Post-FMLA Leave Is An Employee Entitled To As An Accomodation Under the ADA?

Until recently, employers could do nothing but guess at what that answer might be. But recently the U.S. Circuit Court of Appeals for the Seventh Circuit in*Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017), cert. denied, 138 S. Ct. 1441 (2018), provided employer with some much needed clarity in this area. In *Severson,* an operations manager with a back impairment took a 12-week medical leave under the Family Medical Leave Act (FMLA) to deal with his back pain. On the last day of the FMLA leave he underwent back surgery and was unable to work for another three months. Because he failed to return to work after expiration of his FMLA leave, his employment was terminated.

In his lawsuit Severson claimed his employer violated the Americans with Disabilities Act (ADA) by failing to provide him with the extra leave his back surgery required. The district court disagreed, dismissing Severson's claims and holding that the ADA may require brief periods of medical leave, such as a few days or even weeks, but that multiple-month periods of leave are not required under the ADA. In affirming the dismissal, the Seventh Circuit ruled that the ADA requires employers to provide disabled employees with a "reasonable accommodation," being defined as an accommodation that allows an "otherwise qualified" disabled employee to perform the essential functions of their employment position. The Seventh Circuit concluded that "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." Therefore, the Seventh Circuit determined that providing an extended leave of absence to disabled employees is not and should not be considered as a "reasonable accommodation" required under the ADA.

Employers outside Illinois, Indiana and Wisconsin are cautioned not to unequivocally follow the holding in *Severson,* as the Seventh Circuit's ruling is inconsistent with rulings in four other federal appellate courts and the EEOC on this very issue. It is likely the U.S. Supreme Court may take up this issue in the future to clarify once and for all just what the employer's obligations are in these factual circumstances. Until then, employers are advised to apply the "reasonable accommodation" standard on a case-by-case basis. Please contact the attorneys at Holifield Janich Rachal Ferrera, PLLC for further guidance on this issue.