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The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?

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I. INTRODUCTION

After two years of political maneuvering and often-times heated debate, the Civil Rights Act of 1991 (S 1745) received its final Congressional blessing on November 7, 1991. This new law became effective immediately upon President Bush's signature on November 21, 1991.[1]

As originally proposed in 1990, the Civil Rights Act was in large part a response to a series of politically unpopular decisions by the U.S. Supreme Court during its 1989 term. Of particular concern to the civil rights community and liberal Democrats were the following five decisions:

— *Patterson v. McLean Credit Union*,[2] in which the Supreme Court ruled that an 1866 statute[3] does not prohibit racial harassment and other forms of race discrimination that extend beyond the "mak-

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I would like to extend special thanks to Thomas R. Ostdiek, a second-year student at Creighton University School of Law, for his assistance in the research and preparation of this Article.

1. 226 Daily Lab. Rep. A-12 (BNA)(Nov. 22, 1991).
2. 491 U.S. 164 (1989).
3. 42 U.S.C. § 1981 (1866).

ing" or "enforcement" of a "contract." *Impact.* The Civil Rights Act of 1991 overturns *Patterson* and amends this statute by broadening its scope to encompass all "benefits, privileges, terms, and conditions" of the contractual relationship, including the performance, modification, or termination of a contract. (The term "contract" is used in the broadest sense possible; it applies to all aspects of the employment relationship, even if employment is on an "at-will" basis.)

— *Wards Cove Packing Co., Inc. v. Atonio*,[4] in which the Supreme Court drastically altered the burden of proof applicable to the so-called "disparate impact" theory of discrimination. *Impact.* The Civil Rights Act of 1991 overturns *Wards Cove* by requiring the employer to show that an employment practice is justified by "business necessity," once a person proves that a particular employment practice (or the decision-making process in general, if a particular employment practice cannot be isolated from the decision-making process) has a "disparate impact" on a protected class.

— *Martin v. Wilks*,[5] in which the Supreme Court allowed white fire fighters to collaterally attack a consent decree many years after its issuance. *Impact.* The Civil Rights Act of 1991 overturns *Wilks* by providing that those persons who might be adversely affected by a consent decree must be provided a reasonable opportunity to challenge the order. However, subsequent legal challenges would be barred absent unusual circumstances.

— *Lorance v. AT&T Technologies, Inc.*,[6] in which the Supreme Court ruled that the time limit for challenging a discriminatory seniority system begins to run when the plan is adopted, not when the plan is applied to a specific individual. *Impact.* The Civil Rights Act of 1991 overturns *Lorance* by permitting individual challenges to discriminatory seniority plans in three potential settings: when the seniority system is adopted; when an individual becomes subject to its terms; or when an individual is injured by its specific application to him or her.

— *Price Waterhouse v. Hopkins*,[7] in which the Supreme Court indicated that an employer will escape liability in "mixed motive" cases (i.e., when an employer is motivated in part by discriminatory reasons and in part by legitimate considerations) if the employer can establish that it would have made the same decision absent the discriminatory motive. *Impact.* The Civil Rights Act of 1991 overturns *Price Waterhouse* by providing that *any* reliance on a discriminatory reason is illegal.

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4. 490 U.S. 642 (1989).
5. 490 U.S. 755 (1989).
6. 490 U.S. 900 (1989).
7. 490 U.S. 228 (1989).

As the 1990 version of the Civil Rights Act tracked its way through the House (HR 4000) and Senate (S 2104), it became clear that the legislation was intended to go well beyond simply reversing the five Supreme Court decisions noted above. For example, while damages available under existing laws typically provided only for the recovery of actual damages (*e.g.*, lost wages, restoration of benefits, etc.) suffered by the plaintiff, the Civil Rights Act provided for compensatory and punitive damages as well. In addition, the legislation provided for jury trials upon request in all cases alleging intentional discrimination.

The Senate version of the 1990 Civil Rights Act was passed by the Senate in July 1990 by a 65-34 margin.[8] The House version of the 1990 Civil Rights Act was passed by the House in August 1990 by a vote of 272-154.[9] A consolidated version of the 1990 Civil Rights Act was vetoed by President Bush in October 1990, as the President continued to lambast the legislation as a "quota bill." Attempts to override President Bush's veto were narrowly defeated.

Nearly an identical version of the 1990 Act was introduced into the House in January 1991 (HR 1).[10] Shortly thereafter, the Supreme Court added more fuel to the debate by handing down two additional decisions which were unpopular to the civil rights community:

— *EEOC v. Arabian American Oil Co.*,[11] in which the Supreme Court ruled that the Civil Rights Act of 1964 (Title VII)[12] does not extend its protection to American citizens working outside the territorial jurisdiction of the United States, even where the employer is incorporated in the United States. *Impact.* The Civil Rights Act of 1991 overturns this ruling by providing that American citizens working in foreign countries are generally protected by U.S. civil rights laws if the employer is an American-owned or controlled company.

— *West Virginia University Hospitals, Inc. v. Casey*,[13] in which the Supreme Court ruled that expert witness fees are not recoverable by a prevailing plaintiff as a form of attorneys' fees under the Attorneys' Fees Awards Act.[14] *Impact.* The Civil Rights Act of 1991 overturns this decision by providing that expert witness fees may be recoverable under the attorneys' fees provisions of most federal civil rights laws.

The House version of the 1991 Civil Rights Act (HR 1) passed the House in June 1991 by a margin of 273 to 158.[15] As the Senate began to debate its version of the 1991 Act (Sen. Danforth, R. Mo., actually

8. 140 Daily Lab. Rep. A-9 (BNA)(July 20, 1990).
9. 151 Daily Lab. Rep., A-6 (BNA)(Aug. 6, 1990).
10. 4 Daily Lab. Rep., A-2 (BNA)(Jan. 7, 1991).
11. 111 S. Ct. 1227 (1991).
12. 42 U.S.C. §§ 2000e to 2000e-17 (1988).
13. 111 S. Ct. 1138 (1991).
14. 42 U.S.C. § 1988 (1976).
15. 109 Daily Lab. Rep. A-9 (BNA)(June 6, 1991).

introduced three versions of the bill in an effort to win White House approval: S 1407, S 1408 and S 1409),[16] it was widely believed that Congress would be unable to mount a veto-proof margin under any version of the Act.

So, what happened to ensure passage of the 1991 Civil Rights Act?

Ironically, the Clarence Thomas confirmation hearings proved to be the final impetus for passage of this new law. Somehow the debate came to focus upon Professor Anita Hill, sexual harassment, and the general unavailability of economic relief for victims of sexual harassment. With the uproar over the confirmation of Clarence Thomas to the United States Supreme Court, and the likely impact of the confirmation vote in an election year, President Bush's veto-proof margin began to fade. Through last-minute negotiations, a compromise, bipartisan version of the Civil Rights Act (S 1745) received the President's support. Language was inserted into the bill to alleviate President Bush's concern that the legislation would lead to the adoption of informal "quotas."[17]

II. GENERAL OVERVIEW

The major highlights of the Civil Rights Act of 1991, in summary fashion, include the following:

— The 1866 Civil Rights Act[18] is amended to clarify that all forms of race and ethnic discrimination (including harassment) are unlawful under the statute—not merely the "making" or "enforcement" of a contract;[19]

— Title VII of the Civil Rights Act of 1964[20] is amended to provide that punitive and compensatory damages are now available in cases of intentional discrimination on the basis of an individual's race, color, religion, sex, or national origin;[21]

— The Americans With Disabilities Act of 1990[22] is amended to provide that punitive and compensatory damages are now available in cases of intentional discrimination on the basis of an individual's disability or handicap status (such damages are not allowable, however, if the employer can show that it made a good faith effort, in consultation with the disabled individual, to reasonably accommo-

16. 127 Daily Lab. Rep. A-10, (BNA)(July 2, 1991).
17. 208 Daily Lab. Rep. A-11, (BNA)(Oct. 28, 1991).
18. 42 U.S.C. § 1981 (1866).
19. Civil Rights Act Of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991)(hereinafter Civil Rights Act of 1991).
20. The damages provisions, however, appear as an amendment to 42 U.S.C. § 1981, rather than as an amendment to Title VII.
21. Civil Rights Act of 1991 § 102 (1991).
22. 42 U.S.C. § 12101 (1991).

date that individual's disability);[23]

— Both Title VII and the Americans With Disabilities Act are amended to provide for the right to trial by jury in those cases where the complaining party seeks compensatory or punitive damages;[24]

— Title VII is amended to provide that, in those cases where the complaining party demonstrates that an employment practice causes a "disparate impact" on the basis of race, color, religion, sex, or national origin, the employer will be required to demonstrate that the challenged practice is job-related and consistent with "business necessity" (a violation is also established if the complaining party can demonstrate that a less-discriminatory alternative practice exists, and the employer refuses to adopt the alternative practice);[25]

— Title VII is amended to outlaw the practice known as "race norming";[26]

— Title VII is amended to provide that *any* reliance on a discriminatory factor is unlawful, even if other, non-discriminatory reasons also influenced the decision;[27]

— Title VII is amended to provide that consent decrees are not subject to attack in subsequent litigation, provided the potential litigant had notice of the proposed consent decree and an opportunity to present objections to its terms, or was otherwise represented by another person who previously challenged the consent decree on the same legal grounds;[28]

— Both Title VII and the Americans With Disabilities Act are amended to clarify that American citizens working in foreign countries are entitled to protection under these laws, provided the employer is American-owned or controlled, and provided that compliance with American law would not violate a law of the foreign country;[29]

— Title VII is amended to clarify that seniority systems are vulnerable to attack not only when adopted, but also when an individual becomes subject to its terms or is otherwise injured by the application of the seniority system;[30]

— Title VII and the Attorneys' Fees Awards Act are amended to clarify that expert witness fees are also recoverable as a form of attorneys' fees;[31]

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23. Civil Rights Act of 1991, § 102(a)(3)(1991).
24. Civil Rights Act of 1991, § 102(c)(1991).
25. Civil Rights Act of 1991, § 105 (1991).
26. Civil Rights Act of 1991, § 106 (1991).
27. Civil Rights Act of 1991, § 107(a)(1991).
28. Civil Rights Act of 1991, § 108 (1991).
29. Civil Rights Act of 1991, § 109 (1991).
30. Civil Rights Act of 1991, § 112 (1991).
31. Civil Rights Act of 1991, § 113 (1991).

— The Age Discrimination In Employment Act[32] is amended to adopt the "right to sue" procedures available under Title VII;[33]
— A "Glass Ceiling Commission" is established to examine why women and minorities are excluded from management and decision-making positions in business and to prepare recommendations designed to foster their advancement to such positions;[34]
— Many provisions of the Federal civil rights laws will be extended to employees of the House and Senate, as well as Presidential appointees, although the procedural and remedial framework varies considerably;[35]
— Previously-exempt State employees (*e.g.*, those individuals chosen or appointed by a person elected to public office) are now protected against discrimination on the basis of race, color, religion, sex, national origin, age, handicap or disability status;[36]
— The Act is effective upon enactment (*e.g.*, November 21, 1991), unless otherwise specifically provided.[37]

III. SECTION-BY-SECTION ANALYSIS

The Civil Rights Act of 1991 is comprised of five "Titles." Title I is a broad-based redrafting of the rights and remedies available under existing federal civil rights laws. Title II, the so-called "Glass Ceiling Act of 1991," establishes the Glass Ceiling Commission to conduct a study concerning the elimination of barriers to the advancement of women and minorities in the workplace, and to prepare recommendations to foster their advancement to management and decision-making positions in business. Title III, the so-called "Government Employee Rights Act of 1991," extends certain protection under federal civil rights laws to the Senate and other government employees to be free from discrimination. Title IV simply provides the effective date of this legislation, as well as a "savings" clause in the event any portion of the Act is struck down as being invalid. Title V amends Section 1205 of Public Law 101-628, which established the Civil War Sites Advisory Commission.

A. Title I

Section 101 amends the 1866 Civil Rights Act by providing that the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, as well as the enjoyment of

32. 29 U.S.C. 626(e)(1967).
33. Civil Rights Act of 1991, § 115 (1991).
34. Civil Rights Act of 1991, § 203 (1991).
35. Civil Rights Act of 1991, §§ 301-325 (1991).
36. Civil Rights Act of 1991, § 321 (1991).
37. Civil Rights Act of 1991, § 402 (1991).

all benefits, privileges, terms, and conditions of the contractual relationship. Section 101 also clarifies that the rights protected under this law are free from impairment by both governmental and non-governmental parties.

Impact. The 1866 law has been interpreted to prohibit discrimination only on the basis of an individual's race or ethnic origin. The amendments do *not* expand the classes of persons entitled to protection under the 1866 law; rather, the amendments simply clarify that *all* forms of discrimination in the employment relationship—not merely the "making" and "enforcement" of a contract—are unlawful. As a result, claims of racial and ethnic harassment may now be brought under this statute, effectively overturning the Supreme Court's *Patterson*[38] ruling.

Section 102 of the Act provides for damages in cases of intentional discrimination. *Section 102(a)(1)* amends the 1866 Civil Rights Act by providing that, in cases of intentional discrimination brought under Title VII, the complaining party may recover compensatory and punitive damages, in addition to any other form of relief previously authorized by Title VII.

Impact. This amendment will allow for the availability of compensatory and punitive damages in all cases alleging intentional discrimination. Prohibited forms of discrimination include discrimination based on an individual's race, color, religion, sex, or national origin.

Section 102(a)(2) extends the same availability for compensatory and punitive damages to cases of intentional discrimination against individuals on the basis of their handicap or disability. This section is a technical amendment to the Americans With Disabilities Act of 1990 (prohibiting discrimination on the basis of disability) and the Rehabilitation Act of 1973[39] (prohibiting discrimination against handicapped individuals by federal contractors, federal sub-contractors, and recipients of federal financial assistance).

Impact. The Americans With Disabilities Act was signed into law by President Bush on July 26, 1990, in large part, because of a compromise measure disallowing punitive and compensatory damages for victims of disability discrimination. The Civil Rights Act of 1991 renders this compromise a nullity.

Section 102(a)(3) provides that, where the alleged discrimination involves the failure to "reasonably accommodate" an individual's disability, compensatory and punitive damages may not be awarded if the employer can show that it made a "good faith effort," in consultation with the disabled individual, to identify and make a "reasonable accommodation" to the disabled individual.

38. 491 U.S. 164 (1989).
39. 29 U.S.C. §§ 701-796(i)(1982).

Impact. In the limited situation where an employer is charged with failing to "reasonably accommodate" an individual's disability, the employer can escape compensatory and punitive damages, provided it can show that it made a "good faith effort" to accommodate the individual. As a result, the legitimacy of an employer's efforts to "reasonably accommodate" disabled individuals will become a future litigation battleground for disability discrimination claims.

Section 102(b)(1) allows for the recovery of punitive damages in cases where the complaining party demonstrates that the employer discriminated against him or her with "malice" or with "reckless indifference" to the individual's civil rights.

Impact. The "reckless indifference" standard will implicate virtually every case involving allegations of intentional discrimination. As a result, punitive damages will be potentially available in the vast majority of cases.

Section 102(b)(2) provides that compensatory damages do not include back pay, interest on back pay, and other types of relief available under Title VII.

Impact. This section clarifies that compensatory damages are *in addition to* actual damages available for back pay, interest, and similar forms of relief, which are currently available under Title VII.

Section 102(b)(3) provides a limitation on the amount of compensatory and punitive damages available to a prevailing party in cases of intentional discrimination. The *combined sum* of compensatory damages (including damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses) *and* punitive damages (*i.e.*, damages designed to deter or punish an employer) are tied to the size of the employer in the following fashion:

A) damages of up to $50,000 for employers employing 15-100 employees;

B) damages of up to $100,000 for employers employing 101-200 employees;

C) damages of up to $200,000 for employers employing 201-500 employees; and

D) damages of up to $300,000 for employers employing more than 500 employees.[40]

Impact. This section of the Act establishes certain "caps" on the

40. On November 26, 1991, Sen. Edward Kennedy (D-Mass.) and Rep. Barbara Kennelly (D-Conn.) introduced legislation (The Equal Remedies Act of 1991) to amend the Civil Rights Act of 1991 by removing all of the caps on compensatory and punitive damages (S 2062). On the same day, Sen. Orrin Hatch (R-Utah) introduced a separate proposal (Employee Equity and Job Preservation Act of 1991) that retains only the $50,000 cap on damage awards for employers with 50 or fewer employees (S 2053). 229 Daily Lab. Rep. A-6 (BNA)(Nov. 27, 1991). Sen.

amount of compensatory and punitive damages available to complaining parties, based on the size of the employing entity. In determining the number of employees employed by an employer who may have multi-site locations, the employees at each location are typically added together in determining the threshold number of employees. This will normally depend on whether there is "common control" over the various operations. More significantly, it is anticipated that the "caps" available under this section will be quickly converted into "floors" based on the size of the employer.

Section 102(b)(4) clarifies that the foregoing "caps" do not apply to cases alleging discrimination under the 1866 Civil Rights Act.

Impact. This means that in cases of racial and ethnic discrimination, compensatory and punitive damages potentially will be *unlimited* in amount, as they are under existing interpretations of the 1866 law.

Section 102(c) provides that where compensatory or punitive damages are sought by the complaining party, either party may request a trial by jury. The court is prohibited from informing the jury of the various "caps" noted above.

Impact. The availability of trial by jury is a significant victory for the plaintiffs' bar. It is a well-known fact that juries tend to be more sympathetic to the "little guy," as opposed to the "heartless" corporate entity. Prior to the passage of the Civil Rights Act of 1991, jury trials were unavailable under Title VII. Since most cases of discrimination involve allegations of intentional violations of the law, virtually all plaintiffs will now seek compensatory and punitive damages, thus triggering the availability of trial by jury. The odds of prevailing in employment discrimination cases, from the employer's perspective, will now be significantly reduced. The prohibition against advising the jury of the various "caps" on damages could help prevent the "caps" from becoming "floors."

Section 102(d) defines the term "complaining party" to include the Equal Employment Opportunity Commission, the Attorney General, and any other person entitled to bring an action under Title VII, the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990.

Impact. Both the government and non-governmental plaintiffs will be entitled to bring an action for the recovery of those damages outlined above.

Section 103 amends the Attorneys' Fees Awards Act to provide for the recovery of attorneys' fees under these new amendments.

Impact. This amendment clarifies that prevailing plaintiffs, other

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Kennedy's bill was approved by the Senate Labor and Human Resources Committee on March 11, 1992. 49 Daily Lab. Rep. A-11 (BNA)(Mar. 12, 1992).

than the United States, will be entitled to the recovery of attorneys' fees in any action brought under the Civil Right Act of 1991.[41]

Section 104 incorporates new definitions into Title VII, including definitions of the terms "complaining party", "demonstrates", and "respondent."

Impact. As noted above, the term "complaining party" includes the Equal Employment Opportunity Commission, the Attorney General, and any other person entitled to bring an action under Title VII. The term "demonstrates" refers to the burden of proof in litigating discrimination claims. The term "respondent" includes employers, employment agencies, labor organizations, joint-labor management committees controlling apprenticeship or other training or retraining programs, and federal entities subject to Title VII.

Section 105 addresses the burden of proof in "disparate impact" cases. This section amends Title VII by providing that disparate impact is established if:

1) a complaining party demonstrates that the employer uses a particular employment practice that causes a "disparate impact" on the basis of race, color, religion, sex or national origin, and the employer fails to demonstrate that the practice is job-related and consistent with "business necessity"; or
2) the complaining party demonstrates that an alternative employment practice exists which does not have an unlawful "disparate impact," and that the employer refuses to adopt the alternative practice.

The complaining party is generally required to identify a particular or specific employment practice that causes the "disparate impact," except in those cases where the complaining party can demonstrate that the elements of an employer's decision-making process are not capable of separation for analysis. In that event, the decision-making process may be analyzed as a single employment practice.

The employer may defend against a "disparate impact" claim by demonstrating that a specific employment practice does not cause the impact, or otherwise by establishing that the practice is both job-related and consistent with "business necessity." In defining the term "business necessity," courts must consider case law as it existed prior to the Supreme Court's 1989 decision in *Wards Cove Packing Co., Inc. v. Atonio*.[42]

Finally, an employer's rule barring the employment of individuals who currently use or possess controlled substances will not be deemed

41. On February 19, 1992, Rep. Robert Andrews (D-N.J.) introduced legislation (HR 4242) that would require an award of attorneys' fees to the Equal Employment Opportunity Commission when it is the prevailing party. 35 Daily Lab. Rep. A-19 (BNA)(Feb. 21, 1992).

42. 490 U.S. 642 (1989).

unlawful, even if the rule results in a "disparate impact" on a "protected class," unless it can be shown that the rule was adopted or applied with an intent to discriminate.

Impact. Oddly enough, this section of the Civil Rights Act of 1991 became the focal point of Congressional debate. This is the section of the Act that President Bush referred to as inviting the implementation of "quotas." In essence, this section of the Act largely restores the case law as it existed prior to the Supreme Court's 1989 ruling in *Wards Cove*.[43] The requirement that the complaining party must isolate a particular employment practice causing the disparate impact represents a compromise measure.

The "disparate impact" theory of discrimination involves neutral employment practices that are not discriminatory on their face, but which result in discrimination in their application or effect on a "protected class" (*i.e.*, race, color, religion, sex, or national origin). Examples include height and weight standards,[44] certain educational requirements,[45] use of arrest[46] and conviction records,[47] use of credit history information,[48] and similar practices that are neutral on their face. In order to establish a "disparate impact" claim, the complaining party must show that the challenged criterion disproportionately impacts members of a protected class, as compared to the majority class. This demonstration is usually made through the use of statistical analyses.

By and large, "disparate impact" cases are fairly infrequent, as compared to cases alleging intentional discrimination (*i.e.*, "disparate treatment" cases). In fact, the authors of a recent study published in the May, 1991 issue of the *Stanford Law Review* estimate that disparate impact cases accounted for *less than 2%* of all discrimination suits filed between January 1, 1985 - March 31, 1987.[49]

Finally, compensatory and punitive damages are *not* available in cases alleging disparate impact; nor are complaining parties entitled to trial by jury in such cases.

Section 106 prohibits the adjustment of test scores on the basis of race, color, religion, sex, or national origin.

Impact. This section of the Civil Rights Act of 1991 prohibits the practice known as "race norming" in the use of test scores. Simply put, different cut-off scores and other adjustment techniques cannot

43. *Id.*
44. Dothard v. Rawlinson, 433 U.S. 321 (1977).
45. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
46. Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972).
47. Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).
48. Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974)(garnishment rule).
49. John J. Donohue III, Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998, n.57 (1991).

be used to alter the test results of an applicant or employee on the basis of his or her race, color, religion, sex or national origin.

Section 107(a) amends Title VII by clarifying that a violation of the law is established when the complaining party can show that race, color, religion, sex, or national origin was "a motivating factor" for any employment practice, even though other legitimate factors may have also motivated the practice.

Impact. This section of the Act overturns the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins.*[50] The amendment makes clear that an individual's race, color, religion, sex, or national origin must play *no* factor in the challenged employment practice.

Section 107(b) provides that the employer can limit its damages in such "mixed motive" cases by proving that it would have taken the same action in the absence of the discriminatory factor. If the employer can prove that it would have made the same decision absent the discriminatory motivation, then the court may only grant declaratory relief, injunctive relief, and attorneys' fees and costs shown to be directly attributable to the pursuit of that claim.

Impact. If the complaining party can establish that race, color, religion, sex, or national origin was in any way a motivating factor in the challenged employment practice, then he or she is entitled to relief under Title VII. However, if the employer can demonstrate that it would have made the same decision absent the illegal factor, then the complaining party is only entitled to limited relief and the recovery of attorneys' fees and costs. In other words, if the employer can make such a showing, the court is prohibited from awarding any form of damages (*i.e.*, actual, compensatory, or punitive) or issuing an order requiring the admission, reinstatement, hiring, promotion, or payment to the complaining party.

Section 108 amends Title VII by prohibiting challenges to consent decrees or orders that resolve claims of employment discrimination, provided the affected individual had actual notice of the proposed decree or order and was provided an opportunity to present objections to the decree or order, or whose interests were otherwise adequately represented by another person who challenged the decree or order on the same legal grounds and with a similar factual situation.

Impact. This section of the 1991 Civil Rights Act overturns the Supreme Court's 1989 ruling in *Martin v. Wilks.*[51] In future cases involving class-wide challenges to employment practices, the agreed-upon consent decree or court order will be immune to subsequent legal attack, provided affected individuals had notice of the proposed decree or order and were provided a reasonable opportunity to present

50. 490 U.S. 228 (1989).
51. 490 U.S. 755 (1989).

objections to its terms, or were otherwise adequately represented by another person with a similar legal basis for challenging the consent decree. This provision should lend some finality to court-approved consent decrees resolving class-based allegations of discrimination.

Section 109 amends both Title VII and the Americans With Disabilities Act of 1990 by extending the protection of such laws to American citizens working in foreign countries for an employer that is American-controlled or owned. A limited exception is provided in cases where compliance with American civil rights laws would cause the employer to violate the law of the foreign country in which the worker is employed. In determining whether an employer controls a corporation, the courts must apply the following factors:

A) The interrelation of operations;
B) Common management;
C) Centralized control of labor relations; and
D) Common ownership or financial control of the employer and the corporation.

Impact. This section of the Act overturns the Supreme Court's 1991 ruling in *EEOC v. Arabian American Oil Company*.[52] This amendment effectively extends the provisions of Title VII and the Americans With Disabilities Act to American citizens working in foreign countries, provided the employer is an American-owned or controlled company. In short, U.S. civil rights laws will be given extraterritorial effect where the foreign employer is American-owned or controlled, except where compliance with American law would violate the laws of the foreign country.

Section 110 amends Title VII by requiring the Equal Employment Opportunity Commission to establish a "Technical Assistance Training Institute," through which the Commission is required to provide technical assistance and training to the public regarding those laws and regulations enforced by the Commission. However, failure to comply with the law will not be excused because of any failure to receive such technical assistance.

Impact. This section of the 1991 Civil Rights Act is intended to allay employer concerns that the Commission is not truly a neutral party in the investigation and prosecution of alleged civil rights violations. While it is, indeed, a positive gesture to the employer community, given chronic under-funding and under-staffing at the Commission, it is highly unlikely that technical assistance will be readily available to the employer community on a convenient, timely basis.

Section 111 amends Title VII by requiring the Equal Employment Opportunity Commission to carry out educational and outreach activi-

52. 111 S. Ct. 1227 (1991).

ties targeted to historical victims of employment discrimination who have not been equitably served by the Commission in the past, as well as all other individuals on whose behalf the Commission has authority to enforce laws prohibiting employment discrimination.

Impact. The Commission has been accused of neglecting certain minority groups at the expense of others, in particular, Asians and Spanish-speaking minorities. This section of the 1991 Civil Rights Act requires the Commission to target such groups for educational and outreach activities designed to educate such individuals about their rights under U.S. civil rights laws.

Section 112 amends Title VII by providing that discriminatory seniority systems may be challenged when the system is adopted, when an individual becomes subject to its terms, or when an individual is specifically injured through application of the seniority system to him or her.

Impact. This section of the 1991 Civil Rights Act overturns the Supreme Court's 1989 ruling in *Lorance v. AT&T Technologies.*[53] In essence, this section of the Act will allow individuals to challenge discriminatory seniority systems at different points in time—not simply when the system is adopted. This section will have limited application to those claims challenging seniority systems as being motivated by unlawful discrimination.

Section 113 amends Title VII and the Attorneys' Fees Awards Act by providing that courts may, in their discretion, include expert witness fees as part of any attorneys' fees award otherwise recoverable by a prevailing plaintiff.

Impact. This section of the 1991 Civil Rights Act overturns the Supreme Court's 1991 ruling in *West Virginia University Hospitals, Inc. v. Casey.*[54] This amendment will encourage the use of expert witnesses in employment discrimination litigation (*e.g.*, doctors, psychologists, psychiatrists, counselors, statisticians, etc.), since such fees will now be recoverable to the prevailing plaintiff as a part of his/her attorneys' fees. Under pre-existing case law, the plaintiff typically had to simply absorb the costs of expert witnesses, regardless of the outcome of the case.

Section 114 amends Title VII by expanding the time limits in which a federal employee may file a civil action following final action by the Equal Employment Opportunity Commission or other applicable department or agency (from 30 to 90 days). This section of the Act also amends Title VII to provide that interest to compensate for delay in the payment of damages will be available to federal employees on the same basis as interest is currently available to non-public parties.

53. 490 U.S. 900 (1989).
54. 111 S. Ct. 1138 (1991).

Impact. This section of the 1991 Civil Rights Act simply harmonizes the procedures applicable to challenges brought by governmental and non-governmental employees. Federal employees will now have a longer period of time in which to file a civil action following an adverse agency ruling.

Section 115 amends the Age Discrimination in Employment Act of 1967 by requiring the Equal Employment Opportunity Commission to notify age discrimination plaintiffs upon the termination of agency proceedings. Following notice of such action by the Equal Employment Opportunity Commission, a civil action may be brought within 90 days following receipt of the notice.

Impact. This section of the 1991 Civil Rights Act incorporates the "right to sue" provisions of Title VII into the Age Discrimination in Employment Act. In the past, the Commission was not required to notify complaining parties in age discrimination actions of the Commission's final action on a complaint. As a result, many potential plaintiffs inadvertently allowed their claims to lapse. This section of the Act will help to avoid that result by requiring specific notice to complaining parties of the termination of agency proceedings. However, failure of the complaining party to file suit within the 90 days following receipt of the notice of "right to sue" will serve as a bar to any subsequent attempt to file a claim based on the same action.

Section 116 clarifies that nothing in the Civil Rights Act of 1991 should be interpreted as affecting existing, court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

Impact. This section of the Act is designed to preclude challenges to the existing patchwork of court-ordered remedies, including affirmative action plans and conciliation agreements.

Section 117 extends Title VII, with certain limitations, to the House of Representatives.

Impact. This section of the Act represents a Congressional face-saving measure in response to mounting public criticism that Congress routinely exempts itself from those laws it inflicts on the remainder of the country.

Section 118 provides that the use of alternative means of dispute resolution (*e.g.*, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration) is encouraged to resolve disputes arising under the various civil rights laws.

Impact. This section of the Act is simply designed to encourage and authorize the use of dispute resolution techniques as an alternative to litigation. It is doubtful, however, that plaintiffs' attorneys will have much interest in alternative means of dispute resolution, particularly given the present attractiveness of large damage awards and the availability of trial by jury. However, the Equal Employment Oppor-

tunity Commission recently announced that it is exploring the use of alternative dispute resolution techniques on a voluntary pilot basis.[55] Perhaps this action will spur heightened awareness and use of such alternatives to litigation.

B. Title II—The Glass Ceiling Act of 1991

The Glass Ceiling Act of 1991[56] establishes the Glass Ceiling Commission to conduct a study and prepare recommendations concerning the elimination of barriers to the advancement of women and minorities to management and decision-making positions in business. In addition, the Glass Ceiling Act establishes the National Award For Diversity And Excellence In American Executive Management, which is to be awarded to a business that has made substantial efforts to promote the opportunities and developmental experiences of women and minorities to foster their advancement to management and decision-making positions within the business.

The 21-member Commission will terminate four years following the enactment of this legislation. Commission members will be appointed for the life of the Commission. In fulfilling its obligations under the Glass Ceiling Act, the Commission is authorized to hold hearings, take testimony, and take such other actions as the Commission determines necessary to carry out its duties.

Impact. The Glass Ceiling Act of 1991 is a Congressional response to the Department of Labor's pilot study entitled, "Report on the Glass Ceiling Initiative," which was released in August, 1991. The Department of Labor's Report concluded that women and minorities were under-represented at the management and decision-making levels in the workplace, in part, because of "artificial barriers" to the advancement of women and minorities to such levels. The Glass Ceiling Act of 1991 requires the Commission to study the issue further and make recommendations on how such barriers can be eliminated from the workplace.

C. Title III—Government Employee Rights Act of 1991

Title III applies to employees of the Senate, Presidential appointees, and certain previously-exempt State governmental employees.[57] This Act extends the protection of Title VII, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990 to all such employees. However, a unique Senate procedure for consideration of alleged violations involving Senate employees requires counseling, mediation, formal com-

55. 21 Daily Lab. Rep. A-15 (BNA)(Jan. 31, 1992).
56. Civil Rights Act of 1991, §§ 201-210 (1991).
57. Civil Rights Act of 1991, §§ 301-325 (1991).

plaint and hearing by a hearing board, and review by the Select Committee on Ethics, followed by judicial review. Punitive damages are not available under this Act, although compensatory damages are available in appropriate cases. Interestingly, all counseling, mediation, hearings, deliberations and decisions of the hearing board must remain confidential. The final decision of the Select Committee on Ethics will only be made public if the decision is in favor of the complaining Senate employee, or if the decision reverses a decision of the hearing board which had been in favor of the employee. The Act constitutes a Senate employee's exclusive remedy to redress discriminatory practices prohibited under the Act.

Finally, the Act extends coverage to previously-exempt State employees, specifically those individuals chosen or appointed by a person elected to public office in any State or political subdivision.

Impact. Title III represents another face-saving measure taken by Congress in response to the wide-spread public perception that Congress exempts itself from those civil rights laws it extends to all other segments of the population. Nevertheless, important differences remain between the coverage of these laws as between Congress and other segments of the population.

D. Title IV—Effective Date

Except as otherwise noted in particular provisions of the Civil Rights Act of 1991, the Act takes effect upon President Bush's signature on November 21, 1991.[58]

Impact. The House version (HR 1) of the Civil Rights Act provided for retroactive application of the Act, in many cases, to the Supreme Court's 1989 term. The final version of the Act eliminates this provision, thus eliminating a large degree of uncertainty with respect to the status of those actions filed after the Supreme Court's 1989 term. Unless otherwise noted, the Act is prospective in its application.[59]

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58. Civil Rights Act of 1991, § 402 (1991).

59. While the issue is unsettled, the Equal Employment Opportunity Commission (hereinafter "EEOC") has stated that until rescinded or superseded, it will not apply the compensatory and punitive damages provisions of the Civil Rights Act of 1991 to pending charges or to conduct that occurred prior to November 21, 1991, the effective date of the Act. EEOC *Policy Guidance on Retroactivity of Civil Rights Act of 1991*, 1 Daily Lab. Rep. D-1 to D-3 (BNA)(Jan. 2, 1992).

The EEOC studied the statutory language and legislative history of the Act and judicial precedents regarding determinations of retroactivity with respect to other laws. The EEOC concluded that "in light of the ambiguity in legislative history and Supreme Court precedent, the issue of whether the damages provisions of the new Act should be applied retroactively is much in question," noting that as of December 27, 1991, five federal courts had addressed the issue and reached different conclusions. *Id.* at D-3.

The EEOC determined that the most recent Supreme Court case that addressed the issue of retroactivity, *Bowen v. Georgetown University Hospital*, 488

IV. OVERALL IMPACT OF THE CIVIL RIGHTS ACT OF 1991

The price of discrimination has just increased a thousand-fold. With the availability of compensatory and punitive damages in cases of intentional discrimination (the vast majority of discrimination cases involve allegations of intentional discrimination), coupled with the availability of jury trials in such cases, employers are certain to see an increase in employment litigation.

It is likely that the so-called "caps" will either be eliminated altogether or soon become "floors" for assessing damage awards, and due to the availability of compensatory damages, claims of harassment and other forms of unfair treatment will undoubtedly increase. Other "goodies" for the plaintiffs' bar include the increasing availability of attorneys' fees, as well as the recovery of expert witness fees, where the plaintiff is the prevailing party.

Employers must also be mindful that the Civil Rights Act of 1991 similarly amends Title I of the Americans With Disabilities Act, which takes effect July 26, 1992. Thus, in most cases, compensatory and punitive damages will likewise be available in those cases alleging intentional disability discrimination, as will trial by jury. Disabled individuals will, by and large, present perhaps the most sympathetic plaintiff of all in the eyes of a jury. This situation is exacerbated by the many uncertainties created by the vague terminology utilized in the Americans With Disabilities Act. Thus, disability discrimination cases will be particularly dangerous to employers.

It is anticipated that there will be a new surge of discrimination claims in the hiring context for two reasons: First, the Equal Employment Opportunity Commission recently authorized the use of "testers" (*i.e.*, impostors feigning to be applicants seeking employment with an employer) in the hiring context.[60] Secondly, given the prior exclusion of disabled individuals from the workplace, early litigation efforts under the Americans With Disabilities Act will likely focus on getting such individuals "through the door" to obtain employment. These factors are certain to spawn increased litigation activity in the hiring context, particularly with respect to the Americans With Disabilities Act.

A second area that will undoubtedly see an increase in litigation activity is that of harassment in all forms—particularly, racial, sexual

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U.S. 204 (1988), should be followed. In that case, the Supreme Court struck down regulations enacted by the Department of Health and Human Services which were explicitly enacted to apply retroactively.

Accordingly, the EEOC will not seek the additional damages provided by the Act in charges filed prior to November 21, 1991, or in charges filed after November 21, 1991 that challenge conduct that occurred prior to the enactment of the Act.

60. 6 Daily Lab. Rep. A-9 (BNA)(Jan. 9, 1991).

and disability harassment. Such claims will be ripe for the recovery of compensatory damages (*i.e.*, damages for mental anguish, suffering, emotional pain, and loss of enjoyment of life). Sexual harassment claims are already at reported record highs at many civil rights agencies across the country.

Finally, it is important to note that most intentional acts of discrimination are uninsurable under existing insurance policies. As a general rule, it is viewed as violative of public policy to insure against intentional violations of the law. Thus, insurance coverage will generally be unavailable to protect employers from the most devastating of all claims—those seeking compensatory and punitive damage awards. This will likely lead to an increase in the amount of negotiated settlement agreements, at least prior to that point in the administrative process at which the EEOC issues its "reasonable cause" determination.[61]

61. The EEOC will seek "full relief" (including actual, compensatory, and punitive damages, where appropriate) on behalf of aggrieved individuals once a finding of "reasonable cause" has been made. *See EEOC's Technical Assistance Manual for The Americans With Disabilities Act*, §§ 10.3 & 10.5, 18 Daily Lab. Rep. (Special Supplement at S-39 to S-40)(BNA)(Jan. 28, 1992). Thus, employers will have more of an incentive to litigate adverse rulings following the agency's determination, particularly where the EEOC seeks the recovery of compensatory and/or punitive damages as part of its efforts to obtain "full relief."