Timing is Everything:
The EPL Implications of *Lewis v. City of Chicago*

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Timing is Everything

Successfully defending employment litigation frequently requires detailed information concerning employee and management conduct. As such, significant time delays between an alleged wrongful act and a claim arising from it increase defense expenses and may impact a company's ability to identify and locate the key witnesses or documentation necessary to dismiss allegations of wrongdoing.

Given the complications of delayed litigation, employers should take heed of a recent opinion from the Supreme Court, *Lewis v. City of Chicago*[1] (hereafter referred to as "*Lewis*"). The opinion opens up employers to claims for past discriminatory practices by entitling plaintiffs to bring disparate impact litigation long after the initial conduct giving rise to the offense occurred. This means that companies may unwittingly find themselves liable for employment practices occurring years ago, perhaps even before existing management was in place.

The Facts

Lewis centers on a written examination used to screen applicants for the Chicago Fire Department. The test was first administered in July of 1995 by the City of Chicago. In January of 1996, the City separated applicants into three groups based on their test scores. Those scoring in the bottom tier could no longer be considered for firefighting positions. Top-tier scorers could advance to the next qualifying stage of the process. Candidates in between these groups could possibly advance to the next level, but not until the top-tier level of candidates were exhausted.

Beginning in May of 1996, and throughout the next several years, the City drew candidates from the top tier and eventually from the middle-tier group as well. By March of 1997, several middle-tier candidates who had yet to be hired filed discrimination charges with the EEOC and a civil action for disparate impact discrimination followed.

Accruing Disparate Impact Claims

Title VII of the Civil Rights Act of 1964 requires that plaintiffs bring charges in a timely fashion. For disparate impact claims, plaintiffs must bring charges within 180 days from the date of the alleged violation, or 300 days if the charge is also covered by a state or local anti-discrimination law.

Defendants in *Lewis* argue that the conduct giving rise to the discriminatory impact was a single act—the initial decision to use the test results to create a hiring list—and because plaintiffs' claim addresses later hiring decisions, the claim is not timely. Plaintiffs, on the other hand, assert that each instance of using those scores was in and of itself an act of discrimination leading to disparate impact and therefore the charge period should have accrued in each subsequent instance of use.

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[1] Arthur L. Lewis, Jr., Et Al., Petitioners V. City Of Chicago, Illinois 560 U.S. (2010), (SC No. 08-974)

The Supreme Court's opinion clarifies the issue of timing and claim accrual, holding that 1) individual instances of excluding certain candidates while advancing others constitute an "employment practice" as required by Title VII, and 2) if that practice originated during the original charge period, then claims arising out of that conduct could accrue even beyond the charge period:

> "Aside from the first round of selection in May 1996 (which all agree is beyond the 300 day charging period), the acts petitioners challenge (the City's use of its cutoff score in selecting candidates) occurred within the charging period. Accordingly, no one disputes that if petitioners could bring new claims based on those acts, their claims were timely. The issue, in other words, is not *when* petitioners' claims accrued, but *whether* they could accrue at all."[2]

Thus, according to the Supreme Court, as long as there is an identifiable discriminatory act giving rise to disparate impact, the application of that act (in this case, using test scores to advance or not advance applicants) begins a new accrual period to bring charges.

Risk Transfer and Mitigation

Employment Practices Liability Insurance (EPLI) is designed to protect companies in the unfortunate event of claims alleging wrongful employment practices, such as discrimination. Coverage typically is written on a claims-made basis, meaning that the policy will apply to a claim arising during the policy period, even where the actions giving rise to the claim occurred prior to policy inception. However, before a policy is bound, an application must be completed asking whether the insured is aware of claims or circumstances giving rise to a claim. Failure to disclose such items could result in a policy rescission.

In the wake of the *Lewis* decision, how is an entity to know if current employment practices are rooted in a questionable employment practice? Careful, ongoing review of policies and procedures is always prudent, and especially more so given the increased chance of current liability for previous acts. So too is the implementation and/or reemphasizing of an efficient and effective chain of communication within an organization to maximize the likelihood of timely reporting and notice of events/acts that are reasonably likely to or have already given rise to a claim.

Given the current favorable conditions for insurance purchasers within the commercial management liability insurance marketplace, it is an ideal time for organizations to review and challenge their current program to ensure the broadest terms available that mirror and address their corporate risk profile and risk transfer needs. While pricing often strongly influences a buyer's decision, in the extremely volatile arena of employment related litigation, strength of insurance contract and its ultimate responsiveness in the event of a claim is equally important. Strength of contract is found not only in the proper drafting of terms and conditions but also in

[2] Arthur L. Lewis, Jr., Et Al., Petitioners V. City Of Chicago, Illinois 560 U.S. (2010), 6. (SC No. 08-974)

the soundness of the carrier and the strength of the claims professionals, both on the insurer and brokerage side of the equation.

Some key provisions that insureds should focus on include, but are not limited to:

- Notice
- Definition of Claim / Wrongful Act
- Duty to Defend
- Choice of Counsel

For those companies that do not currently purchase EPLI, the Supreme Court's decision in *Lewis* may provide a catalyst to reevaluate their current approach, especially given the favorable rates often available in this current marketplace.

Know Your Risk

Unlike many other areas of litigation, employment-related matters are frequently taxing to both a company and its individuals. Employment litigation may result in reputational damage that is difficult to remedy. Knowing the risks and having proper risk transfer mechanisms in place can serve to minimize the potential deleterious effects of a difficult employment practices claim.

We would be pleased to discuss with you the benefits that employment practices liability insurance can provide and how best to tailor this and other risk solutions to your needs. Contact an Integro representative or visit us online at www.integrogroup.com to learn more.

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About Integro
Integro is an insurance brokerage and risk management firm dedicated to serving the insurance and risk management needs of complex institutional risks. Integro has offices across North America, as well as in Bermuda and London. Its headquarter office is located at 1 State Street, 9th Floor, New York NY 10004. 1-877-688-8701. www.integrogroup.com.

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