

## MRA - News to Know

Taken from MRA's *Inside HR* newsletter

### Employers Can Still Use I-9 in Current Form

U.S. Citizenship and Immigration Services (USCIS) announced June 26, 2009, that the Form I-9, *Employment Eligibility Verification* (Rev 02/2/09) will continue to be valid for use beyond June 30, 2009. USCIS has requested that the Office of Management and Budget (OMB) approve the continued use of the current version of the form. While this request is pending, the Form I-9 will not expire, said the agency. USCIS will provide an update when the extension is approved. Employers will be able to use either the Form I-9 with the new revision date or the Form I-9 with the 02/02/09 revision date at the bottom of the form. For more information on the Form I-9, please visit: <http://www.uscis.gov/i-9>.

Pursuant to the Immigration Reform and Control Act of 1986, all employers, agricultural recruiters, and referrers for a fee are required to verify the identity and employment authorization of each individual they hire for employment in the United States, regardless of that individual's citizenship. As part of the verification process, employers and employees must complete the Form I-9, with employers retaining the form for a statutorily established period of time (three years after the employee's date of hire or one year after the date that employment is discharged) and make the form available for inspection for certain government officials.

The documents designated as acceptable for the Form I-9 are divided among three lists: List A - documents that establish both identity and employment authorization; List B - documents that establish only identity; and List C - documents that establish only employment authorization. Many work authorization documents must be renewed on or before their expiration date, requiring the Form I-9 to be updated. This process is called reverification. The Department of Homeland Security recommends using a "tickler" system to keep track of employees with documents of limited-duration work authorization.

USCIS issued a reminder that effective April 3, 2009, all U.S. employers are required to use the revised Form I-9 (with a revision date of 02/02/09 and expiration date of June 30, 2009). The revised Form I-9 reflects changes made to the list of documents acceptable for the form pursuant to an interim rule (<http://edocket.access.gpo.gov/2008/pdf/E8-29874.pdf>) issued in the *Federal Register*. The interim rule narrowed the list of acceptable identity documents and further specifies that expired documents are not considered acceptable forms of identification.

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## Supreme Court Shifts Burden to Employee on Age Discrimination Claims

Declining to import the mixed-motives burden-shifting rubric applied under Title VII of the Civil Rights Act of 1964, a divided Supreme Court ruled that a plaintiff claiming disparate treatment under the Age Discrimination in Employment Act of 1967 (ADEA) must establish by preponderance of evidence that age was the “but-for” cause” of the adverse employment action challenged. Even when the plaintiff has produced some evidence that age was one motivating factor in the employer’s decision, the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of age, held the Court. Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, dissented. Writing separately, Justice Breyer also dissented and was joined by Justices Souter and Ginsburg. ([Gross v FBL Fin Servs. Inc.](#), USSCt, Dkt 08-441. Decided June 18, 2009.)

**Background.** A 54-year-old employee sued his employer, alleging that it demoted him because of his age in violation of the ADEA. The district court used a mixed-motives jury instruction, charging the jury that the employee had the burden to prove that: (1) his employer demoted him; and (2) age was a motivating factor in the demotion decision. The court also instructed the jury that the verdict must be for the employer if it had been “proved by a preponderance of the evidence that [the employer] would have demoted [the employee] regardless of his age.” The jury returned a verdict in favor of the employee, awarding lost compensation in the amount of \$46,945.

**Appeals court ruling.** The Eighth Circuit Court of Appeals reversed the judgment and remanded the case for a new trial, holding that the jury was incorrectly instructed under the standard of *Price Waterhouse v. Hopkins*, 490 US 228 (1989). In *Price Waterhouse*, a splintered opinion, the Supreme Court addressed the proper approach to causation when an employer is motivated by both permissible and impermissible considerations in making an employment decision. Six Justices agreed that once a Title VII plaintiff shows that discrimination was a “motivating” or “substantial factor” in an employer’s adverse action, the burden of persuasion then shifts to the employer to show that it would have taken the same action regardless of the impermissible consideration. Justice O’Connor went further, holding that to shift the burden of persuasion to the employer, the plaintiff had to offer “direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision.”

The Eighth Circuit applied this standard, holding that the employee was required to present “[d]irect evidence ...sufficient to support a finding by a reasonable fact-finder that an illegitimate criterion actually motivated the adverse employment action.” Upon presentation of such direct evidence, the burden was shifted to the employer to persuade the fact-finder that it was “more likely than not that the decision would have been the same absent consideration of the illegitimate factor.” But the jury instruction in this case had erroneously shifted the burden of persuasion from the employee to his employer upon proof by any evidence – direct or otherwise – that age was a “motivating factor” in the employment decision. Since the employee had failed to present the direct evidence required, he should have been held to the burden of persuasion that applies to non-mixed-motives claims, held the appeals court. Thus, the jury should have been instructed to determine whether the employee met his burden of proving that “age was the determining factor” in his demotion.

**Supreme Court.** The High Court was presented with the question of whether a plaintiff must “present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case.”

However, prior to reaching that question, the Court reasoned that it was required to determine whether the burden of persuasion ever shifts to the party defending against a purported mixed-motives discrimination claim brought under the ADEA. The Court concluded that it does not.

Because Title VII is materially different from the ADEA with regard to the relevant burden of persuasion, precedent construing Title VII does not control construction of the ADEA, said the High Court. Subsequent to *Price Waterhouse*, Congress amended Title VII “by explicitly authorizing discrimination claims in which an improper consideration was ‘a motivating factor’ for an adverse employment decision,” wrote the Court. The High Court has never held that this burden-shifting framework is applicable to ADEA claims. “Unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor,” wrote the Court. Further, Congress neglected to add such a provision when it amended Title VII, even though it amended the ADEA at the same time in several other ways. “We cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA,” the Court said. “The Court’s interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* and *Price Waterhouse*.”

As to the question of whether the text of the ADEA authorizes a mixed-motives age bias claim, the High Court concluded that it does not. The ADEA provides that “[i]t shall be unlawful for an employer ...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, *because of* such individual’s age,” the Court emphasized, citing 29 USC §623(a)(1). The ordinary meaning of the requirement that an adverse action was taken “because of” age is that age was the ‘reason’ that the employer decided to act,” wrote the Court. Thus, to establish a disparate treatment under “the plain language” of the ADEA, “a plaintiff must prove that age was the ‘but for’ cause of the employer’s adverse decision,” instructed the Court. It then follows that under §623(a)(1), “the plaintiff retains the burden of persuasion to establish that age was the ‘but-for’ cause of the employer’s adverse action,” the Court said. Thus, the burden required to establish employer liability is the same in an alleged mix-motives case as in any other ADEA disparate treatment claim.

The High Court rejected any notion that the interpretation of the ADEA is controlled by *Price Waterhouse* and its shifting of the burden of persuasion in Title VII mixed-motives claims. It is “far from clear” that the Court would use the same approach if considering the question today. “[It] has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply.” The problems associated with the application of *Price Waterhouse* “have eliminated any perceivable benefit to extending its framework to ADEA claims,” wrote the Court.

Concluding that the plaintiff in an ADEA disparate-treatment claim must prove that age is the “but-for” cause of the employment action challenged, and that the burden never shifts to the employer to show the same action would have been taken regardless of age, the High Court vacated the Eighth Circuit’s judgment and remanded the matter for further proceedings.

**Dissenting opinions.** Justice Stevens, with whom Justices Souter, Ginsburg, and Breyer joined in dissenting, would not have applied the “‘but-for’ causation standard” and would have answered only the question presented to the Court, finding that a plaintiff is not required to present direct evidence of age bias to obtain a mixed-motives jury instruction. “The Court’s endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law,” wrote Justice



Stevens. The "but-for" standard adopted by the Court was rejected in *Price Waterhouse* and by Congress in the Civil Rights Act of 1991, the Justice asserted. "Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking."

In a separate dissent, Justice Breyer, joined by Justices Souter and Ginsburg agreed with Justice Stevens' conclusion that mixed-motives instructions are appropriate in ADEA cases. Justice Breyer also disagreed with the majority's conclusion that the words "because of" in the statutory text requires an ADEA plaintiff to show that age was the "but-for" cause of the challenged employment action. "The words 'because of' do not inherently require a showing of 'but-for' causation, and I see no reason to require such a showing," wrote the Justice.

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## IRS Seeks Comments on Business Use of Cell Phones

The IRS has issued a notice and request for comments regarding several proposals to simplify the procedures under which employers substantiate an employee's business use of employer-provided cellular telephones or other similar telecommunications equipment (cell phones). The notice also requests suggestions for alternative approaches to simplify the procedures under which employers substantiate an employee's business use of employer-provided cell phones.

**Background.** If an employer provides a cell phone to an employee, and the employer acquires and pays the costs of using the cell phone, the employee receives a fringe benefit. To the extent that the employee uses the employer's cell phone for business purposes, the fair market value of such usage qualifies as a working condition fringe benefit excludable from the employee's gross income and the cell phone expense is a deductible business expense for the employer, provided that the substantiation requirements of Code Sec. 274(d) are met. However, to the extent the employee uses the employer's cell phone for personal purposes, the fair market value of such usage is includable in the employee's gross income. The employer's cost to provide the cell phone is not determinative of the fair market value of the benefit received by the employee.

The IRS and Treasury Department are considering the following proposals to simplify the Code Sec. 274(d) substantiation requirements applicable to employee usage of employer-provided cell phones.

**Simplified substantiation methods.** The IRS and Treasury Department are considering three alternative methods to simplify the substantiation requirements applicable to employee usage of employer-provided cell phones: a minimal personal use method, a safe harbor substantiation method, and a statistical sampling method (or a combination of them). Any simplified cell phone substantiation method will be optional; taxpayers may continue to comply with current Code Sec. 274(d) substantiation requirements.

*Minimal personal use method.* The IRS and Treasury Department are considering two proposals that would allow an employer to deem all of an employee's usage of an employer-provided cell phone as business usage. Under the first proposal, the entire amount of an employee's use of an employer-provided cell phone would be deemed to be for business purposes if the employee can account to his or her employer with sufficient records to establish that the employee maintains and uses a personal (non-employer-provided) cell phone for personal purposes during the employee's work hours.

Alternatively, the second proposal would define a specified amount or type of "minimal" personal use that would be disregarded in determining the amount of personal use of an employer-provided cell phone. For example, "minimal" could be defined by reference to a particular number of minutes of use or for certain personal purposes.

*Safe harbor substantiation method.* The IRS and Treasury Department are considering a safe harbor method under which an employer would treat a certain percentage of each employee's use of an employer-provided cell phone as business usage. The remaining percentage of use would be deemed to be for personal purposes. For this proposal, the IRS and Treasury Department propose a business use percentage of 75 percent.

*Statistical sampling method.* The IRS and Treasury Department are considering a proposal that would allow employers to use statistical sampling techniques to measure an employee's personal use of an employer-provided cell phone. In general, an employer could use an approved statistical sampling methodology similar to that provided in Rev. Proc. 2004-29 to determine the percentage of personal use of employer-provided cell phones. The employer would multiply that percentage times the value of each employee's total usage to determine the value of personal usage. The remaining portion of the employee's usage would be deemed to be for business purposes.

**Simplified fair market value determination.** To the extent that an employee's use of an employer-provided cell phone does not qualify as a working condition fringe benefit (because the employer does not satisfy Code Sec. 274(d) or the cell phone is used partially for personal purposes), the fair market value of an employee's use of the employer-provided cell phone is a taxable fringe benefit that is includable in the employee's gross income. An employer's cost to provide the cell phone is not determinative of the fair market value of an employee's fringe benefit. The IRS and Treasury Department are interested in understanding the methods employers currently use to arrive at the fair market value to an employee of an employer-provided cell phone. The IRS and Treasury Department are considering whether a simplified valuation method would be helpful and appropriate to determine such fair market value.

**Request for comments.** The IRS and Treasury Department request public comments on the proposals contained in the notice and suggestions for other approaches for modifying and simplifying the substantiation requirements applicable to employee usage of employer-provided cell phones. The IRS and Treasury Department are particularly interested in any comments regarding:

- The specific provisions that should be required to be included in an employer's written policy prohibiting personal use of employer-provided cell phones;
- The types of employee records sufficient to establish that the employee maintains and uses a personal (non-employer-provided) cell phone for purposes of the first proposed minimum personal use method contained in the notice;
- How to define a specified amount or type of "minimal" personal use (e.g., a maximum number of minutes of use or a list of acceptable personal uses) that should be disregarded in determining the amount of personal use of an employer-provided cell phone for purposes of the second proposed minimum personal use method contained in the notice;
- The business use percentage that should be applied in the proposed safe harbor substantiation method contained in the notice and the data and rationale upon which it is based;
- The methods currently used by employers to determine the fair market value of an employee's use of an employer-provided cell phone; and
- Whether a simplified method of determining the fair market value of an employee's use of an employer-provided cell phone would be appropriate, and, if so, suggested simplified methodologies for determining such fair market value.

Comments must be submitted in writing on or before September 4, 2009, and should include a reference to Notice 2009-46. Submissions should be sent to: Internal Revenue Service Attn: CC:PA:LPD:PR (Notice 2009-46), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044.



Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (Notice 2009-46), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. Alternatively, comments may be submitted electronically directly to the IRS via the following e-mail address: [Notice.comments@irs.counsel.treas.gov](mailto:Notice.comments@irs.counsel.treas.gov). Please include "Notice 2009-46" in the subject line of any electronic communication. All comments will be available for public inspection and copying.

Source: [IRS Notice 2009-46, IRB 2009-23, June 8, 2009](#).

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