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November 2009

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LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

Miscellaneous

EEOC Assists Employers with Pandemic Issues as they Relate to the Americans with Disabilities Act

The EEOC issued a technical assistance document entitled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" to assist employers with questions about how the provisions of the ADA apply during a flu pandemic. Employers may ask employees about possible cold and flu symptoms because such inquiries are not considered disability-related inquiries. Employers may send employees home if they display flu-like symptoms during a pandemic. It is not recommended that employers mandate flu shots because that could violate the religious belief of some employees. Employers may consider encouraging employees to take the flu vaccine rather than requiring them to do so. During a pandemic, employers may encourage employees to telecommute or require their employees to

adopt infection-control practices (such as regular hand washing) or the wearing of personal protective equipment. Employers may require employees who have been away from the workplace during a pandemic to provide doctor's notes certifying their fitness to return to work. The EEOC cautions that health care professionals may be too busy during and immediately after a pandemic outbreak to provide such certifications and therefore employers may need to rely on local clinics to provide forms, stamps or e-mails to certify that the employees do not have pandemic flu and can return to work. For more information, please check the EEOC web site at www.eeoc.gov.

EEO Poster Update

On October 22, 2009, the Equal Employment Opportunity Commission ("EEOC") announced changes to its current EEO poster (September 2002 edition). The new poster or supplement must be posted by November 21, 2009 for all employers with 15 or more

employees. The new EEO poster (November 2009 edition) includes the Genetic Information and Nondiscrimination Act ("GINA"), as well as the recent ADA Amendments Act of 2008 ("ADAAA"). The EEOC allows employers to either post the November 2009 version of the EEO Poster, or they may post an "EEO is the law" poster supplement. The supplement (available at www.eeoc.gov/gina_supplement.pdf) must be posted next to the September 2002 edition of the EEO poster. The complete revised EEO poster may be accessed at www.eeoc.gov/self_print_poster.pdf.

E-Verify Extended

The Department of Homeland Security has extended until the end of September 2012, the authorization for E-Verify. As of September 8, 2009, federal contracts must include a clause that requires companies conducting businesses with the federal government to enroll in the E-Verify program. E-Verify is voluntary for other businesses. However, several proposals pending in Congress would require all U.S. employers to use E-Verify.

Child Labor Law Violation Results in \$50,000 Fine

The Department of Labor's Wage and Hour Division assessed a \$50,000 penalty against a restaurant in connection with the death of a 17-year old employee who worked as a parking valet. The Fair Labor Standards Act prohibits 17-year old workers from being required to drive vehicles as part of their employment duties once the sun goes down. Driving a vehicle in the daytime can only be incidental to the worker's job duties.

New Legislation

Family & Medical Leave Act Amended

On October 28, 2009, the President signed a defense bill that included an amendment to the FMLA (H.R. 2647). The amendment

mandates exigency leave to all covered active duty members and expands the military caregiver provisions to family members of certain former service members. Previously exigency leave was available only to families of members of the National Guard and Reserve. The caregiver leave is also extended to family members of injured or seriously ill veterans. The caregiver leave is the one that allows 26 workweeks of leave in a single 12-month period, and the 12-month period commences when the employee starts using military caregiver leave.

Unemployment Compensation Extended

Congress has extended the unemployment compensation benefit again granting 16 to 20 more weeks of compensation, depending on the unemployment rate in each state. This extension means that employees in some states will now be eligible to receive up to 99 weeks of unemployment benefits. Employers will pay for this extension with the federal unemployment compensation tax.

GINA is Coming

We have had 18 months to prepare for the effective date of the Genetic Information Nondiscrimination Act (GINA) and the time is here—November 21, 2009. As a reminder, "genetic information" is defined as 1) an individual's own genetic tests; 2) the genetic tests of family members; and 3) **the manifestation of a disease or disorder in family members**. Thus, if an employee is known to have a genetic predisposition to a disease, the employee could not be excluded from a position that might exacerbate his condition. Also, genetic information that is received inadvertently or with the permission of the employee may not be used for purposes of prohibiting employment actions based on genetic information.

Employers with 15 or more employees are covered by GINA, those with less than 15 employees or those that are exempt from

coverage under Title VII are not covered under GINA. The Act prohibits employers from refusing to hire, terminating, classifying or segregating an employee based upon genetic information, as well as retaliation against employees for alleging violations of the Act or participating in investigations concerning alleged violations. Further, employers must be extremely cautious about how they gather and maintain any genetic information concerning employees. Information collected must be on "separate forms and in separate medical files", and such records must be kept confidential and stored in locked files in the same manner as medical records under the Americans with Disabilities Act.

Supervisors and others who interview employees or receive requests for leave based on the employee's own health issues or the health issues of their families will need to be trained on the new Act. Handbooks and EEO policies will need to be revised to include prohibition against discrimination based on genetic information. Post offer, pre-employment medical examinations or return to work/fitness for duty examinations cannot request or include any inquiries about family medical history. When discussing the need for medical leave or reasonable accommodation, do not seek information that may reveal genetic information. The EEOC has issued guidance materials on GINA, available at http://www.eeoc.gov/policy/docs/qanda_geneticinfo.html

Discrimination

No Retaliation for Discharged Employee Taking Intermittent Leave Under FMLA

An employee was discharged for performance reasons while on intermittent FMLA leave. She argued that she was discharged in retaliation for taking FMLA leave which intent was evidenced by her direct supervisor's

warnings that her absences were affecting her job performance. However, the employee's supervisor was able to show that his warnings predated the employee's use of FMLA leave, and the individual responsible for discharging her was unaware that the employee was taking FMLA leave. Further, the company's policy provided for firing employees who fail to respond to prior warnings and the employee had been given several warnings before she was discharged. The district court granted summary judgment in favor of the employer and the appellate court affirmed. *Long v. Teachers' Retirement System of Illinois*, No. 08-3094 (7th Cir. 10/23/09).

Seasonal Affective Disorder Requires Accommodation

A teacher presented her school district with a note from her psychologist requesting that she be transferred to a classroom with natural light because of her seasonal affective disorder (SAD). The doctor stated that working in natural exterior light was a medical necessity. Another teacher was willing to trade classrooms with her but the school district rejected the trade. The court said that even if the school district incurred some costs to relocate the teacher to a different classroom, a jury could reasonably find that the move would not have been an undue hardship. *Ekstrand v. School District of Somerset*, No. 09-1853 (7th Cir. 10/6/09)

Sarbanes-Oxley Act Complainant Must Follow Timeline Rules

A compliance manager alleged she was fired for reporting to American International Group, Inc. that the corporation may be violating a federal law. However, she waited too long to file her lawsuit after OSHA ruled on her complaint. The court dismissed the complaint stating that it lacked subject matter jurisdiction to consider the retaliation case under Sarbanes-Oxley (SOX) because the lawsuit was filed too late. *Lebron v. American Inv. Group Inc.*, No. 09 Civ. 4285 (S.D. NY 2009)

Employees whose employers are subject to SOX and who feel they have been discriminated against in retaliation for bringing a violation of law to the attention of their employer may file a SOX complaint. The complaint must be filed in writing with OSHA within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant). OSHA investigates complaints similar to investigations conducted by the Equal Employment Opportunity Commission and provides a finding. Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order.

Reminder to do Your Due Diligence Before Hiring

Eric Myers sued TooJay's alleging they violated his rights under federal law by failing to hire him because he had previously filed for bankruptcy protection. The case was heard in the Middle District of Florida where the court granted partial summary judgment to TooJay's. It found that the statute did not cover Myers' allegation that TooJay's withdrew their offer of employment when it learned of his bankruptcy proceeding. However, the court said that because Myers presented evidence that he was actually hired and that TooJay's changed its mind, he could proceed to trial on the theory that the company fired him in violation of the bankruptcy code. *Myers v. TooJay's Management Corp.*, No. 5:08-cv-365 (2009)