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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.

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#### *Proposed Legislation*

#### **Paid Family Leave Act Proposed**

The anticipated paid leave amendment to the Family & Medical Leave Act was introduced in Congress last month by Representatives Pete Stark (D-CA), George Miller (D-CA), Lynn Woolsey (D-CA), and Carolyn Maloney (D-NY). Labeled the Family Medical Leave and Insurance Act of 2009 (the "Act"), the Act provides 12 weeks of paid family and medical leave. The stated reason for this proposal was that many FMLA eligible employees are not able to utilize the benefits of the FMLA because FMLA leave is unpaid leave. The Act would take effect on January 1, 2011 and apply to periods of leave that commence on or after January 1, 2012. The Act would

- provide all workers with 12 weeks of paid leave over a 12-month period to care for a new child, provide care for an ill family member, treat their own illness, care for a wounded veteran, or

deal with the deployment of a family member;

- provide paid benefits through a new trust fund that would be financed equally by employers and employees (each would contribute 0.2% of the employee pay);
- progressively tier the benefits so that a low wage worker (earning less than \$30,000) will receive full or near full salary replacement, middle income workers (\$30,000- \$60,000) receive 55% wage replacement, and higher earners (over \$60,000) receive 40-45%, with the benefit capped at approximately \$800 per week; and
- allow states and businesses with materially equivalent or better benefits to opt-out of the program.

The Secretary of Labor would administer the program and would have the authority to contract with the states to provide the benefits. Of course, the proposed Act prohibits an employer from interfering with,

discriminating or retaliating against any employee for exercising their paid leave rights and provides these employees with a private cause of action.

### **Effective Date of E-Verify Rule Delayed Until June 30, 2009**

The federal government has pushed back, for the third time, the effective date of a new rule requiring federal contractors to use the federal government's E-Verify electronic employment eligibility verification system. The latest effective date is June 30, 2009. This is the system that organizations with federal contracts would be required to use to determine if their new hires and existing employees were authorized to work in the United States. E-Verify would apply to federal contracts with a performance period of more than 120 days and a value of more than \$100,000. Service and construction subcontracts of a covered contract would be required to include the E-Verify clause if the subcontract's value is more than \$3,000.

#### *Religious Discrimination*

### **New Guidance on Religious Discrimination**

The Equal Employment Opportunity Commission updated its religious discrimination guidance under Title VII. To assist employers, they also developed a fact sheet summarizing the lengthy new guidance. The fact sheet in question and answer form is available at [http://www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html). EEOC guidance is intended to assist employers in their compliance with the laws and to provide consistency in the application of those laws. Courts are not bound by the EEOC's views and policies but they are given "great weight" by the courts. What constitutes religious beliefs is broadly interpreted and includes beliefs outside a formal church or organized religion and beliefs that may seem illogical or unreasonable to others. A belief is religious under Title VII if it is religious in the

person's own scheme of things, meaning the individual has a sincere and meaningful belief that occupied "in the life of its possessor" a place parallel to that filled by God. The guidance does not change an employer's obligation to reasonably accommodate the religious beliefs of an employee. Such accommodation is any adjustment to the work environment that will allow the employee to comply with his religious beliefs. The accommodation is not required if it imposes an undue hardship upon the employer of more than a *de minimis* cost or burden. Religious harassment remains a form of religious discrimination.

### **Allowing Police Officer to Wear Headscarf Imposed an Undue Burden on Employer**

A Muslim police officer requested an accommodation to wear a headscarf in accordance with her Islamic beliefs. The city rejected her request but she repeatedly wore her headscarf to work. The city sent her home for failing to comply with its department directive that prohibited wearing of religious symbols or clothing as part of the uniform. After the police officer was suspended, she filed a lawsuit. The court decided that she established a *prima facie* case of religious bias because her religious beliefs were sincere. However, the court granted the city's summary judgment because the request would detrimentally impact the perception of the department's impartiality by citizens of all races and religions which the police serve and protect. *Webb v. City of Philadelphia*, No. 07-3081 (3d Cir. 2009)

#### *Discrimination Cases*

### **Cat's Paw Evidence Barred in USERRA Lawsuit**

A U.S. Army reservist working at a hospital alleged he was fired because his supervisor resented his role in the military. After he was fired for insubordination, shirking of duties, and poor attitude, he sued under the

Uniformed Services Employment and Reemployment Rights Act. Although the human resource executive and not his supervisor discharged him, he alleged that the human resource executive was a “cat’s paw” for his supervisor who harbored discriminatory animus toward him. The cat’s paw theory seeks to prove that the firing official acts as the conduit of the supervisor’s prejudice – his cat’s paw. The trial court permitted the jury to hear evidence of the supervisor’s attitude toward the reservist’s role in the military and the jury found in favor of the reservist. The appellate court said that while a plaintiff may pursue a cat’s paw theory of liability under USERRA, the trial court should not have permitted the supervisor’s prejudice to be heard by the jury because the trial court failed to first determine whether a reasonable jury could find that the supervisor’s influence in the decision rose to the required level of being a “singular influence” over the human resource executive’s decision. Since the evidence indicated that the human resource executive conducted an independent investigation of the reservist’s alleged workplace infractions and had obtained information from sources other than the supervisor, the appeals court concluded that the evidence should have been barred from the jury. *Staub v. Proctor Hospital*, No. 08-1316 (7<sup>th</sup> Cir. 2009)

**Misconduct Discovered During FMLA Leave Justifies Discharge**

A manager took Family and Medical Leave but was discharged the day he returned from

leave. The manager had a 15-year record of positive work reviews. However, during his leave an investigation revealed that he had likely caused and covered up shipping problems discovered at the terminal he managed. The manager offered no evidence that the company acted with discriminatory intent when it fired him for his performance shortcomings or that he would have retained his job had he not taken FMLA leave. Further, he was unable to show that he was treated less favorably than similarly situated employees. *Cracco v. Vitran Express Inc.*, No. 07-3827 (7<sup>th</sup> Cir. 2009)

*Fair Labor Standards Act*

**Exempt Employees May Be Required to Use Vacation Accrual**

The Department of Labor issued an Opinion letter (FLSA2009-2) addressing whether an employer may require exempt employees to use accrued vacation time during a temporary plant shutdown of less than one workweek without affecting their exempt status. The DOL answered in the affirmative and said that exempt employees may be forced to use accrued vacation time as long as they receive their guaranteed salaries. The DOL said that since employers are not required to provide any vacation time to employees under the FLSA, there is no prohibition on an employer giving vacation time and later requiring that the vacation time be taken on specific days.