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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.

Discrimination

Sleeping on the Job Good Reason for Discharge

A sanitation worker was discharged after he was found sleeping on the job. He claimed his discharge was a pretext for discrimination alleging the employer violated the Americans with Disabilities Act because he had Graves disease and diabetes. The district court disagreed finding that the employer had provided a legitimate nondiscriminatory reason for discharging the employee, i.e., violating the company policy prohibiting sleeping on the job. According to the employee, he simply took a break but was not sleeping-instead he rested his eyes for ten or fifteen minutes. He alleged that at times when he felt he could not perform certain tasks due to dizziness and other symptoms, his co-workers assisted him. However, he worked without any restrictions imposed by his doctor. The court found that the employee did not produce facts sufficient to show that

management acted based on discriminatory animus for his disability. *McNary v. Schreiber Foods, Inc.*, No. 07-3378 (8th Cir. 2008).

Sleeping Qualifies as Major Life Activity

A trainee was dismissed from an FBI training program after repeatedly requesting to be stationed in his hometown. An FBI counselor opined that he was suffering from post-traumatic stress disorder (PTSD) after being held hostage in a home invasion. The trainee alleged that the PTSD impaired his ability to sleep more than 2-4 hours per night and that, when his supervisor found out about the PTSD, the supervisor trumped up reasons to have him expelled from the program. One of the arguments the FBI made was that the plaintiff did not sufficiently show that his sleep disorder was adversely affecting his job performance. The court held that sleeping was a major life activity under the Rehabilitation Act and that the trainee presented sufficient evidence that the PTSD

substantially limited his ability to sleep. His sleeping impairment was severe and persisted for five months. Although the trainee was not required to prove that sleeplessness affected his performance, the trainee averred that the FBI's proffered reason for termination, his poor socialization skills, was caused by being overly tired. *Desmond v. Mukasey*, 530 F.3d 944 (D.C. Cir. 2008)

Sexual Relations Qualifies as a Major Life Activity Under Rehabilitation Act

After the candidate passed the entrance examinations for the U.S. Foreign Service and received a medical clearance, she was diagnosed and treated for stage-one breast cancer. The State Department revoked her medical clearance because she would be unable to receive adequate post-surgical follow-up care at many of its overseas posts. The candidate did not seek an accommodation, arguing that she was cancer-free and required no specialized follow-up care. Although the court found the candidate was not actually disabled because her post-surgery inability to work was temporary and her doctor had declared her cancer-free, the candidate had a record of impairment plus the candidate was permanently impaired in the major life activity of engaging in sexual relations. The candidate explained, "I now find that the prospect of dating and developing an intimate relationship is just too painful and frightening. While I have overcome the physical disease, my ability to enter into romantic relationships has been crippled indefinitely and perhaps permanently." Based on the U.S. Supreme Court's 1998 holding in *Bragdon v. Abbot* that human reproduction qualifies as a major life activity, this court held that the candidate could show that she was limited in the major life activity of sexual relations. *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008)

Suspension of TSA Worker Upheld

An Egyptian-born Muslim aviation security expert employed by the TSA was suspended without pay when his security clearance was not renewed. The court found that without the clearance, the employee could not establish a *prima facie* case of religious bias. The Court found that a plaintiff who lacks a minimum objective qualification for a position, such as not having a license or similar prerequisite, cannot establish a *prima facie* case under a mixed-motive theory. The employee's job required him to have access to national security information which he could not do without a security clearance. *Makky v. Chertoff*, 2008 U.S. App. LEXIS 16687(3d Cir. 2008).

New Legislation

Florida: Governor Signs Work Readiness

On June 30 Gov. Charlie Crist signed a bill implementing the Ready to Work Program, Chapter 2008-35 effective July 1, 2008. This program helps employers in the hiring process by creating a new Ready to Work credential that demonstrates high school graduates' readiness for employment. To earn the credential, high school students must successfully demonstrate their competency in, and pass skill assessments at, Reading for Information, Applied Mathematics, and Locating Information. The new program has the potential to give employers a competitive edge by reducing turnover and training costs, saving hiring time and money, and increasing productivity and profitability. Employers may also use it as a no-cost way to supplement or replace their current employee assessments and as a tool to build the skills of current employees and evaluate employees for promotion. For more information on the Ready to Work program, visit www.floridareadytowork.com/employers.

Florida's Gun Bill

Employers lost round one in their effort to stop the enforcement of Florida Statutes §790.251, Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008. Judge Robert Hinkle ruled that while employees with concealed weapons permits could bring their guns onto employers' property, retailers could prohibit customers from doing so. It is important to remember that the statute defines an "employee" as a person who possesses a valid concealed weapon permit. "Employer" is defined as a business that has "employees". Thus, a business that has at least one worker with a valid Florida concealed weapon permit is subject to the statute's requirements but businesses that do not have a least one worker with a concealed weapon permit are not subject to the statute. Accordingly, these provisions of the statute remain in effect and prohibit "employers" from:

1. Conditioning employment on the fact that an "employee" or a prospective "employee" holds or does not hold a gun license;
2. Terminating or otherwise discriminating against any "employee" simply because the individual possesses a firearm inside his or her locked, privately-owned vehicle;
3. Preventing any "employee" from entering the parking lot or place of business because his or her vehicle contains a legal firearm; or

4. Taking any action against an "employee" based upon verbal or written statements of any party concerning possession of a firearm stored inside a motor vehicle lawfully parked in a parking lot.

The law does not allow "employees" to bring their guns into the workplace. Further, the prohibitions do not apply to:

- o School property
- o Correctional institutions
- o Nuclear powered electricity generating facility
- o Where substantial activities involving national defense, aerospace, or homeland security is conducted
- o **Where primary business is the manufacture, use, storage, or transportation of combustible or explosive materials**
- o **A motor vehicle owned, leased, or rented by a public or private employer or the landlord of a public or private employer**
- o On any property upon which possession of a firearm or other legal product by a customer, employee, or invitee is prohibited pursuant to any federal law, contract with a federal government entity, or general law of this state.

Employers that have policies that prohibit employees from keeping a gun in their vehicles on company property will need to revise the policies to comply with the law.