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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.

Family & Medical Leave Act

New Rules Effective January 16, 2009

The Department of Labor has significantly revised and added to the benefits allowed employees under the FMLA, revised the definition of serious health condition, and employers' responsibilities. A new poster must replace the prior poster. The poster and new forms are available from the Department of Labor's website:

<http://www.dol.gov/esa/whd/fmla/finalrule.htm>

Personnel policies for **employers of 50 or more employees** should be amended to address the new rules.

Discrimination

No Age Discrimination Shown

A 59-year old police officer alleged that he was discriminated against based on his age when he was required to participate in a more rigorous annual training program than in

previous years. The court found that all police officers were required to participate in the more rigorous training and the 59-year old officer was treated no differently than younger officers. Further, the officer did not show that the new program had a significantly disparate impact on older officers, although some of the older officers found the program exhausting. *Summers v. Winter*, No. 08-12039 (11th Cir. 2008)

Insubordination is Legitimate Reason for Discharge

A black employee failed to show that his discharge for insubordination was a pretext for discrimination or retaliation. The employee alleged that his foreman was a racist and that the manager who discharged him knew the foreman who reported the insubordination was aware of the foreman's racist animus. The court ruled that the foreman's racist statements made several years before could be considered in determining whether the manager who

discharged him was acting as a “cat’s paw” for the foreman’s animus. However, the evidence was insufficient to show that the manager’s decision was influenced by the foreman’s racism because the manager conducted an independent investigation that included obtaining the employee’s version and there was no evidence that the manager/decision maker was biased. *Clack v. Rock-Tenn Co.*, 2008 WL 5378026 (4th Cir. 2009)

Allergy to Fragrance Chemical

A former hospital nurse had an allergy to a common fragrance chemical which she disclosed during her interview before she was hired. She also submitted an affidavit and a doctor’s record that demonstrated a history of severe allergic reaction to the chemical that is found in over 500 different products. The court concluded that the nurse had a record of impairment under the Americans with Disabilities Act and that she could proceed with her failure to accommodate and wrongful discharge claims against the employer. Under the “record of impairment” definition in the ADA, a plaintiff need only show that she has a history of an impairment that has substantially limited one or more major life activities of which the employer had knowledge. *Bridges v. Reinhard*, No. 3:08CV253 (E.D. Va. 2008)

Misspelled Doctor’s Note Dooms Employee

Tyson Foods Inc. rejected a note from an employee that stated she was being treated for a “recurry” rash. When questioned, the employee stated she did not write the statement on the doctor’s note but that someone in the doctor’s office added it. The doctor’s office, however, denied adding the statement to the return to work authorization. The employee alleged that she was challenged about the note only because she had a learning disability. The court said that even if Tyson was wrong in concluding that

the employee altered the note, there was no evidence that the company acted in violation of the ADA. *Blake v. Tyson Foods, Inc.*, No. 07-3189-CV-S-WAK (W.D. Mo. 2008)

Proposed Rules

E-Verify – Federal Contractors

E-Verify is a voluntary system for verifying the work eligibility of workers. The government proposed a new rule published in the Federal Register that would require most federal contractors and subcontractors to use E-Verify for both newly hired employees as well as those already working directly on a government contract. This requirement greatly expands the current E-Verify program, which applies only to new hires. SHRM and other business organizations filed suit arguing that the government exceeded its authority by mandating a program designed as a voluntary pilot project and by mandating the re-verification of existing employees, currently not allowed under E-Verify requirements. On January 8, 2009 the parties reached an agreement with the U.S. Department of Justice to delay the effective date of the new rule until February 20, 2009 to allow time for an expedited hearing on the merits of the case.

Pending Bills

Two Employment-Related Bills Pass House

Democrats in the House moved quickly to pass the Ledbetter Fair Pay Act (**HR 11**) and the Paycheck Fairness Act (**HR 12**) on Jan. 9, 2009. The Paycheck Fairness Act would amend provisions of the Equal Pay Act to remove caps on compensatory and punitive damages, authorize class actions, and make it much more difficult for employers to assert defenses. The Equal Pay Act, a portion of the Fair Labor Standards Act, is applicable to employers of any size.

The Ledbetter Fair Pay Act would overturn a U.S. Supreme Court decision. The Supreme Court ruled in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) that the time limits for filing a discrimination charge with the Equal Employment Opportunity Commission start to run when the employer makes a discriminatory decision about the employee's compensation, not each time the employee receives a paycheck affected by discrimination. H.R. 11 is aimed at reversing the *Ledbetter* ruling and would amend Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act to provide that the charge filing periods would be triggered whenever an employee is affected by application of a discriminatory compensation decision or practice. This bill makes it easier for employees to file claims against their employers allowing employees to bring a case up decades after a discriminatory act

occurred. A version of the Ledbetter Fair Pay Act failed to pass in July 2007. There has been no word when the Senate might consider the measures. Employer and business groups, including the Society for Human Resource Management (SHRM) and the U.S. Chamber of Commerce, have opposed passage of the Ledbetter Fair Pay Act.

Employee Free Choice Act

Democrats appear to be backing away, at least for now, from the Employee Free Choice Act (the card check bill) that would, among other things, allow unions to obtain representation of a workforce by merely collecting employees' signatures on cards. However, employers should not be too quick to relax on this issue. One of Barack Obama's campaign promises was, "We will pass the Employee Free Choice Act. It is not a matter of if but when."