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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

E-Verify Extension Cleared House Committee

The House Appropriations Committee approved a two-year extension for E-Verify, the federal government's electronic Employment program. The current authorization for E-Verify is set to expire on September 30, 2009. Extending the funding for E-Verify for two years will keep debate on the employment verification program alive and part of the legislative process.

COBRA Subsidy Update

Only an individual who is entitled to COBRA due to an involuntary termination of employment between September 1, 2008 and December 31, 2009 can be eligible for the subsidy as an Assistance Eligible Individual (AEI). The activation of an employee who is in the military reserve or National Guard should be treated as an involuntary

termination for purposes of the subsidy even though it is a leave of absence for other purposes. The employee and his or her family members do not lose eligibility for the subsidy due to eligibility for TRICARE. If a seasonal employee was eligible for health benefits, the end of his/her term of employment is an involuntary termination for purposes of the subsidy if the employee is willing and able to continue employment. On May 21, 2009, the Department of Labor began to accept appeals from former employees who believe their termination was involuntary but the employer denied the former employee's request to be treated as an AEI.

AEI's must pay 35% of the COBRA premium on an after-tax basis to be eligible for the 65% subsidy. This means that an employee cannot apply credits in a health reimbursement arrangement to pay his COBRA subsidy because such credits are treated as the employer's and not the employee's payment of COBRA. Also, no subsidy is available when the employer pays

the COBRA premiums as part of a severance agreement, for example. The COBRA subsidy does not have to be reported on either a W-2 or Form 1099. However, employers are still responsible for recordkeeping requirements.

Discrimination

Retaliation by Association Rejected

An employee alleged that he was terminated in retaliation for his fiancée having filed an EEOC charge against his employer alleging a violation of Title VII of the Civil Rights Act of 1964 as amended. A three judge panel of the Court of Appeals initially agreed that the employee could state a claim of retaliation under these circumstances. However, the *en banc* 6th Circuit Court of Appeals rejected plaintiff's contention that the statute should protect persons who are closely associated with someone who has engaged in protected activity. The Equal Employment Opportunity Commission filed an amicus brief supporting the Plaintiff's position based on its guidelines. However, no appellate court to date has followed the EEOC guidelines. All have held that the plain meaning of Title VII requires that the employee must have been engaged in protected activity in some way to complain of retaliation. While the plaintiff alleged he helped his fiancée file her EEOC charge, he could not prove the employer was aware of his assistance. If the employer is unaware of the protected activity, the employer cannot discriminate against him because of it.

Thompson v. North American Stainless LP, No. 07-5040 (6th Cir. 2009).

Gender Stereotyping

In an interesting turn of events, a male employee who was accused of sexual harassment by a female coworker and then fired was able to establish that his discharge was based on gender stereotyping. The female coworker accused the plaintiff of harassing and stalking her when she refused

to have sex with him. No investigation was conducted, however, the Plaintiff did admit to accessing the coworker's email account, calling her at home, and sending her a note. The employer discharged the plaintiff stating, "You probably did what she said you did because you're male and nobody would believe you anyway." The court found that a reasonable jury could construe the statement as an invidious sex stereotype. *Sassaman v. Gamache*, No. 07-2721-cv (2nd Cir. 2009)

Age Discrimination Test is "But For"

Plaintiff Gross filed a lawsuit against his employer alleging that the employer demoted him in violation of the Age Discrimination in Employment Act (ADEA) which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." The trial court instructed the jury to enter a verdict for Gross if he proved by a preponderance of the evidence, that he was demoted and his age was a motivating factor (i.e., played a part) in the demotion. The jury returned a verdict for Gross and the Eighth Circuit reversed. The U.S. Supreme Court held on June 18, 2009 that a plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. In other words, the adverse action would not have occurred but for the individual's age. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. The Supreme Court said it has never applied Title VII's burden-shifting framework to ADEA claims. Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was a "motivating factor" for the adverse action, the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. *Gross v. FBL*

Financial Services, Inc., No. 08-441 (S. Ct. 2009)

No Lilly Ledbetter Protection for Failure to Promote Claim

When Congress passed the Lilly Ledbetter Fair Pay Act without any committee action, little floor debate, and no amendments, and President Obama quickly signed the bill into law, it became clear that multiple lawsuits would follow to clarify the breadth of the Act. Because the bill was rushed through Congress without proper debate, there is no legislative history to define what the new law's reference to "other (discriminatory) practice" might mean beyond pay discrimination. In one of the first cases to interpret Lilly Ledbetter, a terminated employee in Pennsylvania claimed that the Ledbetter relaxed time limits applied to her failure-to-promote claims. Alleging a continuing violation of Title VII, the former employee claimed that her former employer illegally denied her a series of promotions, and then retaliated by firing her when she complained. The judge stated that a failure to promote claim which is separate from a discriminatory compensation claim, does not fall within the purview of Lilly Ledbetter. Further, the court found that each promotion that the former employee claimed was a discrete act subject to the 180/300 day statute of limitations, not a continuing violation, and her time for making those claims had past. *Rowland v. Certain Teed Corp.*, No. 08-3671 (E.D. Pa. 5/21/09)

Proposed Legislation

Healthy Families Act Introduced

The Society for Human Resource Management (SHRM) advised that the Healthy Families Act has been introduced in both houses of Congress. The bill would require public and private employers with 15 or more employees to provide such employees with up to 56 hours of paid sick leave. Employees would be allowed to accrue

one hour of paid sick leave for every 30 hours worked and could start using the leave after 60 days of employment. The paid sick leave could be used for the employee's own medical needs or to care for a child, parent, spouse, or any other blood relative, or for an absence resulting from domestic violence, sexual assault or stalking. Sick leave under the HFA would be in addition to any leave provided by the FMLA, state leave laws, or workers' compensation laws. Leave taken by an employee under HFA could not be counted as leave under an employer's absence control or no-fault attendance policy. SHRM is opposed to the HFA as currently written. It believes a paid sick leave mandate as outlined in the HFA would limit employers' flexibility to design a benefit package that meets the needs of their unique workforce, resulting in significant costs for employers. SHRM encourages business owners to write their Members of Congress and express their views about the Healthy Families Act (H.R. 2460) and (S. 1152).

ADA Amendments Act Regulations Proposed

The Equal Employment Opportunity Commission (EEOC) voted 2-1 on June 17, 2009, in favor of a proposed revision of the Americans with Disabilities Act (ADA) Title I regulations. Amendments to the Title I regulations have been proposed to incorporate the ADA Amendments Act's (ADAAA) new definition of "disability," which took effect Jan. 1, 2009. While many of the changes would simply add language from the ADAAA to the Title I regulations, Republican Commissioner Constance Barker voted against the proposed regulations because she said that the creation of a presumptive list of disabilities, among other changes, went beyond the EEOC's rulemaking authority. Commissioner Barker said that she feared the courts would not give deference to the EEOC's regulations because they include things not part of the Act itself. Acting Chairman Stuart Ishimaru disagreed, saying

that the proposed regulations, which now have been sent to the Office of Management and Budget (OMB) for its review, “embrace the spirit Congress intended” by defining disability broadly. As a result, ADA cases will focus on whether there was unlawful discrimination, rather than whether individuals have disabilities covered by the law. Once the proposed regulations are approved, they will be published in the Federal Register for public comment.

The proposed regulations would make a number of changes to incorporate the ADAAA’s definition of disability, and the ADAAA’s examples of bodily functions considered major life activities. The definition of “substantially limits” would be loosened by the proposed rule. The proposed rule notes that an impairment may substantially limit a major life activity without severely or significantly restricting the performance of a major life activity. Language would be added noting that temporary, nonchronic impairments such as a cold, seasonal influenza, a sprained joint or broken bone that’s expected to soon heal ordinarily would not substantially limit a major life activity. However, the proposed rule states that in some circumstances an impairment that lasts less than six months may still be long-term

enough to substantially limit a major life activity, even though someone with an impairment of six months or less would not be regarded as having a disability, according to the ADAAA.

The proposed regulations state that certain impairments would consistently meet the definition of disability. These conditions would include blindness, deafness, intellectual and developmental disabilities, partially or completely missing limbs, mobility impairments, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic syndrome and schizophrenia. The individual assessment of whether someone has a disability would still be used, yet these impairments would be presumed covered by the ADA. The proposed rule also identifies other types of impairments—asthma, high-blood pressure, coronary artery disease, learning disabilities, back and leg impairments, carpal tunnel syndrome, hyperthyroidism and other psychiatric impairments, such as panic attacks, anxiety disorder and mild depression—that may be covered ADA disabilities. *Source: Society for Human Resource Management*