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March 2008

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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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#### *Discrimination*

##### **Employer Must be Given Chance to Correct Misconduct**

An employee alleged she was constructively discharged when she resigned after complaining about coworkers' misconduct. However, she reported the conduct of only one coworker after which the employer immediately investigated and determined that the conduct was not severe or pervasive enough to establish a hostile work environment. The comments alleged to have been made by the store manager included asking her about the sexual orientation of another woman, telling her that two women wanted to make a sandwich out of him, and that he had been wrongly written up for sexual harassment. The court held that these comments did not provide a basis for imputing knowledge to the employer that she was being harassed by other coworkers. *Anda v. Wickes Furniture*

Co., 2008 U.S. App. LEXIS 3433 (8<sup>th</sup> Cir. 2007)

##### **EEOC 2007 Charges Up for FY 2007**

The Equal Employment Opportunity Commission received 82,792 private sector discrimination charges in fiscal year 2007 which represents a 9% increase over the previous year. Race discrimination (30,510) remains the most common claim followed by retaliation (26,663), age (19,103), disability (17,734), sexual harassment (12,510), and pregnancy (5,587). In a poor economy, employers should brace themselves for more discrimination charges.

##### **Intake Questionnaire Filed with EEOC Constitutes a Charge**

The U.S. Supreme Court ruled that an intake questionnaire filed with the EEOC by an employee alleging age discrimination was sufficient to permit the employee to file a lawsuit after 60 days, regardless of the

fact that the employer had never received notice of the charge, the EEOC had not interviewed the charging party nor investigated the charge, and no formal charge document had been prepared. The Court ruled that the document constitutes a charge under the Age Discrimination in Employment Act (and possibly any other statute the EEOC enforces) if it (1) contains an allegation of discrimination, (2) names the employer, and (3) reasonably can be construed to request the EEOC to take remedial action to protect the employee's rights or otherwise settle a dispute between employer and employee. *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2/27/08)

### **"Familial Status" Not Actionable Under Title VII**

A nonprofit corporation discharged its CEO, his wife and daughter pursuant to its anti-nepotism policy. The family alleged their discharge amounted to sex discrimination. The Tenth Circuit Court of Appeals held that Title VII does not protect either the family unit or individual family members from discrimination based on their familial status alone. Further, the sex discrimination claims did not survive because they were intertwined with the familial status theory of relief. *Adamson v. Multi Community Diversified Services*, 102 FEP Cases 1061 (10<sup>th</sup> Cir. 2/1/08)

### *Disabilities*

The Equal Employment Opportunity Commission issued new guidance for employers and for disabled veterans comparing and contrasting the differences and similarities between USERRA and the Americans with Disabilities Act. The Uniformed Services Employment and Reemployment Rights Act prohibits employers from discriminating against employees or applicants for employment on

the basis of their military status or military obligations, and protects the reemployment rights of those who leave their civilian jobs to served in the uniformed services. It applies to all employers, regardless of size. The ADA applies to employers of 15 or more employees. Both USERRA and the ADA include reasonable accommodation obligations but USERRA requires employers to go further than the ADA by making reasonable efforts to assist a veteran who is returning to employment to become qualified for a job. You can download both the employers' guidance and the veterans' guidance using the following links: <http://www.eeoc.gov/facts/veterans-disabilities-employers.html> for the employers' guide and <http://www.eeoc.gov/facts/veterans-disabilities.html> for the veterans' guide.

### **Irritable Bowel Syndrome May be Disability**

This case raises an issue of first impression. A former employee with IBS was allowed to proceed with her case alleging disability discrimination. She presented evidence that her IBS requires her to be able to visit the restroom whenever the urge strikes and that sometimes she has uncontrollable bowel movements. She alleged that IBS affects her ability to lift heavy things without losing control of her bowels, and it requires her to remain close to a bathroom in case she has an uncontrollable bowel movement. The court allowed the case to proceed because it believes a jury could decide that controlling one's bowels is a major life activity and that a person who needs to be free to visit the restroom frequently is significantly restricted as to the condition, manner, or duration under which she can perform that major life activity as compared to the average person in the population. *Carrasco v. Spectrum Health Hospitals*, 2008 U.S. Dist. LEXIS 8666 (W.D. Mich. 2/6/08)

**Don't Forget to Guard Against  
"Association" Claims Under the ADA**

A nurse manager claimed she was fired by an Illinois hospital because of her husband's medical treatment costs. The hospital tried to have the case dismissed but the appeals court held that the nurse had provided evidence that the hospital's management was interested specifically in the high cost of her husband's medical treatment. The nurse's supervisor confronted her about the rising costs of her husband's medical claims in September 2004. A committee reviewed the expenses and found them unusually high and suggested he consider less expensive care. Again in February 2005 the supervisor approached the nurse about the husband's treatment, and in May 2005, the supervisor called a meeting and stated the hospital needed to creatively cut costs. The nurse was fired on August 3, 2005. The court noted that 42 U.S.C. § 12112(b)(4) prohibits employers from discriminating against an employee based on "the known disabilities of an individual with whom [the employee] is known to have a relationship or association." Claims under this section generally fit one of three categories: expense claims such as this one, disability by association claims and distraction claims. *Dewitt v. Proctor Hospital*, 2008 U.S. App. LEXIS 4157 (7<sup>th</sup> Cir. 2/27/08)

*Pending Legislation*

**Florida Legislators Consider Gun Bill Again**

Last year the Florida legislature debated a gun bill that would bar employers and business owners from prohibiting guns in vehicles on their parking lots. The bill did not pass. The topic is back again and has been traveling through committees in both the Senate and House. Senate Bill 1130 and House Bill 503, titled the "Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008" is backed by the National Rifle Association. [www.FLSenate.gov](http://www.FLSenate.gov) The bills would require employers, among others, to allow employees to have legally owned firearms locked inside their private vehicles in parking lots. The bills also specifically bar employers from: conditioning employment on prospective employees' agreement to refrain from keeping guns in their cars; attempting to prevent customers, employees, and guests from entering the company parking lot when there is a gun in the vehicle; and terminating or discriminating against employees for exercising their right to bear arms. Needless to say, employer and business groups are strongly opposed to the legislation alleging an intrusion into their private property rights.