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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.

New Legislation

Victims of Sexual Violence Leave

On July 2, 2008, Florida adopted a new law requiring employers with 50 or more employees to grant up to three working days' leave in a 12-month period to seek legal protection from sexual violence, obtain medical care or mental health counseling, obtain services from a victim service organization, make the employee's home secure or seek new housing, seek legal assistance, and to prepare for and attend court proceedings. Sexual violence is defined as sexual battery or lewd or lascivious acts committed on or in the presence of someone under the age of 16, or sexual performance by a child, or any other forcible felony involving a sexual act, regardless of whether criminal charges were filed. Leave may be taken with or without pay. To be eligible, an employee must have been employed for at least three months. Employers may require the employee to provide documentation showing the need for leave and must keep

such information confidential. Employers may not interfere with or retaliate against employees who use leave. Aggrieved employees have the right to file a civil suit for damages or equitable relief. This is similar to but not the same statute as the Florida Domestic Violence Leave Act of 2007.

Retaliation

Complaint Handling Protest Protected

A former hospital employee (employed on an as-needed basis) complained to her immediate supervisor about a male co-worker's unwanted physical contact. She sued the Hospital on the theory that it had violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 when she lost her job in a restructuring. The former employee complained that one day a male coworker came into a crowded Hospital lounge where there were no free chairs, plopped down on the plaintiff's lap, and whispered "You're pretty" into her ear. This happened sometime between her April hiring

date and late July or early August. That was not the first instance of the coworker's misbehavior. Approximately one week before that incident, the coworker had also sat on her lap and whispered a comment about her appearance. Around the first week of August, plaintiff reported the second incident to her supervisor. During this meeting, her supervisor expressed reluctance to speak to the coworker about the incident if the plaintiff was unwilling to file a formal complaint. However, after the plaintiff informed the supervisor that she had previously been the victim of a sexual assault, the supervisor agreed to speak to the coworker. The male coworker's offensive behavior stopped immediately after the plaintiff complained. The court held that the plaintiff had engaged in protected activity when she complained to the hospital's general counsel about the supervisor's handling of her initial complaint. Further, the court held that a reasonable jury could find the supervisor executed the restructuring plan, including declining to call plaintiff for on-call work, and ultimately terminating her in retaliation for her questioning the supervisor's response. *Magyar v. St. Joseph Regional Medical Center*, 2008 WL 4182647 (7th Cir. 9/12/08)

Disabilities

Reasonable Accommodation

A former worker with post-traumatic stress disorder and depression raised a factual issue as to whether her employer properly engaged in the interactive process required by the Americans with Disabilities Act to identify a reasonable accommodation. The worker's disorder was due to workplace harassment. She requested a transfer to another facility that would have violated the collective bargaining agreement. The court found that the company could have requested a variance and/or the employee could have applied for available nonunion positions but

the employer failed to explore other options. This suggests, the court concluded, that the employer could have taken other steps to find an appropriate reasonable accommodation for the employee. *Wilson v. International Truck and Engine Corp.*, No. 06 cv 3655 (N.D. Ill. 9/4/08)

Indefinite Absence Legitimate Reason for Discharge

A county employee was absent from work for three years before she was discharged. She had a workplace injury and was on temporary total disability. When her workers' compensation claim was resolved, the employer invited her to submit an application. She did not do so and later learned that she had been terminated. The court declined to find pretext in the employee's termination. During the employee's absence, the clerk's office was restructured and her position eliminated. "Although this would clearly have justified her termination, under state workers' compensation law she could not be terminated until her protective temporary total disability status was expired," wrote the court. *Dixon-Thomas v. Oklahoma County Board of County Commissioners*, No. 07-6249 (10th Cir. 9/18/08)

Hostile Environment Claim

The Circuit Courts of Appeals are split on whether a hospital work environment claim is viable under the Americans with Disabilities Act. In this case, an Illinois District Court held that a hostile environment harassment claim is viable under the ADA. Denying summary judgment to the employer, the court said a reasonable jury could find that the employee was subjected to verbal taunts, vandalism, and theft that interfered with his ability to do his job, conditions that might constitute a hostile environment. *Maggio v. Konica-Minolta Business Solutions USA*, No. 06 C 2893 (N.D. Ill. 9/15/08)