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September 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*

#### **Employee Must Prove Comparator is Similarly Situated**

A black employee working for a unionized newspaper alleged that she was discriminated against because of her race when the newspaper refused her request for a light duty assignment. She alleged that a white coworker with the same restrictions was allowed to work a light duty assignment and that she should have had the same accommodation. The court explained that the workers' assignments were based on seniority pursuant to the collective bargaining agreement, and the white coworker had started work with the newspaper three years before the black employee. The more senior employees were able to avoid doing the strenuous work. The two workers were not similarly situated in all relevant respects so the employee's race claim failed. *Tyson v. Gannett Inc.*, No. 07-2832 (7<sup>th</sup> Cir. 2008)

### *Family & Medical Leave Act*

#### **Employer's Failure to Inform of Ineligibility Not Fatal**

A part-time employee sued her employer for violating the Family and Medical Leave Act because the employer failed to inform her that she was not eligible for FMLA at the time she requested leave. The employee was not allowed to return to work after taking leave. The court joined three other appellate courts, including the 11<sup>th</sup> Circuit, in holding that the Department of Labor's regulations improperly expanded the scope of the statute. When Congress drafted the FMLA, it did not state that an employer who failed to advise an employee of her ineligibility would have to honor the ineligible employee's leave request. *Sinacole v. iGate Capital*, No. 07-1141 (3d Cir. 2008) Cautious employers should still provide notice to employees who are ineligible for FMLA as soon as possible just to avoid the cost of defending against a lawsuit.

## **Spouse Can't Claim FMLA Retaliation**

A police officer sued the sheriff and parish jail warden under Family and Medical Leave Act (FMLA), alleging that they retaliated against him because of an FMLA suit filed by the officer's wife against the sheriff and the warden. Ordinarily, cases seeking to enforce proscriptive rights are brought by the employees who were discriminated against. To make a prima facie case for retaliation under the FMLA provision making it unlawful for an employer to discriminate against an individual for opposing a practice made unlawful by the FMLA, a plaintiff must show that: (1) he was protected under the FMLA; (2) he suffered an adverse employment decision; and either (3a) that he was treated less favorably than an employee who had not requested leave under the FMLA; or (3b) the adverse decision was made because he took FMLA leave.

In support of his appeal, the police officer neither seriously argued that he opposed any practice made unlawful by the FMLA nor seeks to satisfy the criteria for a prima facie case of retaliation. Instead, he argued that he had given, or was about to give, information in connection with an inquiry into his wife's FMLA case; and (2) but for the fact that his wife settled her case, he was about to testify in support of her claims. He did not allege that he ever provided any information of any kind, formally or informally, in connection with an inquiry or proceeding relating to his wife's claim. Nor is there even an allegation that Defendants questioned the police officer regarding his wife's case. The police officer, the court said, seeks to avoid the literal confines of the FMLA by arguing that other courts have provided broader protections to an employee based on his or her familial relationship to an employee seeking to oppose an unlawful or discriminatory action under other anti-retaliation statutes. However, the court said it has been unwilling to expand anti-retaliation provisions in

another context. The court held that a plaintiff could not bring a retaliation claim against his employer under the FMLA based merely on his wife's protected activities. *Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368 (5th Cir. 2008)

## *Fair Labor Standards Act*

### **Joint Employment**

A nursing assistant worked for three staffing agencies and all of the agencies assigned the nursing assistant to work at the same hospital. While working at the hospital, the nursing assistant worked in excess of 40 hours per week for which she received only straight time pay. When sued for nonpayment of overtime, the hospital said it was not responsible for payment of overtime because she worked for the three agencies. The court disagreed finding that the facts and relevant factors established the hospital's status as a joint employer with the three staffing agencies. The court also rejected the hospital's claim that it exercised no control over the aid, noting that the hospital personnel carefully supervised and documented her work. Under the Fair Labor Standards Act, even where one entity exercises ultimate control over an employee, it does not preclude a finding that another entity exerts sufficient control to be a joint employer. *Barfield v. New York City Health & Hospitals Corp.*, No. 06-4137-cv (2d Cir. 2008)

## *New Legislation*

### **ADA Amendments Act**

A series of Supreme Court decisions narrowly interpreting the Americans with Disabilities Act of 1990 has resulted in an unusual alliance between the disability rights and business communities who together forged a compromise on this issue. The House of Representatives and U.S. Senate have

overwhelmingly passed the ADA Amendments Act. President Bush signed the Act into law on September 25, 2008 and it takes effect on January 1, 2009.

The amendments would result in a whole new segment of employees being classified as disabled under the ADA who do not meet the definition of having a disability under the current ADA because mitigating measures are available to them. The bill specifically states that "medication, prosthetics, hearing aids, assistive technology, learned behavior or adaptive neurological modifications" are not to be considered in determining whether there is an impairment that causes a substantial limitation on a major life activity. Only ordinary eyeglasses and contact lenses may be considered as mitigating measures.

The ADA Amendments Act of 2008 would provide a new definition of the "substantial limitation" on a major life activity requirement under the current law. "Substantially limits" would mean "materially restricts." The ADA Amendments Act instructs that courts are to construe broadly the definition of a disability.

The Act specifically defines a "major life activity" to include, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting,

bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." A major life activity also includes "major bodily functions," which includes "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." This list is not all inclusive.

The measure, according to a SHRM Government Affairs Department analysis, clarifies the current requirement that impairment must substantially limit only one major life activity, such as work, to be considered a disability, and retains the current law standard that the burden of proof remains with the employee for showing that he or she is a qualified employee with a disability.

The expanded definition of disability would not apply to a "transitory impairment" with an actual or expected duration of six (6) months or less; and employers would not be required to provide a reasonable accommodation to individuals regarded as disabled. The bill provides that a person is "regarded as" having a disability if the employee establishes that he or she has been discriminated against because of an actual or perceived mental or physical impairment.