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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.

Disabilities Law

Regulations Finalized Implementing the ADA

On March 24, 2011, the Equal Employment Opportunity Commission issued in final form its Americans with Disabilities Amendments Act regulations. The regulations will take effect on May 24, 2011. The final regulations provide nine rules of construction to guide the analysis of what constitutes a disability. Applying these rules of construction, the EEOC provided examples of impairments that should easily be concluded to be disabilities:

- The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the Americans with Disabilities Act (ADA), and "substantially limits" is not meant to be a demanding standard.

- *Impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.* It need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Not every impairment will constitute a disability.
- The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.
- The determination of whether impairment substantially limits a major

life activity requires an individualized assessment.

- The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical or statistical analysis.
- The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. But the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
- *An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.*
- An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.
- The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage does not apply to the definition of an actual disability. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

In addition, the final regulations state that *major life activities include* caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; as well as the operation of *major bodily functions*, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions. Major bodily functions include the operation of an individual organ within a body system, such

as the operation of the kidney, liver or pancreas.

Other guidelines--The statute is to be construed broadly; employers should focus on accommodations, as opposed to questioning whether someone is disabled; and mitigating measures including medicine, other treatments, and prosthetic devices must be set aside in analyzing whether an individual is "disabled." The EEOC included a list of conditions that, according to the EEOC, will "virtually always" be covered impairments. The EEOC says those impairments are not per se disabilities. They include: Autism that substantially limits brain function; cancer that substantially limits normal cell growth; cerebral palsy that substantially limits brain function; diabetes that substantially limits endocrine function; epilepsy that substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection that substantially limits immune function; multiple sclerosis that substantially limits neurological function; muscular dystrophy that substantially limits neurological function; major depressive disorder, bipolar disorder, post-traumatic disorder, obsessive compulsive disorder and schizophrenia that substantially limits brain function.

In effect, the EEOC has made it clear that any impairment – no matter how brief in duration – can be a covered disability. However, don't "regard" someone as having a disability or impairment because that also gives them protection under the Act. Sounds like a Catch 22.

National Labor Relations Board

More Bazaar Decisions from the NLRB

While union membership in the private sector has declined steadily over the past several decades, it is clear that the current administration is an advocate for organized labor. President Obama has appointed two overtly pro-union members to the National Labor Relations Board (NLRB). This Board has been extremely busy revising the

rulings of the Bush administration and making decisions that lean heavily in favor of unions.

In a recent decision, the NLRB found that employees of AT&T had a right to wear t-shirts that referred to them as “inmates” or “prisoners” when they conducted service calls at the homes of the company's customers. Chairman Wilma B. Liebman and Member Craig Becker agreed with an administrative law judge that customers would not reasonably have mistaken the shirts—with “Inmate #” in relatively small print on the front and “Prisoner of AT&T” between vertical stripes on the back—for prison garb. The board majority held that the company violated Section 8(a)(1) of the Labor Management Relations Act by prohibiting employees from wearing the shirts, which were distributed by a union to publicize the union's dispute with the company over a new collective-bargaining contract. The board observed that employees made home service calls in response to appointments made by customers, telephoned customers in advance to confirm the appointments, wore identification tags, and parked their company trucks near customers' homes. The board concluded that the company failed to demonstrate “special circumstances” justifying a ban on the shirt. Member Brian E. Hayes dissented, writing that the ALJ and the board majority “failed to give sufficient weight to the potential for employees wearing these shirts to frighten customers in their own homes and thereby to cause substantial damage to the Respondent's reputation.” Southern New England Tel. Co. d/b/a AT&T Conn., 356 NLRB No. 118, 190 LRRM 1205, (3/24/11). This decision begs the question, how an employee in the United States can be a prisoner of their employer when they have the right to resign and work elsewhere. Prior to this decision, employees, under certain circumstances, could wear union emblems on their shirt or hat.

In another decision, the NLRB found that the existence of three objectionable rules contained within an employee handbook

were sufficient to overturn the results of a decertification election. In *Jurys Boston Hotel*, 356 NLRB No. 114 (2011), the employer had voluntarily recognized the union as its employees' bargaining representative. Two years later, the employees filed a petition seeking to decertify the union. The hotel had a 63 page employee handbook containing the regular rules and regulations that might be found in any typical handbook. However, after the election petition was filed, the union filed an unfair labor practice charge challenging three policies within the handbook: 1) No Solicitation Policy; 2) No Loitering Policy; and, 3) Grooming Policy banning wearing of buttons. Those policies had been in effect for two years without the union raising any complaints prior to the requested election. The employer, in response, voluntarily revised two of the policies and deleted one in its entirety. The hearing officer found the policies were objectionable but not sufficient to overturn the decertification election because they were promulgated before the employer recognized the union and were not enforced. The NLRB majority overturned the hearing officer's ruling, finding that the policies in question were objectionable and that “[e]ach of these rules, in force during the critical election period, reasonably tended to interfere with employee free choice.” The Board also found that the fact that the election was decided by a single vote proved that the rules could have affected the results.

Immigration

Social Security Administration Resumes No-Match Letters

The Social Security Administration (SSA) has resumed sending employers no-match letters. No-match letters are issued by the SSA if an employee's name does not correspond to a valid Social Security number. The no-match letter, which the SSA calls a decentralized correspondence (Décor) notice, says that employers do not have to respond to the letter. However, if employers don't respond, the SSA may refer the matter to the Internal Revenue

Service or the Justice Department for criminal prosecution of Social Security fraud. Employers should not ignore the letters. When the no-match letters come in, note the date they arrived and have an action plan for how to respond. Once HR knows about the receipt of a no-match letter, it should make sure that the no-match didn't result from a typo or other mix-up in its own records. Then allow the employee a reasonable period of time (60-90 days) to correct the record and produce valid documents. It might be appropriate to discharge employees who fail to provide alternate acceptable documentation of identity and work eligibility within a reasonable period but do so with caution. Resumption of the no-match letters began March 22, 2011 but employers are just now receiving them.

Final Rule on Employment Eligibility Verification Form Issued

The U.S. Citizenship and Immigration Services (USCIS) published a final rule in the April 15, 2011, Federal Register. The final rule takes effect May 16, 2011. Employers may continue to use the current version of the Form I-9 (Rev. 08/07/2009) or the previous version (Rev. 02/02/2009).

The current Form I-9 may be found at <http://www.uscis.gov/I-9>. The Handbook for Employers, Instructions for Completing the Form I-9 (M-274) was updated on Jan. 5, 2011, and is available for review at www.uscis.gov/files/form/m-274.pdf.

Fair Labor Standards Act

New Regulations Adopted

On April 5, 2011, the Department of Labor's Wage and Hour Division finalized changes to several Fair Labor Standards Act regulations originally proposed in 2008. The regulations appear in the Federal Register and will be effective May 5, 2011. <http://www.gpo.gov/fdsys/pkg/FR-2011-04-05/pdf/2011-6749.pdf>. Employers with salaried non-exempt employees who are compensated under the fluctuating workweek method of payment (29 C.F.R. § 778.114), as well as restaurants, hotels, and other employers who take advantage of the FLSA's tip credit provision to meet their minimum wage obligations should pay particular attention to these regulations. The DOL also took this opportunity to update and clean up some of the outdated provisions found in their regulations.