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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.

Proposed legislation

Bills Introduced to Prohibit Discrimination Against the Unemployed

On August 2, 2011, the U.S. Senate proposed S. 1471 to complement the recently proposed bill in the U.S. House of Representatives, H.R. 2501. Otherwise known as the Fair Employment Opportunity Act of 2011, the proposed Acts are nearly identical in providing expansive rights and broad protections to the unemployed, including retaliation provisions and generous remedies. Covered employers are defined similar to Title VII of the Civil Rights Act—employers engaged in commerce and having 15 or more employees working 20 or more weeks this year or last year and any

person who acts, directly or indirectly, on behalf of the employer. The proposed acts would make it unlawful for an employer or employment agency to refuse to offer or consider for employment an individual simply because of his unemployed status.

FMLA Amendments Proposed

Ever since the Family & Medical Leave Act was signed into law, Congress has tried to amend it in various ways. On June 28, 2011, Sen. Dick Durbin introduced a bill (S. 1283), entitled the "Family and Medical Leave Inclusion Act," which would amend the FMLA to grant eligible employees leave rights to care for a same-sex spouse, domestic partner, parent-in-law, sibling, grandchild, or grandparent who has a

serious health condition. Two weeks later, on July 13, Sen. Jon Tester introduced a bill (S. 1358), entitled the "Parental Bereavement Act of 2011," which would provide FMLA leave because of the death of an eligible employee's son or daughter. On June 23, Rep. Lynn Woolsey introduced a 201-page bill (H.R. 2346), the first 119 pages of which would make major amendments to the FMLA. It would allow eligible employees to receive paid leave for any of FMLA's qualifying reasons, which this bill would expand to include leave to care for the employee's domestic partner, grandchild, grandparent or sibling with a serious health condition, similar to Sen. Durbin's bill. The bill requires a mandatory insurance program and relaxes the eligibility standards currently in force, by redefining an eligible employee as one who has been employed for at least six months (instead of the current 12 months); worked only 625 hours or more in the prior SIX MONTHS (instead of 1,250 hours in the prior 12 months); and whose employer employs TWO OR MORE EMPLOYEES (instead of 50 employees within a 75-mile radius).

Eligible employees would be entitled to receive between 40% and 100% of their daily earnings while on leave, depending on their level of annual income. The bill would require the creation of an "Insurance Fund" that would pay employees for their time spent on FMLA leave. The Insurance Fund would be funded by imposing a family and medical leave tax on both individuals and employers equal to .02% of the employee's wages (or .01% in the case of a small employer). Self-employed individuals would also be taxed, at .04% of their income, if they elect to participate in the Insurance Program.

H.B. 2346 includes a provision, subtitled the "Healthy Families Act," which would permit employees to earn up to 56 hours of paid sick time per year, accruing at the rate of 1 hour of paid sick time for every 30 hours worked. Employees would be able to carry over earned but unused paid sick time into the next calendar year.

Discrimination

Being Replaced by Computer Software Is Not Age Discrimination

A terminated protected-age employee failed to establish a *prima facie* case of age discrimination, when he was replaced by a web-based computer program, since the computer program does not constitute replacement by younger individual. The ADEA prohibits employers from discriminating against employees on the basis of age who are at least 40 years old. A plaintiff must prove through direct or circumstantial evidence that age was the 'but for' cause of the discharge. Under that framework, the plaintiff must first establish a *prima facie* case of discrimination. He may do so by showing that he (1) was a member of the protected age group, (2) was subjected to adverse employment action, (3) was qualified to do the job, and (4) was replaced by or otherwise lost a position to a younger individual. If the plaintiff establishes his *prima facie* case, the defendant must articulate a legitimate, nondiscriminatory reason for the challenged employment action. The only issue before the court was the fourth element—whether he was replaced by or lost a position to a younger individual. The record evidence demonstrates that the plaintiff was not replaced by a younger individual. When he was discharged, defendants streamlined their product-design process by implementing a web-based computer program called Design Net. *Gortemoller v. Int'l Furniture Mktg. Inc.*, 112 FEP Cases 1563 (11th Cir. July 20, 2011)

ADA Association Discrimination

An airline manager's claim that he was discharged because of his association with his disabled wife failed, despite his contention that the discharge shortly after her condition worsened showed the employer's concern that he would be distracted at work. However, the employer was aware of her condition for many years and there was extensive evidence of the

employee's poor job performance. The manager's allegation that the decision maker lied about the reason for discharging him did not show that his wife's condition was a factor, and he was not entitled to reasonable accommodation. Air Wisconsin asserts that it terminated the plaintiff for poor performance based on his failure to stay within budget, failure to report security violations, and improper supervision of employees, which led to the security violations in the first place. The plaintiff's claim arises under section 12112(b)(4) of the Act, which prohibits "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." Several circuits have relied on three theories into which "association discrimination" plaintiffs generally fall: (1) "expense"; (2) "disability by association"; and (3) "distraction." The "expense" theory covers situations where an employee suffers an adverse employment action because of his or her association with a disabled individual covered under the employer's health plan, which is costly to the employer. The "disability by association" theory encompasses two related situations. Either the employer fears that the employee may contract the disability of the person he or she is associated with (for example the employee's partner is infected with HIV and the employer fears the employee may become infected), or the employee is

genetically predisposed to develop a disability that his or her relatives have. The "distraction" theory is based on the employee's being somewhat inattentive at work because of the disability of someone with whom he or she is associated. The court found that while the plaintiff's poor performance at work was likely due to his wife's illness that is irrelevant under this provision of the Act. The plaintiff was not entitled to a reasonable accommodation on account of his wife's disability. Therefore, because his discharge was based on actually performing his job unsatisfactorily, and not fears that his wife's disability might prevent him from performing adequately, Air Wisconsin's conduct is not prohibited by this section of the Act. *Stansberry v. Air Wisconsin Airlines Corp.*, 24 AD Cases 1544 (6th Cir. 2011)

Miscellaneous

EEO-1 and VETS-100/100A Deadlines

The annual deadline to file your EEO-1 report is September 30, 2011. The annual deadline to file the VETS-100/100A has been extended until November 30, 2011 as the website is experiencing technical problems that prevent federal contractors from submitting the required information. The system is expected to be back up and running by October 1.