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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.

Discrimination Claims Update

Retaliation Claims Most Frequent

Statistics released recently by the Equal Employment Opportunity Commission show that retaliation claims have skyrocketed so that now they are the most frequently filed EEOC charge. Retaliation claims are a major problem for employers because they are easier for employees to prove and difficult for employers to defend against. Even if the underlying discrimination claim has no merit or is dismissed, the retaliation claim can go forward. To state a *prima facie* case, an individual claiming retaliation must only show that an adverse employment action occurred and that there is a causal connection between the employee's discrimination claim and the employer's action. In 2006 the U.S. Supreme Court broadened the scope of adverse action that must be shown in a retaliation case which may have resulted in the increase in claims. Something seemingly innocent such as reassigning employee's duties may be sufficient to state a retaliation claim. However, the anti-retaliation provision does not protect an individual from all retaliation—only retaliation that produces an injury or harm. The Court in *Burlington Northern & Santa Fe Railway Company v. White,* 126 S. Ct. 2405 (2006) said: "We conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present

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context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Independent Contractors

Department of Labor, IRS and States Working Together to Crack Down on Misclassified Employees

The Labor Department is signing agreements to share information with states and the Internal Revenue Service as it gets more aggressive in its crackdown on businesses that misclassify workers as independent contractors. The information will help target businesses that improperly label workers as independent contractors which may deprive them of minimum wage and overtime pay. Misclassifying workers also lets companies avoid paying workers compensation, unemployment insurance and federal taxes. Labor officials say sharing information could subject businesses to multiple fines from state and federal agencies. Last year, the agency collected nearly $4 million in back wages for about 6,500 misclassified employees. States working with the DOL include Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah and Washington. Illinois and New York are expected to sign up as well.

Americans with Disabilities Act

EEOC Flexing its ADA Muscle

Recently the EEOC and Verizon settled a class action disability discrimination case for $20 million. The EEOC alleged the company maintained a "no fault" attendance policy which contains multiple steps of discipline, up to and including discharge, for all absences, including absences caused by an employee's disability, except for certified FMLA leave, jury or military duty, death in the immediate family or excused time without pay. If an employee accumulates a certain number of chargeable absences, the employee is placed on a disciplinary step. Additional absences incurred during the step period result in more serious discipline up to and including discharge. The EEOC alleged that an employee who was on workers' compensation leave due to a disability arising from a work-related injury was automatically terminated after one year of leave without consideration of whether a reasonable accommodation under the ADA might have allowed the employee to return to work. This is a good example of how important it is to consider all employment laws when making a discharge decision, especially when an illness or injury is involved.

Sears, Roebuck and Company Settlement

In another case alleging discrimination based on an inflexible absence policy, EEOC sued Sears alleging that its inflexible workers' compensation leave policy violated the ADA. The case arose from a charge of discrimination filed with the EEOC by a former Sears service technician who was injured on the job, took workers' compensation leave, and, although remaining disabled by the injuries, repeatedly attempted to return to work. However, Sears never found a reasonable accommodation and fired him when his leave expired. Pre-trial discovery revealed hundreds of other employees similarly discharged. Sears agreed to a $6.2 million settlement in a consent decree.

Labor Law

NLRB Issues Guidance on Social Media

In a series of "advice memos" the NLRB General Counsel made it clear that disciplining employees for comments they make in social media is neither prohibited, nor is it without risk. The major issue for the NLRB is disciplining employees for

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comments that constitute "protected concerted activity." If there is no concerted activity, there is no violation of the National Labor Relations Act. The Board's test for concerted activity is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention. Comments made "solely by and on behalf of the employee himself" are not concerted. Comments must look toward group action; mere personal griping is not protected.

If you think this does not apply to you because your company is not unionized, you may want to reconsider. The NLRB, like the EEOC is flexing its muscle and aiming at non-unionized companies. Read on…

NLRB Notice to Employees

Effective November 14, 2011, virtually all private sector employers must post a notice, in a place where similar notices are posted in the workplace, as well as on employer internet or intranet sites (if the employer regularly communicates with employees about personnel rules or policies by such means), informing employees of their right to, among other things: Organize a union to negotiate wages, hours, and other terms and conditions of employment; discuss wages and benefits and other terms and conditions of employment or union organizing with co-workers or a union; take action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with an employer or with a government agency, and seeking help from a union; strike and picket, depending on the purpose or means of the strike or the picketing; and choose not to do any of these activities, including joining or remaining a member of a union. Failure to post the notice may result in the NLRB finding that the employer committed an unfair labor practice under Section 8(a)(1) of the NLRA by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

A copy of the poster is attached for your convenience

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Employee Rights

Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.

- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

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*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

SEPTEMBER 2011