

Representing Management Exclusively in Workplace Law and Related Litigation

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EMPLOYMENT LAW UPDATE

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Jackson Lewis Employment Update

I. SUPREME COURT RULINGS

None.

II. FEDERAL LEGISLATION

A. Long Awaited FMLA Regulations Released

[11/17/2008] The DOL has released final revised regulations implementing the Family and Medical Leave Act. The revised regulations are over 750 pages in length and adopt most of the positions the DOL outlined in proposed regulations issued in February 2008.

B. Federal Workplace Legislation Currently Under Consideration

[11/13/2008] With a new Administration headed for the White House, Congress returned to Capitol Hill, and dozens of workplace bills stalled in a divided Congress for months. This may be a legislative "perfect storm". Details of federal workplace legislation currently under consideration are available by copying the following link: <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1558/>

C. President Bush Signs Landmark Amendments To The Americans With Disabilities Act

[9/25/2008] With praise from disability groups and business organizations alike, President Bush has signed into law amendments to the Americans with Disabilities Act that significantly expand the protections afforded to disabled individuals. The ADA Amendments Act of 2008 ("ADAAA") expressly overturns several landmark Supreme Court decisions narrowly interpreting the definition of "disability" and will make disposing of ADA cases prior to trial more challenging for employers. The changes to the ADA took effect on January 1, 2009.

D. Employees Gain Whistleblower Protection Under New Consumer Product Safety Law

[8/28/2008] Whistleblower protection was given to employees in the retail and manufacturing sectors under the new Consumer Product Safety Improvement Act of 2008 (H.R. 4040). The Act is the most comprehensive overhaul of consumer product safety laws since the Consumer Product Safety Act of 1972. The large number of consumer product recalls in 2007 (448, about half were of products for children) prompted Congress to take action. Most provisions of the Act, including the whistleblower protection provisions, are effective immediately.

III. STATE LAWS

A. New York Adds Further Employment-Related Protections For Individuals With Criminal Conviction Record

[11/12/2008] New York State Governor David A. Paterson has signed into law three laws aimed at enhancing employment opportunities for individuals with prior criminal convictions by reminding and educating New York employers and employees about employers' obligations. Employer protection against claims of negligent hiring also is enhanced. The new laws relate to Article 23-A of New York's Correction Law, which requires employers to consider and balance a number of factors before terminating or refusing to hire individuals with a prior criminal conviction. Article 23-A does not apply where there is a specific legal prohibition on hiring applicants with a criminal history.

B. California Enacts New Disability Access Legislation

[11/10/2008] A landmark disability access bill aimed at decreasing unwarranted disability-access litigation that does not advance disability access while increasing equal access for individuals with disabilities has been approved by Governor Schwarzenegger. The legislation, S.B. 1608, adds new provisions to the state's existing disability access laws which are likely to benefit employers and landlords. The law went into effect January 1, 2009, with some provisions delayed until July 1, 2009.

C. New Jersey Issues Family Leave Insurance Poster?

[11/10/2008] New Jersey's Family Leave Insurance law provides eligible employees with up to six weeks of family leave benefits to care for a newborn or newly adopted child, or to care for a child, spouse, domestic partner, civil union partner or parent with a serious health condition. Employees will be eligible to begin receiving family leave benefits on July 1, 2009.

D. California Supreme Court: Voluntary Administrative Proceedings Toll Limitations Period under FEHA

[11/4/2008] The California Supreme Court has ruled the one-year statute of limitation on claims under the California Fair Employment and Housing Act ("FEHA") is subject to equitable tolling while an employee pursues an internal administrative remedy before filing a claim. *McDonald v. Antelope Valley Community College Dist.*, No. S153964 (Cal. Oct. 27, 2008). The Court agreed with the Court of Appeal that the trial court incorrectly dismissed claims on statute of limitation grounds and returned the case to the trial court for further proceedings.

E. New York's Highest Court Chooses Employment-at-Will Over Theory Of Implied Contract

[10/27/2008] Allowing an employee to continue working past the expiration date stipulated in an employment contract does not necessarily bind the employer to successive contract terms, the New York Court of Appeals has held, overturning prior law. *Goldman v. White Plains Center for Nursing Care, LLC*, 2008 NY Slip Op. 7760 (Oct. 16, 2008).

F. San Francisco Health Care Ordinance Reaches Far And Wide

[10/27/2008] Employers located anywhere in the United States are required to spend specified minimums on health care benefits for any of their employees working in San Francisco under a local ordinance recently upheld by the Ninth Circuit Court of Appeals. Employers may face significant penalties for failing to comply with the San Francisco Health Care Security Ordinance, which went into effect this year.

G. San Francisco Employers Obligated To Provide Mass Transit Commuter Benefits

[9/17/2008] Employers with an average of 20 or more employees were required, as of December 20, 2008, to establish a mass transit commuter program for employees who work ten or more hours per week in San Francisco. Eligible employees must be offered:

- a pre-tax election program consistent with federal tax law that permits employees to exclude certain commuting costs from taxable wages (the current maximum amount is \$110 per month);
- a transit pass for the public transit system requested by the employee or reimbursement for equivalent vanpool charges for an amount that is at least equal to the value of a monthly Municipal Railway FastPass (currently \$45); or
- transportation in a vanpool, bus or similar multi-passenger vehicle operated by or for the employer at no cost to the employee.

H. New York Legislative Update; Mini-Warn Law and Restriction On Non-Competition Clauses In Broadcast Industry

[8/8/2008] On August 5th, New York State Governor David Paterson signed into law the New York State Worker Adjustment and Retraining Notification Act and the Broadcast Employees Freedom to Work Act. Both statutes have significant consequences for employers. The former is far more expansive than the federal Worker Adjustment and Retraining Notification Act (WARN) in regard to covered private sector employers and covered events requiring advance notice to employees. The latter imposes a statutory restriction against non-competition agreements on employees in the broadcasting industry.

IV. DISCRIMINATION

A. Sixth Circuit Holds Disabled Retirees Lack Standing To Bring Claims Under Disabilities Act

[12/12/2008] Disabled employees do not have standing under the Americans with Disabilities Act to bring suit against their former employer for discrimination with respect to payment of post-employment fringe benefits, the federal Court of Appeals in Cincinnati has ruled. The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

B. Expanding Discrimination Claims Under New Jersey LAD - From Employment Practices To Business Models

[12/11/2008] Issues of alleged discrimination can venture far outside the traditional realm of employer-employee disputes under the New Jersey Law Against Discrimination. Last month, an online match-making company settled a claim before the New Jersey Division on Civil Rights in which the Company's business model, and the services (or lack of services) provided by the Company, were the basis for the discrimination claim. *Eric McKinley v. eHarmony.com*, NJ Office of Attorney General, DCR Docket No. PQ271B-02846 (Nov. 2008).

C. Are You Being Served?

[11/24/2008] A recent Americans with Disabilities Act ("ADA") and Minnesota Human Rights Act ("MHRA") case from the Federal District Court in Minnesota highlights the need for employers to scrutinize carefully the timeliness of discrimination claims. *Quasius v. The Schwan Food Company*, No. 08-575 (D. Minn. Nov. 14, 2008).

D. Intermittent FMLA Leave Terminates When New 12-Month FMLA Period Begins

[11/11/2008] Employers can breathe easier when calculating intermittent leave under the Family and Medical Leave Act leave pursuant to a case recently decided by the U.S. Sixth Circuit Court of Appeals. In *Candice Davis v. Michigan Bell Telephone Company*, No. 07-1512 (6th Cir. 2008), the Court found that intermittent FMLA leave cannot carry over into a new 12-month FMLA period, it held. The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio and Tennessee.

E. Driving Not A Major Life Activity Under The Americans With Disabilities Act, Circuit Court Decides

[11/11/2008] The U.S. Court of Appeals for the Tenth Circuit has ruled that driving is not a major life activity under the Americans with Disabilities Act, a case of first impression. *Kellogg v. Energy Safety Servs. Inc.*, No. 07-8072 (10th Cir. Oct. 15, 2008). Vacating a jury verdict in favor of an employee who could not drive because of epilepsy, the Court found that the trial court's jury instruction stating driving was a major life activity was erroneous. In its verdict, the jury did not identify what major life activities the plaintiff was substantially limited in performing. As a result, the court could not determine if the erroneous instruction affected the verdict and, accordingly, ordered a new trial.

F. Patient Awarded \$400K By New Jersey Jury For Lack Of Sign Language Interpreter At Medical Treatments

[10/23/2008] A jury has held that a physician violated the federal Americans with Disabilities Act ("ADA") and the New Jersey Law Against Discrimination ("LAD") in failing to provide a deaf patient with an interpreter. Following a three-week trial, the Hudson County jury awarded the patient \$400,000, including \$200,000 in punitive damages

G. "Cat's Paw" Liability Based On Conduct Of Subordinate Recognized By New Jersey State Court

[9/16/2008] A State appellate court, for the first time in New Jersey, has adopted the imposition of the "cat's paw" liability, whereby an employer may be liable for a lower-level supervisor's discriminatory behavior even though the ultimate decision maker is incapable of discrimination under the circumstances. *Kwiatkowski v. Merrill Lynch, et. al.*, Docket No. A-2770-06T1 (App. Div. Aug. 13, 2008).

H. Federal Appeals Court: Refusal To Comply With FMLA Obligations Justifies Adverse Employment Action

[8/28/2008] An employee who was terminated after refusing to fulfill her obligations under the Family and Medical Leave Act has no claim under the statute, the federal appellate court in Chicago has held. *Ridings v. Riverside Med. Ctr.*, No. 06-4328 (7th Cir. Aug. 11, 2008). The Seventh Circuit Court of Appeals found a full-time employee who refused to either work eight-hour days on-site or submit medical documentation to request FMLA leave may be terminated for absenteeism or insubordination. The Court affirmed the lower court's grant of summary judgment for the employer. The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

I. Retailer Must Make All Merchandise Accessible To Disabled, California Appellate Court Rules

[8/7/2008] The California Court of Appeals in San Francisco ruled that a retailer failed to make merchandise available to disabled individuals in violation of the federal Americans with Disabilities Act, the Unruh Act and the State Disabled Persons Act. *Californians for Disability Rights v. Mervyn's LLC*, No. A106199 (Cal. Ct. App. Jul. 29, 2008). The Court further ruled that the retailer did not satisfy its ADA obligation to provide access by opening new stores that were accessible. In so finding, the Court reversed judgment in favor of the retailer and returned the case to the trial court for further proceedings.

J. Sleeping And Sexual Relations Are Major Life Activities Under Disability Laws, D.C. Court Rules

[8/7/2008] The federal appeals court in the District of Columbia has ruled, in separate decisions, that sleeping and engaging in sexual relations constitute major life activities for the purpose of determining whether an individual suffers from a "disability" under federal disability discrimination laws. *Desmond v. Mukasey*, No. 07-5139 (July 1, 2008); *Adams v. Rice*, No. 07-5101 (D.C. Cir. July 18, 2008).

K. NJ Supreme Court Clarifies Standard For Religion And Ancestry Hostile Work Environment Claims

[8/7/2008] A unanimous New Jersey Supreme Court has held that the standard of proof in religion- and ancestry-based hostile work environment claims brought under the state Law Against Discrimination is no greater than it is in sex- or race-based hostile work environment claims. *Jason Cutler v. Theodore Dorn, et al.*, A-51-07 (July 31, 2008). The Court reversed the

lower court's dismissal of the plaintiff's hostile work environment claim and reinstated a trial verdict in favor of Plaintiff.

L. Federal Appeals Court Announces New Summary Judgment Standard For Mixed Motive Discrimination Claims

[7/28/2008] Easing the way for plaintiffs to get to trial, a panel of the U.S. Court of Appeals for the Sixth Circuit has announced a new standard for "mixed motive" discrimination claims under Title VII of the Civil Rights Act of 1964. *White v. Baxter Healthcare Corp.*, No. 07-1626 (6th Cir. Jul. 3, 2008). Plaintiffs in mixed motive discrimination claims often allege that an employment decision was motivated by both legitimate (i.e., job performance) and impermissible (i.e., race discrimination) reasons. In this case, the Court held that, to defeat summary judgment, plaintiffs merely must produce evidence (1) of an adverse employment action, and (2) that a protected characteristic under Title VII was a motivating factor for the adverse action.

M. Second Circuit Says Employers Must Accommodate Obvious Disabilities

[7/24/2008] An employer must provide reasonable accommodation to an employee with an obvious disability even if the employee never requests an accommodation, the federal court of appeals in New York has ruled. Because the ADA requires employers to make accommodations for "known" disabilities, "an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled," the U.S. Court of Appeals for the Second Circuit held. The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

V. RETALIATION

A. Billing Irregularities Not Enough For SOX Civil Whistleblower Protection, Fourth Circuit Rules

[12/15/2008] An employee who was fired after reporting alleged billing irregularities is not protected by the whistleblower provisions of the Sarbanes-Oxley Act of 2002 ("SOX"), the United States Court of Appeals for the Fourth Circuit has ruled. SOX's The law's civil whistleblower provisions protect employees who "definitively and specifically alleg[e] mail or wire fraud" that they "reasonably believe" violates federal law prohibiting fraud against shareholders. Allegations of billing discrepancies, without more, do not meet this standard, the Court said. *Platone v. Dep't of Labor*, No. 07-1635 (4th Cir. Dec. 3, 2008). The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

B. Fourth Circuit Affirms Limitation On Whistleblower Status Under Sarbanes-Oxley Act

[9/25/2008] Refusing to impose strict accountability for any failure to comply with Generally Accepted Accounting Procedures as a *per se* violation of the Sarbanes-Oxley Act of 2002 whistleblower provision, the Court of Appeals for the Fourth Circuit has dismissed a case brought by David Welch, former Chief Financial Officer of Cardinal Bankshares. *Welch v. Chao*, No. 07-1684 (4th Cir. Aug. 5, 2008). The whistleblower provision protects those who report activity they

“reasonably believe” violates a provision of the law related to fraud against shareholders. The Court found that Welch’s complaints did not constitute “protected activity” under the Sarbanes-Oxley Act of 2002 (“SOX”).

VI. WORKPLACE DEVELOPMENTS

A. Employer To Pay \$20.7 Million In Immigration Work-Site Enforcement Settlement

[12/23/2008] In the largest immigration work-site enforcement settlement yet, IFCO Systems North America will pay the government \$20.7 million dollars in civil forfeitures and penalties over four years in consideration of the government's not further pursuing corporate criminal charges against certain IFCO employees for hiring illegal aliens.

B. Federal Appellate Court Held Union Talks Not Required For One-Time-Only Stock Award

[11/3/2008] A company's one-time-only stock award to all full-time employees, regardless of rank, is not a subject of mandatory bargaining between the company and a union that represents some of its workers, the U.S. Court of Appeals for the Second Circuit has ruled. *Unite Here v. NLRB*, No. 06-4440-ag (2d Cir. Oct. 14, 2008). The Court rejected the Union’s argument that the employer’s award of stock to employees was a *unilateral* increase in wages or an alteration of the terms and conditions of employment in violation of the National Labor Relations Act, denying the union’s petition for review of the National Labor Relations Board’s ruling.

C. P2P File Sharing Networks - Unintended Gateway To Trade Secrets, Employee Sensitive Information

[10/6/2008] The same software that allows sharing of music and movie files may be placing your company at risk. Absent, due care, this technology can make sensitive corporate financials, trade secrets, and other as well as personal employee or customer information readily available to anyone on the P2P network.

D. Good News, Bad News: Data Indicate Decline & Rise In Federal Discrimination Lawsuits

[9/18/2008] Employment discrimination lawsuits filed in federal court dropped 39.7% in 2006 over the past decade. U.S. Department of Justice's Bureau of Justice Statistics reflect that 14,353 employment discrimination lawsuits were filed in federal court in 2006, down from a high of 23,800 in 1997. A steep increase in workplace law claims followed passage of the Civil Rights Act of 1991. The Act provided greater relief to plaintiffs suing under the employment discrimination provisions of Title VII, most notably, by granting discrimination plaintiffs the right to a trial by jury. The number of claims filed annually reached a high in 1997 before leveling off (still approximately 20,000 each year) through 2004, declining sharply thereafter. The report shows the median award for prevailing plaintiffs declined slightly, from \$154,500 in 2005 to \$150,000 in 2006 (exclusive of defense fees and prevailing plaintiffs’ recovery of attorney’s fees).

E. Health Care Provider Agrees To Pay Nearly \$1M To Texas For Mishandling Personal Data

[7/28/2008] Texas Attorney General Greg Abbott has announced a settlement agreement with a company charged with violations of state law protecting personal information. The company agreed to pay Texas \$990,000, including \$100,000 in attorneys' fees, and to strengthen its existing information security policies. A State Attorney General investigation found that the health care provider, Select Physical Therapy Texas L.P., improperly disposed of customer records containing sensitive personal information. The settlement was reached *without* confirmation of any identity theft or other misuse of the personal information of individuals whose records may have been accessed due to the company's mishandling.

F. Hospital To Pay \$100,000, Comply With 3-Year Corrective Action Plan For HIPAA Data Breach

[7/24/2008] The U.S. Department of Health & Human Services has announced that it has entered into a Resolution Agreement, for the first time, concerning potential violations of the privacy and security regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Resolution Agreement, entered into on July 16, 2008, requires a Seattle-based health care provider to pay \$100,000 and to implement a corrective action plan to ensure that it will safeguard electronic patient information.