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EMPLOYMENT LAW UPDATE

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Jackson Lewis Employment Update

I. SUPREME COURT RULINGS

A. Supreme Court Rules for White Firefighters in Bias Claim

[6/30/2009] In a much-awaited decision, the U.S. Supreme Court has ruled that the City of New Haven improperly discriminated on the basis of race when it refused to certify the results of a promotional test on which white and Hispanic firefighters outperformed their black colleagues. *Ricci v. DeStefano*, Nos. 07-1428 & 08-328 (June 29, 2009). A 5-4 majority of the Court rejected the City's argument that it disregarded the test results to avoid violating Title VII's disparate-impact provisions and placed employers squarely on the horns of a dilemma—either way someone will sue.

B. Supreme Court Rules ADEA Plaintiffs are Not Entitled to “Mixed Motive” Instruction

[6/25/2009] Rejecting the view of many lower courts, the Supreme Court has determined, by a 5-4 vote, that under the federal Age Discrimination in Employment Act (“ADEA”), employees alleging disparate treatment must prove that age discrimination was the “but-for” cause of an adverse employment action in order to prevail. Unlike claims under Title VII, to prove an ADEA case, it no longer is sufficient for plaintiffs to show that age discrimination was a “motivating factor” or “mixed motive” in an adverse employment action. *Gross v. FBL Financial Services, Inc.*, No. 08-441 (June 18, 2009).

C. Supreme Court Nominee Sotomayor’s Record in Labor and Employment Law Cases Reveals Balanced Approach

[5/29/2009] President Barack Obama’s nomination of Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit in New York to replace retiring Justice David Souter on the U.S. Supreme Court has focused employers’ attention on her judicial record in labor and employment law cases. Judge Sotomayor has been a federal district court and appellate court judge for more than 16 years and has issued numerous labor and employment law decisions. Her opinions, cannot be categorized easily as employee- or employer-friendly. She has heard cases involving labor relations, affirmative action, employment discrimination, harassment, age discrimination, and retaliation, yet her decisions do not appear to tip decidedly in favor of one side or the other.

D. Supreme Court Rules Employers Not Required to Adjust Pension Benefits for Pre-1979 Maternity Leave

[5/19/2009] The U.S. Supreme Court has ruled that an employer does not necessarily violate the Pregnancy Discrimination Act when it calculates pension benefits using a seniority-based system that does not accord full credit for time spent on maternity leave prior to Title VII’s

ban on pregnancy discrimination. *AT&T Corp. v. Hulteen*, No. 07-543 (May 18, 2009). Two justices dissented from the majority's opinion.

E. Supreme Court Holds Arbitration Provision in CBA May Bar Employee Federal Age Claims in Court

[4/2/2009] In a 5-4 decision, the United States Supreme Court held that a provision in a collective-bargaining agreement that “clearly and unmistakably” compels union members to arbitrate Age Discrimination in Employment Act (ADEA) claims” is enforceable. *14 Penn Plaza LLC et al. v. Pyett et al.*, No.07-581 (April 1, 2009). The majority opinion, which favors employers by limiting the remedies available to union-represented employees claiming age discrimination, was authored by Justice Thomas, and joined by Chief Justice Roberts, and Justices Scalia, Kennedy and Alito. The majority's holding reversed a New York federal appeals court decision and empowers employers to seek all-inclusive arbitration clauses in collectively bargained agreements.

F. Supreme Court Rules that Arbitrable Counterclaim is No Key to Door of Federal Courthouse

[3/17/2009] The U.S. Supreme Court has held that in determining whether to order arbitration, federal courts should “look through” a petition to compel arbitration to determine whether it is predicated on a controversy that “arises under” federal law in accordance with the so-called well-pleaded complaint rule. This holding requires federal courts to examine the allegations and claims in the complaint to determine whether jurisdiction exists; jurisdiction cannot be predicated on defenses or counterclaims, even if they are subject to an agreement to arbitrate. Thus, a federal court may not entertain a petition to compel arbitration based on the contents of a counterclaim if the underlying substantive controversy does not qualify for federal court adjudication. *Vaden v. Discover Bank*, No. 07-773 (U.S. Mar. 9, 2009).

G. Supreme Court: Title VII Anti-Retaliation Covers Responses to Internal Harassment Investigation

[1/30/2009] The United States Supreme Court has ruled that Title VII of the Civil Rights Act of 1964 (the federal anti-discrimination and anti-harassment statute) protects an employee from retaliation even when the employee merely reports discrimination in response to an employer's questions during an internal investigation of discrimination or harassment complaints made by others. It is not necessary for the employee herself to come forward to initiate a report of discrimination or harassment for protection against retaliation to be available. *Crawford v. Metropolitan Government of Nashville*, No. 06-1595 (Jan. 26, 2009). A contrary result may exist under the Fair Labor Standards Act, but that is legally uncertain.

II. FEDERAL LEGISLATION

A. EEOC Takes First Steps to Overhaul ADA Regulations

[6/24/2009] The U.S. Equal Employment Opportunity Commission on June 17, 2009, voted to revise its regulations on the Americans with Disabilities Act (“ADA”) to reflect changes made by the ADA Amendments Act (“ADAAA”) of 2008. The ADAAA, which became

effective on January, 1, 2009, makes it easier for individuals seeking protection under the ADA to establish that they have a disability, by significantly revising the standard for determining whether an impairment substantially limits a major life activity, and also revising the concept of “regarded as” having a disability.

B. Paid Sick Leave Legislation Introduced in U.S. House of Representatives

[5/21/2009] The U.S. House of Representatives has introduced legislation that would require all employers with 15 employees or more to provide up to seven paid sick days each year entitled, the Healthy Families Act (H.R. 2460). The proposed legislation would affect most employers’ paid time off (PTO) policies. Employees would be entitled to accrue at least one hour of paid sick time for every 30 hours worked, up to a total accrual of 56 hours — or seven days — of paid sick time. Employees would begin accruing hours as soon as they start working for a covered employer and could begin using the accrued time 60 days from their first day of work. Paid sick time would carry over from one year to the next, but under the bill, employees would not be able to accrue more than 56 hours at any time.

C. EEOC Releases Additional Guidance on Avoiding Discrimination Against Caregivers

[4/28/2009] Supplementing 2007 guidance concerning discrimination against employees with caregiver responsibilities, the U.S. Equal Employment Opportunity Commission has issued a “best practices” guidance entitled, “Employer Best Practices for Workers with Caregiving Responsibilities.” Caregiver responsibilities include child care, elder care and care for immediate family members with disabilities, among others. As the U.S. population gets older and family responsibilities expand beyond spouses and children to parents, older family members and other relatives, employers are being asked by their employees to grant flexible work schedules, provide leave not required by the Family and Medical Leave Act and even remove job duties (which may not be required by the Americans with Disabilities Act). These requirements seem to exceed the Commission’s limited authority – to wit, defining the scope of federal laws prohibiting discrimination.

D. Drastic Changes to WARN Contemplated in “Forewarn Act” Bill

[7/2/2009] Both Houses of Congress have introduced bills to amend the Worker Adjustment and Retraining Notification Act, the federal law that requires employers to provide at least 60 calendar days’ advance written notice of “plant closings” and “mass layoffs.” The proposed “Federal Oversight, Reform, and Enforcement of the WARN Act” (“Forewarn Act”) would increase the number of employers subject to WARN and increase the number of entities and individuals who must receive WARN notices, but also would require employers to provide 90 days of WARN notice, instead of 60; prohibit waivers of WARN rights unless supervised by the U.S. Department of Labor or the attorney general of a state; and, create an administrative enforcement scheme to supplement the existing judicial enforcement scheme, giving the DOL the authority to investigate and prosecute alleged WARN violations.

E. Specter Announces He Will Not Support Union-Backed “Card Check” Bill

[3/25/2009] Senator Arlen Specter (R-PA) has announced his opposition to the Employee Free Choice Act (EFCA), the contentious bill pushed by organized labor that would require employers in many cases to recognize and bargain with unions based on card checks rather than government-conducted secret ballot elections. This announcement, made on March 24, ended months of speculation about the Senator’s intentions concerning the bill introduced in the Senate on March 10, 2009.

F. “Employee Free Choice Act” Re-introduced in Congress

[3/11/2009] A bill that would change the nation’s labor law to a degree unknown since 1947 was introduced in both houses of Congress on March 10, 2009. The Employee Free Choice Act (“EFCA”) was passed by the House of Representatives in March of 2007, but was not voted on in the Senate because of fierce opposition from Republicans and then-President George W. Bush. However, with a sympathetic President in the White House, who has revitalized interest in the labor-backed measure by placing it high on his agenda and supporting it in his public statements, EFCA could become law in 2009. EFCA seeks to amend three areas of labor relations law: the process by which a union gains recognition as the exclusive bargaining representative for a unit of employees; the initial collective bargaining process; and employer penalties for violating the law.

G. Economic Stimulus Package Likely to Increase Whistleblower Litigation

[3/6/2009] The American Recovery and Reinvestment Act of 2009 (“ARRA”), signed by President Barack Obama on February 17, 2009, contains broad new protections against retaliation for whistleblowers. The protections are greater than those provided under the Sarbanes-Oxley Act, the Foreign Corrupt Practices Act and state laws, such as the New Jersey Conscientious Employee Protection Act.

H. Federal Stimulus Means New HIPAA Privacy and Security Mandates

[2/24/2009] The American Recovery and Reinvestment Act of 2009 (ARRA) expands, enforces, and enhances the privacy and security safeguards required by the Health Insurance Portability and Accountability Act (HIPAA) for certain individually identifiable health information. The tightening of these safeguards is critical to building the network of computerized record-keeping systems that will service the whole nation. Most businesses will be affected by these changes to some degree.

I. President Obama Issues Fourth Pro-Union Executive Order

[2/9/2009] In another boost to organized labor, President Barack Obama on February 6, 2009, signed an Executive Order, effective immediately, authorizing executive agencies of the federal government to require every contractor or subcontractor on a large-scale construction project to negotiate or become a party to a Project Labor Agreement (PLA) with one or more labor organizations. This is the fourth pro-labor Executive Order signed by President Obama since January 30th.

J. Lilly Ledbetter Fair Pay Act of 2009 Becomes Law

[1/29/2009] President Barack Obama has signed into law the “Lilly Ledbetter Fair Pay Restoration Act of 2009,” the first piece of legislation signed by the President. The law (S. 181) was introduced by Senator Barbara Mikulski (D-MD) and was passed by the Senate on January 22, 2009. It cleared the House of Representatives on January 27, 2009. The new law, signed on January 29, 2009, rejects the U.S. Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, holding that the charge-filing deadline on Title VII compensation discrimination claims begins to run on the date of the first allegedly discriminatory pay decision.

III. STATE LAWS

A. California Supreme Court: No Class Action Requirements for Private Attorneys General Act Claims

[6/30/2009] The California Supreme Court has allowed an employee to proceed to seek to recover penalties in behalf of himself and non-party employees under the California Private Attorneys General Act of 2004 (“PAGA”) without satisfying class certification requirements. *Arias v. Superior Court*, No. S155965 (June 29, 2009). In contrast, the Court ruled that the plaintiff cannot bring claims in a representative capacity under California’s unfair competition law without meeting class certification requirements.

B. Amendments to Maryland Flexible Leave Act Take Effect Immediately

[6/23/2009] Under the Maryland Flexible Leave Act, employers with 15 or more employees must allow workers to use paid leave for the illness of an immediate family member. The Act does not require employers to provide paid leave, mandating only that employees be permitted to use paid leave they have earned under their employers’ policies. The MFLA does not affect employer policies regarding how leave accrues, how often or how much, who is eligible, or the waiting periods for accrual of leave.

C. Maryland Enacts Law Targeting Employers Who Misclassify Workers as Independent Contractors

[6/22/2009] The Maryland “Workplace Fraud Act of 2009” imposes penalties upon employers in the construction and landscaping services industries that misclassify workers as independent contractors rather than employees to avoid payroll and related costs (such as unemployment taxes and workers’ compensation premiums). In addition to establishing standards for determining whether an employer-employee relationship exists, the Act grants Maryland’s Commissioner of Labor and Industry broad investigatory and enforcement powers.

D. California: Intentional Discrimination Not Required for State Disability Discrimination Claim

[6/22/2009] The California Supreme Court has held that a plaintiff seeking damages under the state Unruh Civil Rights Act for a violation of the public accommodation provisions of the federal Americans with Disabilities Act need not prove that the discrimination was intentional.

Munson v. Del Taco, Inc., No. S162818 (Cal. June 11, 2009). The state Supreme Court decision resulted from a question certified from the U.S. Court of Appeals for the Ninth Circuit.

E. Only Class Representatives, Not Class Members, Must Have Standing to Sue under California UCL

[6/18/2009] In a case with employment class action litigation implications, the California Supreme Court has ruled that the standing requirements for fraudulent business practices class action claims under the California Unfair Competition Law apply only to the representative plaintiffs, not to all class members. *In re Tobacco II Cases*, No. S147345 (Cal. May 18, 2009).

F. California Court Enforces Employee's Waiver and Orders Arbitration of Unpaid Vacation

[6/4/2009] Reversing an order denying the employer's motion to compel arbitration, the California Court of Appeal has held that a former employee waived his right to an administrative hearing for alleged unpaid vacation in his arbitration agreement with the employer. *Sonic-Calabasas A, Inc. v. Moreno*, No. B204902 (May 29, 2009). The Court further held that the arbitration agreement did not act as a waiver of unwaivable rights, which would violate public policy.

G. Employment Arbitration Fee-Splitting Provision Not Trumped by AAA Rules, New York Court Rules

[5/27/2009] In a 3-2 decision, a New York State appeals court has found an arbitration agreement void as against public policy, because the employee would be responsible for a prohibitive amount of a \$42,300 arbitrator's bill. *Brady v. The Williams Capital Group*, No. 114198/06 (N.Y. Sup. Ct. App. Div. April 30, 2009). The Appellate Division in Manhattan ruled that the employee should be allowed to take her discrimination claims to arbitration, without being required to adhere to a previously agreed-upon provision for the parties to split the fees and costs equally for the arbitrator. However, the court did not find that the agreement's fee-sharing provision was trumped by conflicting American Arbitration Association rules requiring the employer to pay all costs related to arbitration.

H. New York Court Recognizes Faragher-Ellerth Defense Under State and City Human Rights Laws (in part)

[5/22/2009] In the twin cases of *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the United States Supreme Court held that an employer is not liable for workplace harassment under federal law if it can show "that the employer [1] had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and [2] that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided." *Faragher*, 524 U.S. at 805. This defense, which generally is available only if the plaintiff suffered no tangible employment action, is critical to employers in defending workplace harassment claims. The applicability of the defense to harassment claims brought under state and local civil rights laws is still a developing legal issue. Adding to a growing mix of cases analyzing this issue, the Appellate Division, Second Judicial Department, of the New York State Supreme Court, in

Brooklyn, with jurisdiction over 10 downstate counties, has held that the *Faragher-Ellerth* defense can be used by employers to defend claims under the New York State Human Rights Law. *Barnum v. New York City Transit Authority*, No. 2008-06382, 2009 N.Y. Slip Op. 3855 (May 12, 2009).

I. Connecticut Supreme Court Limits Employer’s Qualified Privilege in Defamation Actions

[5/21/2009] Affirming a judgment in favor of an employee, the Connecticut Supreme Court unanimously held that an employer loses its qualified privilege in a defamation case over intra-corporate communications about an employee’s firing upon a showing of either actual malice or malice in fact. *Gambardella v. Apple Health Care, Inc.*, No. SC 17977 (Conn. May 19, 2009). The qualified privilege would protect the employer if it made an honest mistake. In so ruling, the Court may have made it easier for plaintiffs to bring defamation claims and made it harder for employers to defend against such claims based on the qualified privilege. The Court further ruled that the plaintiff had proven that the defendant made false statements about her and that the statements were made with actual malice.

J. Out-of-State Employee May Sue New York Employer for Discrimination Under State and City Human Rights Laws

[5/18/2009] New York courts have subject matter jurisdiction over discrimination claims filed under the New York State Human Rights Law and the New York City Human Rights Law where the act of discrimination occurred within New York, even if the effects of the alleged discrimination are felt mainly outside the state, the New York Appellate Division, First Department held on May 7, 2009. *Hoffman v. Parade Publ’n*, 2009 NY Slip Op 3678 (N.Y. App. Div. May 7, 2009).

K. Ohio Employers Must Provide Leave for Pregnant Employees, Regardless of Internal Policy

[5/11/2009] The Ohio Civil Rights Act prohibits employers in Ohio from discriminating against its employees “because of sex”, among other things. “Because of sex” is defined to include pregnancy and any illness arising out of and occurring during the course of pregnancy, childbirth, or related medical conditions. These provisions of the Act are similar to the federal Pregnancy Discrimination Act (“PDA”) provision of Title VII. In *Nursing Care Mgmt. of Am. v. OCRC*, 2009-Ohio-1107 (Ohio App. 5th Dist. 2009), Tiffany McFee’s employment was terminated by Nursing Care Management of America, d/b/a Pataskala Oaks, when she presented her employer a physician’s note explaining her inability to work due to a pregnancy-related medical condition. Because she had been employed by the company for less than a year (eight months), McFee did not qualify for leave under the company’s leave policy. The Fifth Appellate District found that McFee had presented direct evidence of pregnancy discrimination.

L. California Court Affirms Arbitration Order, Finding Arbitration Agreement Not Unconscionable

[4/24/2009] Affirming a lower court order directing an employee to arbitrate her disability discrimination, retaliation, and wrongful termination claims, the California Court of Appeal held that an arbitration agreement covering “all disputes” created a mutual agreement to

arbitrate all claims arising out the employment relationship. *Roman v. Superior Court of LA Cty*, No. B209855 (Cal. Ct. App. Apr. 13, 2009). The Court further ruled that the employer did not waive its right to arbitration by responding to the complaint and participating in some discovery.

M. California Court of Appeal Continues Rejection of Private Arbitration Agreements

[3/24/2009] The California Court of Appeal has continued its opposition to private arbitration agreements in another opinion striking down an arbitration agreement which contained a class action waiver and an “unconscionable arbitrator selection clause.” *Sanchez v. Western Pizza Enterprises, Inc.*, No. B203961 (Cal. Ct. App. Mar. 17, 2009). The appellate court affirmed an order denying arbitration in a class action over alleged unpaid job expenses and unpaid minimum wages. As in *Franco v. Athens Disposal Co.*, decided earlier this month, the Court applied the California Supreme Court’s analysis in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), which addressed the enforceability of class action waivers to claims for unpaid overtime.

N. California High Court Affirms Public Employers May Compel Employees to Participate in Investigations

[2/13/2009] The California Supreme Court affirmed the long-standing rule that public employers have the right to compel employees to participate in investigatory interviews, under threat of discipline, so long as the employees have not been required to waive their Fifth Amendment privilege against self-incrimination. *Spielbauer v. County of Santa Clara*, No. S150402 (Cal. Feb. 9, 2009). The Supreme Court reversed the Court of Appeal’s January 2007 determination that an employer must somehow secure a formal grant of criminal use immunity from prosecuting agencies before requiring an employee to answer questions about work-related misconduct.

O. Philadelphia Ordinance Requires Employers to Give Domestic and Sexual Violence Victims Unpaid Leave

[1/6/2009] Despite strong opposition from the business community, beginning January 5, 2009, a Philadelphia ordinance requires employers in the city to give unpaid leave to employees who need time off for reasons related to sexual assault or domestic violence, including stalking. Employees of businesses with fewer than 50 employees will be eligible for up to four weeks of leave in a 12-month period under the ordinance, while employees of business with 50 or more employees will be eligible for up to eight weeks of leave in a 12-month period.

IV. DISCRIMINATION

A. Second Circuit Dismisses Title VII Claims Where Employee Suffered No Adverse Employment Action

[6/22/2009] Finding that the plaintiff suffered no adverse employment action, the U.S. Court of Appeals in New York has affirmed summary judgment in favor of the employer, the New York State Department of Labor, on the plaintiff’s claims for alleged race discrimination and harassment in violation of the Title VII of the Civil Rights Act of 1964. *Cunningham v. New York State Dep’t of Labor*, No. 08-0992-cv (2d Cir. June 10, 2009) (summary order). However, the

Court reversed summary judgment dismissing the plaintiff's retaliation claims and remanded the case for further proceedings.

B. ADA Claim Fails to Disturb Refusal to Hire Based on Positive Test Results

[6/16/2009] An employer's failure to reconsider a positive drug test result allegedly caused by a combination of medications taken to control sleep epilepsy, resulting in an applicant's rejection for employment, is not deemed to be a violation of the Americans with Disabilities Act if the applicant is unable to demonstrate that her sleep epilepsy qualifies as a disability, a Kentucky federal court has held. *Ozee v. Henderson County*, 2009 U.S. Dist. LEXIS 37114 (W.D. Ky. May 1, 2009).

C. Employee's Title VII Claim is Time-Barred Despite Lilly Ledbetter Fair Pay Act, Third Circuit Rules

[6/12/2009] Affirming summary judgment in favor of an employer, a federal appeals court in Philadelphia has held that a plaintiff's Title VII claim that her employer discriminated against her on the basis of gender by denying her a requested pay raise in violation of Title VII was time-barred. The U.S. Court of Appeals for the Third Circuit reached this conclusion despite passage of the Lilly Ledbetter Fair Pay Act, which aids aggrieved employees in bringing suits for pay discrimination, but which the panel found was inapplicable. *Mikula v. Allegheny County*, No. 07-4023 (3d Cir. Mar. 24, 2009) (unpublished opinion).

D. USERRA Requires More Than Restoration of Titles; Courts Will Scrutinize Actual Responsibilities

[6/3/2009] The Uniformed Services Employment and Reemployment Rights Act requires employers to place employees returning from military leave into the position they would have held if they had been continuously employed. Two recent U.S. District Court decisions provide employers with greater clarity regarding their reemployment obligations. *Reed v. Honeywell Int'l, Inc., et al.*, No. CV 07-0396-PHX-MHM (D.Ariz. 2009); *Middleton v. City of Sherwood, et al.*, No. CV 08-604-HA (D.Ore. 2009). The cases focus on the treatment of management employees upon their return from military leave. In both cases, the employees had favorable evaluations before going on military leave and were reinstated to the same positions they held before going on military leave. The employees alleged their performance was criticized for the first time upon their return. They also alleged their employers had suggested their military positions were interfering with their civilian positions. In each case, the trial courts denied the employer's motion for summary judgment and set the case for trial.

E. New Special Report Available on Damages in Systemic Discrimination Class Actions

[6/3/2009] According to the Equal Employment Opportunity Commission, class-wide punitive damages can be determined by a jury in Title VII pattern or practice cases and back pay determinations may be made without individualized hearings when appropriate. If the courts agree with the EEOC, employers could lose their ability to defend individual employment decisions in large class actions due to evidence of wrongdoing based on company-wide statistics.

F. Appeals Court Gives “Glass Ceiling” Pay Discrimination Lawsuit Okay to Proceed

[6/2/2009] Reversing summary judgment in favor of the employer in a pay discrimination case under the Equal Pay Act, a federal appeals court in Cincinnati has held that the plaintiff raised a genuine factual issue warranting a trial over whether she performed substantially equal work for less pay than male co-workers. *Conti v. American Axle & Mfg., Inc.*, No. 08-1301 (6th Cir. May 22, 2009). Suzanne Conti alleged that she hit a glass ceiling in her job due to her employer’s discriminatory pay practices and that her employer violated the Equal Pay Act by paying her less than her male predecessor. The employer claimed that the pay differential was lawful because the plaintiff’s job duties were different than her male counterparts’. The United States Court of Appeals for the Sixth Circuit found this factual dispute could not be resolved on summary judgment and returned the case to trial court for further proceedings.

G. Employee’s Discharge Case Alleging Discriminatory Male Stereotyping Revived by Appeals Court

[6/1/2009] Reversing summary judgment for the employer, the federal appeals court in New York has held that a supervisor’s statement that men have a propensity to harass women supported a claim of discriminatory stereotyping based on sex in violation of Title VII of the Civil Right Act. *Sassaman v. Gamache, Dutchess County Bd. of Elections and Dutchess County*, No. 07-2721-cv, (2d Cir. May 22, 2009). Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. The employer’s minimal internal investigation into harassment claims also may lend credence to a claim of discrimination, the Court held.

H. No Right to Wear Religious Headscarf Under Uniform “Neutrality” Policy, Appeals Court Holds

[5/11/2009] The federal appeals court in Philadelphia has affirmed a lower court’s decision that the Philadelphia Police Department’s refusal to provide a religious accommodation to a female police officer seeking to wear a religious headscarf while on duty and in uniform did not amount to religious discrimination. *Webb v. City of Philadelphia*, 2009 U.S. App. LEXIS 7169 (3d Cir. Apr. 7, 2009).

I. Employer’s Neutral Return-to-Work Process Does Not Override USERRA’s Reemployment Guarantee

[5/7/2009] The U.S. Supreme Court declined review of the Sixth Circuit Court of Appeals’ decision holding that an employer violated the Uniformed Services Employment and Reemployment Rights Act when it delayed re-employment of a returning Army reservist by adhering to its neutral return-to-work process. Generally, USERRA provides reemployment rights for employees returning from military service and protection from employment discrimination following reemployment. *Petty v. Metro Gov’t of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008).

J. Fifth Circuit Provides Guidance Defining Who is a “Supervisor” Under Title VII of Civil Rights Act

[4/29/2009] The U.S. Court of Appeals in New Orleans has held that to be considered a “supervisor” under Title VII a co-worker must have the power to directly affect the terms and conditions of the plaintiff’s employment (such as the authority to discipline or evaluate performance). *Wooten v. Federal Express Corp.*, No. 07-10555 (5th Cir. April 7, 2009). Whether a co-employee is a supervisor is significant in Title VII litigation because an employer may be strictly liable for a hostile work environment created by a supervisor when the conduct culminates in a tangible employment action, such as discharge or demotion.

K. Illinois Supreme Court Expands Strict Liability for Harassment by a Supervisor

[4/23/2009] Illinois’ Supreme Court has broadened the range of cases where an employer can be held strictly liable for the conduct of a supervisory employee, holding that, under the Illinois Human Rights Act, an employer is responsible for sexual harassment by a supervisor, regardless of the supervisor’s actual authority over the victim. *Sangamon Cty Sheriff’s Dep’t v. The Illinois Human Rights Comm’n*, Nos. 105517, 105518 cons. (Ill. Apr. 16, 2009). This is a significant departure from federal caselaw interpreting Title VII of the Civil Rights Act of 1964, the federal law against employment discrimination. Under Title VII, an individual is not a “supervisor” for purposes of imposing strict liability unless he or she has the authority to affect the victim’s employment directly.

L. No Individual Liability under Title VII, First Circuit Rules

[4/7/2009] The U.S. Court of Appeals for the First Circuit in Boston has ruled that supervisors may not be held individually liable for violations of Title VII of the Civil Rights Act of 1964. *Fantini v. Salem State College*, No. 07-2026 (1st Cir. Feb. 23, 2009). Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. Although Title VII’s definition of “employer” includes “any agent” of an employer, the Court held that Congress did not intend to impose individual liability; rather, Congress meant only “to import respondeat superior liability into Title VII.” In so ruling, the Court joined the Courts of Appeals for the nine other Circuits in holding that individuals may not be held liable under Title VII. (The First Circuit has jurisdiction over Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.)

M. Title VII Associational Discrimination Claim Requires Proof Harassment was “Severe or Pervasive”

[3/20/2009] Title VII of the Civil Rights Act of 1964 protects individuals against employment discrimination on the bases of race, color, national origin, sex, and religion. In addition to making it unlawful to discriminate against members of a protected class, Title VII also offers protection to individuals who associate with members of a protected class and experience discriminatory treatment, even if they are not members of a protected class themselves.

N. Third Circuit Allows Award of Extra Damages for Additional Taxes Due to an Award of a Lump Sum Payment

[2/27/2009] In an apparent case of first impression in the circuit, the United States Court of Appeals for the Third Circuit (Philadelphia) has held that a court may award a prevailing employee an additional sum of money (a “gross up”) to compensate the employee for the increased tax burden a back pay award may create. *Eshelman v. Agere Systems Inc.*, No. 05-4895 (3d Cir., Jan. 30, 2009). Accordingly, the Court affirmed the trial court’s grant of an additional amount to the plaintiff. The Third Circuit encompasses Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands.

O. Federal Court Rules Employer-Required Medical Testing Did Not Violate ADA

[2/10/2009] Shedding light on when an employer can require medical testing for a class of employees without running afoul of the Americans with Disabilities Act (“ADA”), a Michigan district court has ruled that an employer did not violate the statute in ordering medical examinations that were a “‘reasonabl[y] effective method’ of achieving [the company’s] goal of a safe workplace.” *Wice v. General Motors Corp.*, No. 07-10662, 21 AD Cases 625 (E.D. Mich. 2008).

P. Do Your Homework! Court Says Failure to Research FMLA Shows Lack of Good Faith

[2/4/2009] Awarding liquidated damages to double the jury’s verdict in a Family and Medical Leave Act case, a federal court in Pennsylvania has found that an employer’s failure to “take affirmative steps to ascertain the requirements of the law” evidenced a lack of good faith and, therefore, the plaintiff was entitled to liquidated damages. *Brown v. Nutrition Management Services Co.*, No. 06-2034 (E.D. Pa. Jan. 21, 2009).

Q. Court Dismisses Failure to Accommodate Case: Employee “Got Exactly What She Wanted”

[2/3/2009] Affirming a jury verdict in favor of the employer in a disability discrimination case, the California Court of Appeal held that the employer engaged in the interactive process required for evaluating a reasonable accommodation of an employee’s disability and, in fact, accommodated the employee’s disability in accordance with the California Fair Employment and Housing Act (FEHA). *Wilson v. County of Orange*, No. G039733 (Cal. Ct. App. Jan. 6, 2009). Indeed, the Court noted that the success of the accommodation process was “borne out by the fact that, in the end, [the employee] got exactly what she wanted.”

V. RETALIATION

A. Employers Threatened by a Connection Between Data Security and Whistleblowing/Retaliation Claims?

[5/28/2009] Many companies are expediting their efforts to develop safeguards to protect personal data in response to the rapid emergence of data privacy and security regulations. The New Jersey Identify Theft Protection Act, the Massachusetts data security regulations, the

federal “red flag” regulations, and the recent amendments to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) under the American Recovery and Reinvestment Act are prime examples of the wave of regulation directed at protecting personal data. While fear of data breaches, reputational harm, litigation and penalties usually drive company executives to action, employee whistleblower and retaliation claims also must be added to this list. At least one New Jersey court held recently that an employee who voices concerns regarding data security is engaged in protected whistleblowing activity under the New Jersey Conscientious Employee Protection Act (“CEPA”).

B. Washington State Labor Retaliation Claim Preempted by National Labor Relations Act

[5/22/2009] A Washington federal trial court has dismissed an employee’s state law retaliation claim, holding that it was preempted by the National Labor Relations Act. *Cope v. WinCo Foods, LLC*. The employee brought his claim under a Washington statute which protects an employee’s right to engage in “concerted activity” without employer interference. The Court held that the claim was preempted because, through passage of the NLRA, Congress actually protected the same activity as the state statute (applying the Garmon preemption doctrine). Accordingly, the claim properly was dismissed.

C. Sarbanes-Oxley Determination Precludes Later Discrimination Lawsuit Involving Same Facts

[5/4/2009] In a case of first impression, a federal appeals court in Philadelphia has held that an employee is precluded from filing claims of discrimination pursuant to Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act against her former employer, where those claims are based on the same facts that supported her earlier, unsuccessful administrative Sarbanes Oxley claim. *Tice v. Bristol-Myers Squibb*, No. 07-3977 (3d Cir. Apr. 8, 2009) (unpublished).

D. DOL Upholds Termination of Insubordinate Truck Driver, Rejecting Driver’s STAA Retaliation Claim

[4/22/2009] The U.S. Department of Labor’s Administrative Review Board ruled that a trucking company did not violate the Surface Transportation Assistance Act (“STAA”) by terminating a driver for insubordination, even though he previously had complained about driving a truck without air conditioning and refused to drive one that smelled of diesel fumes. *Evans v. Gainey Transp. Servs. Inc.*, ARB Case No. 07-068 (Dep’t Labor Mar. 27, 2009). Although the Board found that the employee’s complaints and refusal to drive were protected activities under the STAA, the employee’s termination was unrelated to those complaints. Accordingly, the Board dismissed the employee’s complaint.

E. Department of Labor Decision May Expand SOX Whistleblower Protection

[3/26/2009] A recent decision of the U.S. Department of Labor may expand whistleblower liability under the Sarbanes-Oxley Act (“Sarbanes-Oxley” or “SOX”) to private entities engaged in business with publicly-traded companies. Sarbanes-Oxley applies to companies listed on publicly-traded stock exchanges and, in section 806, protects employees who report certain

wrongdoing to their superiors from retaliation. In *Kalkunte v. DVI Financial Services, Inc.*, the Department of Labor's Administrative Review Board affirmed an Administrative Law Judge's decision holding that both DVI Financial Services ("DVI"), a publicly-traded company, and AP Services, LLC ("AP Services"), a privately-held company, retaliated against Sheila Kalkunte in violation of Sarbanes-Oxley.

F. First Circuit Court Sets Standard for Sarbanes-Oxley Whistleblower Claims

[2/18/2009] In a decision of first impression in the Circuit, but resembling those of other courts, the United States Court of Appeals for the First Circuit held that a plaintiff's allegations of shareholder fraud were not "objectively reasonable" under the whistleblower protection provision of the Sarbanes-Oxley Act ("SOX" or "Act"), and affirmed summary judgment for the employer. *Day v. Staples, Inc.*, No. 08-1689 (1st Cir., Feb. 9, 2009). The Court also found the employer's explanation to the employee of the business reasons behind the complained of issues further decreased the reasonableness of the plaintiff's belief of fraudulent activity.

VI. WORKPLACE DEVELOPMENTS

A. ICE Sends Over 650 Employers I-9 Audit Notices in Nationwide Immigration Enforcement Initiative

[7/2/2009] Six hundred fifty-two employers throughout the country are receiving I-9 Notice of Inspections (NOIs) from the Department of Homeland Security's Immigration and Customs Enforcement (ICE) unit, the Government has announced. ICE is the federal agency responsible for investigating employers for immigration worksite violations. The NOIs require employers to provide copies to ICE of all of their employee Form I-9s and supporting documents by a specified date. In most instances, however, employers are given only three business days to present their records to the local ICE office.

B. Affirmative Action Regulations May Cover Hospitals Servicing Federal Employees Through HMO's

[6/18/2009] The broad reach of the Office of Federal Contract Compliance Programs may extend even further under a recent federal administrative board decision. The U.S. Department of Labor's Administrative Review Board has upheld an administrative law judge's (ALJ's) finding that three hospitals receiving payments from a health plan for providing medical services to U.S. government employees are federal subcontractors required to comply with OFCCP requirements. *OFCCP v. UPMC Braddock*, No. 08-048 (DOL ARB May 29, 2009).

C. Department of Justice Makes Civilian Reemployment Rights of Service Members and Veterans a Priority

[3/9/2009] With the large number of Reservists called to active duty in recent years, most employers may have heard of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). If not, the Department of Justice ("DOJ") wants to ensure that all employers do now. To ensure employers take note, the DOJ announced on March 4, 2009, that it resolved by consent decree two complaints for USERRA violations filed on the same day in Oregon and Michigan. The first complaint was against an Oregon-based business for failing to re-employ

Oregon reservist David Eckhardt following an absence for reservist training. The second complaint was against a Minnesota-based company for failing to re-employ Michigan veteran Stephen Alasin after a three-year tour of duty.

D. Tenth Circuit Lifts Injunction on Oklahoma Gun Laws that Prohibit Employers' "No Weapons" Policies

[2/26/2009] Oklahoma's gun laws making employers criminally liable for prohibiting employees from storing firearms locked in vehicles on company property are not preempted by the federal Occupational Safety and Health Act ("OSH Act"), the U.S. Court of Appeals for the Tenth Circuit has held. *Ramsey Winch Inc. v. Henry*, No. 07-5166 (10th Cir. Feb. 18, 2009). Rejecting the arguments of Oklahoma businesses, the Court reversed the district court's grant of a permanent injunction that kept Oklahoma from enforcing the sections of its gun laws that prohibited property owners from banning the storage of firearms locked in vehicles on the owner's property.

E. Federal Court Finds Employer Not Liable for Sudden Layoff under WARN

[2/4/2009] An employer satisfied the "unforeseeable business circumstances" exception under the Worker Adjustment and Retraining Notification Act ("WARN") when it implemented a layoff without advance notice just days after losing its biggest customer, the federal appellate court in Denver has held. *Gross v. Hale Halsell Co.*, No. 08-5028 (10th Cir. Jan. 20, 2009). WARN's unforeseeable business circumstances exception applied because the customer's withdrawal, and the attendant 40 percent loss in potential business, was not reasonably foreseeable.

