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MONTHLY UPDATE

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EEOC

- EEOC Press Release, dated October 19, 2007, <http://www.eeoc.gov/press/10-19-07.html> (Warning of a “phony e-mail to employers -- being circulated under the subject ‘Harassment Complaint Update For’” that “contains a Trojan Horse Virus”).

GENERAL EEO

- *Am. Ctr. For Int’l Labor Solidarity v. Fed. Ins. Co.*, case no. 04-01523 (Dist. D.C. 10/15/07) (Employer lost EPL-insurance coverage by failing to warn its carrier of an EEOC charge. The EPL policy required notice in the event of a claim and defined a claim, as any “formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document.” The court rejected employer’s argument that an EEOC charge is not a claim “simply because the EEOC cannot impose liability or adjudicate rights.”). See, “Court Says Firm Lost Insurance Coverage For Failing To Promptly Report EEOC Charge,” BNA Daily Labor Report, no. 202, p. A-6 (10/19/07).
- H.R. 3685 (Resolution cleared the House to add sexual orientation as a protected class. Two amendments were dropped from the final resolution. The first was offered then withdrawn; it would have protected gender identity. The second was struck by a vote of the House; it would have protected marital status. The White House has indicated it will veto the bill, if it is passed by the Senate. At the current time, one lawmaker estimated that at least twenty states (now including Colorado) already include sexual orientation in their state’s EEO laws; this resolution, if it becomes law, would affect the remaining thirty states.)

FMLA

- *Novak v. MetroHealth Medical Center*, ___ F.3d. ___, 2007 U.S. App. LEXIS 22884 (6th Cir. 2007) (When confronted with FMLA medical certifications of a “suspicious and contradictory nature,” the employer was entitled to reject them but, before denying leave, was required to notify the employee and provide her a “reasonable opportunity” to correct the deficiencies. Here, employer satisfied that burden. Additionally, the

plaintiff was not entitled to take FMLA leave to care for her adult (18-year old) daughter. While her daughter was allegedly suffering from post-partum depression, she was, nonetheless, able to care for herself. Although her daughter was not able to care for her newborn child, the plaintiff's grandchild, the FMLA only entitles parents to take leave to care for their own child and only when that child is unable to care for themselves.)

- DOL is reexamining the FMLA, especially the medical certification process. See, e.g., "DOL Considering Changes to Forms Used for FMLA Health Care Provider Certifications," BNA Daily Labor Report, no. 189, p. A-9 (10/1/07).

STATE LAW AND MISCELLANEOUS

- *EEOC v. Outback Steak House of Florida, Inc.*, ___ F.Supp. ___, 2007 U.S. Dist. LEXIS 62996 (D. Colo. 2007) (J. Nottingham) (Individual plaintiff is barred from asserting employment claims because she previously filed for bankruptcy and failed to disclose the claim as a potential asset. Amending her bankruptcy schedules to add the claims does not lift that bar. While the bankruptcy trustee may assert her claims, the trustee's recovery is "capped at the level necessary to satisfy all creditors and the costs and fees incurred by this litigation." The EEOC's claim was not at-issue in that particular ruling).
 - See also *Gaskins v. Thousand Trails LP*, ___ F.Supp. ___, case no. 06-755 (S.D. Ohio 2007) (Plaintiff's wage and discrimination claims dismissed for similar reasons).
- Colorado Governor Bill Ritter's Executive Order no. D 028 07 (Rearticulating the legal framework under which certain state employees can be represented by unions, permitting negotiating instead of collective bargaining, "partnership agreements" instead of collective bargaining agreements, no strikes, and "non-binding mediation and/or fact finding" instead of interest arbitration).
- *Long v. Dunlop Sports Group Americas, Inc.*, ___ F.3d ___, 2007 U.S. App. LEXIS 25300 (4th Cir. 2007) (Employer committed no WARN violation. Employees suffered no "employment loss," which would have triggered WARN notice, when employers terminated their employment *duties*, relieved them of all work, but continued to pay their wages and benefits until successor resumed operations).

NLRB

- *Toering Elec. Co.* 351 NLRB No. 18 (9/29/07) (In a 3-2 decision, the NLRB held that a job applicant who is a SALT, and therefore not "genuinely interested" in a meaningful employment relationship is not protected against anti-union discrimination by sec. 8(a)(3) of the NLRA).
- *St. George Warehouse*, 351 NLRB No. 42 (9/30/07) (In a 3-2 decision, the NLRB held that it is the NLRB general counsel who bears the burden of proving that alleged victims of anti-union discrimination took reasonable steps to secure employment. It is not the employer's burden to prove they failed to mitigate).
- *BE&K Constr. Co.*, 351 NLRB No. 29 (9/29/07) (In a 3-2 decision, the NLRB held that an employer's lawsuit against a union does not violate the NLRA, so long as it has a reasonable basis, even if it was motivated by retaliation, applying the Supreme Court's decision in *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002)).

- *Anheuser-Busch Inc.*, 351 NLRB No. 40 (9/29/07) (In a 3-2 decision, the NLRB held that employees who were discharged for misconduct caught on hidden surveillance cameras were entitled to no relief even though the employer violated the NLRA by installing those cameras without first giving the workers' union notice and an opportunity to bargain).
- *BP Amoco Chem.-Chocolate Bayou*, 351 NLRB No. 39 (9/29/07) (In a 2-1 decision, the NLRB held that a union was barred from filing a ULP charge alleging that 37 workers were targeted for layoff as part of anti-union retaliation because the workers had signed severance agreements and releases).
- *Ryder Mem'l Hosp.*, 351 NLRB No. 26 (9/28/07) (Employers and unions may now use the NLRB's sample ballots as election propaganda in campaigns, checking off on the sample the vote the circulator requests (e.g., a union could check the "Yes" line), so long as the circulator uses the NLRB's new ballot form which expresses NLRB neutrality).
- Associate General Counsel Richard A. Siegel's memorandum, OM 08-07 (Outlining new procedures to follow, including providing notice to interested employees, after voluntary recognition).