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## UPDATE

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### SUPREME COURT

- *Ricci v. De Stefano*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2658 (6/29/09) (Employer's action – refusal to apply civil service tests for purposes of promotion opportunities – taken to avoid potential disparate impact claims – by African-American individuals who scored disproportionately low on said tests – may, itself, in turn, become the basis for disparate treatment claims – by the Caucasian and Hispanic individuals who passed said tests and would otherwise have been promoted. In other words, action taken with the intent of avoiding a potential disparate impact claim may, itself, evidence a discriminatory intent in a disparate impact claim.).
  - *Humphries v. Pulaski County Special School Dist.*, \_\_\_ F.3d \_\_\_, 2009 U.S. App. LEXIS 19846 (8<sup>th</sup> Cir. 4/16/09) (Evidence that employer acted pursuant to a court-sanctioned affirmative action plan may, itself, be evidence of discrimination in a disparate treatment claim).
- *Gross v. FBL Financial Services, Inc.*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2343 (6/18/09) (Because the ADEA lacks the statutory language of Title VII/the Civil Rights Act of 1991, which codified mixed-motive claims by requiring a plaintiff to show only “a motivating factor” was her race, gender, national origin, etc., plaintiffs in an age claim must show that age was “the” reason, or in other words, that the employer would not have taken the same action “but for” the plaintiff's age).
  - *Hunter v. Valley View Local Schools*, \_\_\_ F.3d \_\_\_, 2009 U.S. App. LEXIS 2664 (6<sup>th</sup> Cir. 8/26/09) (Analyzing FMLA claims in light of *Gross*, but holding that the FMLA's statutory language – “a negative factor” – was more akin to Title VII's “a motivating factor”; therefore, a plaintiff need prove only that “a motivating factor” in the employer's decision to put her on involuntary leave was her prior FMLA leave).
- *Perdue v. Kenny A.*, case no. 08-970 (Supreme Court accepted certiorari to decide whether trial court may enhance a prevailing plaintiff's attorney fees award for superior representation and exceptional results).

- *Granite Rock Co. v. Intl. Brotherhood of Teamsters*, case no. 08-1214 (Supreme Court accepted certiorari to decide whether a union's international can be held liable for tortiously interfering with a particular local's collective bargaining agreement with an employer, also whether the international can be held liable under Sec. 301(a) of the Labor-Management Relations Act for damages related to strike-related activity in violation of that agreement's no-strike clause even though said international was not a signatory to the agreement that contained the no-strike clause).
- *Stolt-Nielsen v. AnimalFeeds Int'l Corp.* case no. 08-1198 (Supreme Court accepted certiorari to decide whether the arbitration of claims by a class of plaintiffs can be required even though the arbitration agreement is silent as to class claims).

## EEOC

- The EEOC published proposed rules implementing GINA, at 74 Fed. Reg. 9056-71 and 84 Fed. Reg. 23674-77.
- The EEOC's Commission voted to publish a notice of proposed rulemaking under the ADA Amendments Act of 2008 (6/17/09). The EEOC's proposal must clear the OMB before it is published in the Federal Register. The proposed rules have already become controversial. See for example "Portions of EEOC's Proposed ADA Rule May Conflict with Law's Intent, Speakers Say," BNA Daily Labor Report, 126 DLR A-1 (7/6/09).
- Technical assistance issued, entitled "Understanding Waivers of Discrimination Claims in Employee Severance Agreements," available at [http://www.eeoc.gov/policy/docs/qanda\\_severance-agreements.html](http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html) (7/15/09).

## IMMIGRATION REFORM

- Following rejection of the Chamber of Commerce's request for a stay from the U.S. District Court for the Southern District of Maryland, in *Chamber of Commerce v. Chertoff*, case no. 08-cv-03444-AW, 2009 U.S. Dist. LEXIS 75986 (8/25/09), DHS' e-Verify rules, 48 C.F.R. §§ 2, 22, 52 -- basically requiring federal contractors to use e-Verify -- will take effect September 8, 2009. Note, the scope of the federal rules remains to be litigated; arguments have been made as to whether it only requires the federal contractor to run new hires on the federal project through e-Verify; or also existing employees on that project in addition to new hires to that project; or all new hires throughout the company; or even all employees throughout the company.
  - Colorado Department of Labor and Employment Division of Labor published proposed rules, to be codified at 7 CCR 1103-3 (currently available at [www.coworkforce.com/lab/evr](http://www.coworkforce.com/lab/evr)), regarding Colorado's own e-Verify program, CRS 8-2-122.
- 74 Fed.Reg. 41,801 (DHS rescinded its previously proposed "no-match" rule).
- *Williams v. Mohawk Industries, Inc.*, 568 F.3d 1350 (11<sup>th</sup> Cir. 2009) (District court abused its discretion by denying class certification in RICO claim against employer alleging "racketeering activity by hiring illegal aliens and depressing the employees' wages").

## GENERAL EEO

- *Thompson v. North American Stainless*, 567 F.3d 804 (6<sup>th</sup> Cir. 2009) (No retaliation claim under Title VII for retaliation based on the protected activity of plaintiff's spouse, fiancé, or other close associate).
- *Lytes v. DC Water and Sewer Authority*, 572 F.3d 936 (D.C. Cir. 7/21/09) (ADA Amendments Act of 2008 is not retroactive); *Milholland v. Sumner County Board of Education*, 569 F.3d 562 (6<sup>th</sup> Cir. 7/2/09) (same).
- *Middleton v. Chicago*, \_\_\_ F.3d \_\_\_, 2009 U.S. App. LEXIS 18979 (7<sup>th</sup> Cir. 8/24/09) (USERRA claims are subject to the federal 4-year "catch-all" statute of limitations despite the DOL's contention to the contrary that, because USERRA is silent as to a statute of limitations, no limitations period should apply at all).
- *Huston v. Procter & Gamble Paper Products Corp.*, 568 F.3d 100 (3<sup>rd</sup> Cir. 6/8/09) (A supervisor's knowledge is not necessarily imputed to employer in an EEO claim; rather it depends on the extent of the supervisor's actual authority and the nature of her duties. For example, the knowledge of a company's EEO officer would be, but at the other extreme, a foreman's would not. Also, an employer's prompt and remedial response is defense against claim of sexual harassment.).
- *Dillon v. Mountain Coal Co., LLC*, 569 F.3d 1215 (10<sup>th</sup> Cir. 6/23/09) (Employer's letter terminating plaintiff because his work restrictions were inconsistent with the job's demands was insufficient to establish that the employer regarded him as disabled; it merely established that the employer regarded him as unable to perform that particular job).

#### FMLA

- 29 C.F.R. § 825 (2008), Department of Labor, final rules regarding FMLA and family military leave (effective 1/16/09).

#### STATE LAW AND MISCELLANEOUS

- H.B. 09-1057 (Effective August 5, 2009, an employer that is subject to the FMLA must allow employees to take leave to attend parent-teacher conferences – up to 6 hours per month and 18 hours per academic year for full-time employees).
- H.B. 09-1108 (Effective August 5, 2009, employers face possible penalties if their bank fails to honor a paycheck upon presentment).
- H.B. 09-1310 (Effective July 1, 2009, employers face agency investigation and penalties for misclassification of employees as independent contractors).
- *Bouldy v. Vail Valley Center for Aesthetic Dentistry, P.C.*, 186 P.3d 80 (Colo.App. 2008) (Colorado's Wage Order 22 may be the basis for a public policy claim of wrongful discharge, depending on the nature of the plaintiff's job duties).
  - *Kearl v. Portage Environmental, Inc.*, 205 P.3d 496 (Colo.App. 2009) (An employee's "good faith attempt to prevent the employer's participation in defrauding the government" may be the basis for a public policy claim of wrongful discharge).

- *Lucht's Concrete Pumping, Inc., v. Horner*, \_\_\_ P.3d \_\_\_, 2009 Colo. App. LEXIS 1041 (Colo.App. 6/11/09) (Continued at-will employment is not valid consideration for a covenant not to compete, although it may be for other obligations. Not all employees owe a duty of loyalty; rather, it depends on whether the employee had "sufficient authority to create a principal-agent relationship." Employee that does have a duty of loyalty does not violate that duty by talking to a competitor about working there and not disclosing the same to his employer.).
  - *Hertz v. The Luzenac Group*, \_\_\_ F.3d \_\_\_, 2009 U.S. App. LEXIS 18339 (10<sup>th</sup> Cir. 8/11/09) (Detailed review and analysis of Colorado trade secret law and related legal principles).
- *Cory v Allstate Ins.*, \_\_\_ F.3d \_\_\_, 2009 WL 2871541 (10<sup>th</sup> Cir. 2009) (Internal corporate investigators' statement to plaintiff during interview about allegations that he had committed forgery not to worry -- "nothing bad would happen" -- are "not sufficiently definite, specific, or explicit to give him a reasonable expectation of an implied contractual right that modified the express terms of" his at-will employment).
- *Sonic-Calabasas A, Inc., v. Moreno*, 94 Cal.Rptr.3d 544 (Cal.App. 5/29/09) (In light of *Preston v. Ferrer*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 978 (2008), a state-law wage claim must be arbitrated under the Federal Arbitration Act even though the state wage claim law contains a specific provision prohibiting waivers by employees).

#### NLRB

- *Snell Island SNF, LLC, v. NLRB*, \_\_\_ F.3d \_\_\_, 2009 WL 1676116 (2<sup>nd</sup> Cir. 6/17/09) (Joining the First and Seventh Circuits and rejecting the D.C. Circuit's view to the contrary, the Second Circuit held that the NLRB acted lawfully with less than a quorum).
- *Local 917, Intl. Brotherhood of Teamsters, v. NLRB*, \_\_\_ F.3d \_\_\_, 2009 U.S. App. LEXIS 17739 (2<sup>nd</sup> Cir. 8/11/09) (Review and analysis of the secondary-boycott provision contained in the NLRA, sec. 8(e), and its relationship with work preservation agreements).
- *Muffley v. Spartan Mining Co.*, 570 F.3d 534 (4<sup>th</sup> Cir. 7/1/09) (Review and analysis of the "usual four-factor equitable test" to be applied by district courts when reviewing the Board's request for injunctive relief under sec. 10(j) of the NLRA).

#### OSHA

- *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC docket no. 1622, 2009 OSAHRC LEXIS 43 (7/27/09) (Despite Eighth Circuit's order to the contrary, OSHRC reinstated OSHA's controlling employer doctrine in multiemployer worksites).