Covered Employers Must Submit VETS-100 and EEO-1 Reports by September 30, 2005

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Covered Employers Must Submit VETS-100 and EEO-1 Reports by September 30, 2005

Nonexempt federal contractors and subcontractors required to file a VETS- 100 Report, conveying information about the veteran status of their workforce, must do so by September 30, 2005. Covered employers should note that the VETS-100 form will not be mailed to employers this year. Instead, employers meeting the reporting thresholds can obtain a copy of the VETS-100 Report, as well as instructions for completing that report, at DOL.gov, or by contacting the VETS-100 help desk at 301- 306-6752.

Similarly, covered employers required to submit an Employer Identification Report ("EEO-1 Report") must also do so by September 30, 2005. Additional information relevant to the completion of the EEO-1 Report can be found on the EEOC website, or by telephoning (866) 286-6440.

Any employer with questions as to whether it is required to submit either a VETS-100 Report or an EEO-1 Report and, if so, what its reporting requirements may be, can access any of the various resources identified above or contact any member of the Labor and Employment Department.

The Department of Homeland Security

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Temporarily Relaxes I-9 Requirements for Hurricane Katrina Victims

On September 6, 2005, the Department of Homeland Security ("DHS") announced that, for the next 45 days, it will not sanction employers for hiring Hurricane Katrina victims who are unable to provide the documentation normally required under Section 274A of the Immigration and Nationality Act (such as a driver's license or U.S. Social Security card) to verify employment eligibility and identity. Employers will still need to complete Employment Eligibility Verification ("I-9") forms to the best of their ability, and should specifically note where required documentation is not available due to Hurricane Katrina. The DHS will review this policy at the end of the 45-day period and make further recommendations at that time.

Wisconsin Employers Are Strictly Liable for Supervisor Sexual Harassment Under Wisconsin Law

In a recent opinion, the State of Wisconsin Labor and Industry Review Commission (the "Commission") held that the affirmative defense to sexual harassment claims available to employers in lawsuits brought under federal law is not applicable to harassment lawsuits brought under the Wisconsin Fair Employment Act ("WFEA"). In Sanderson v. Handi Gadgets Corp., ERD Case No. CR200201194/20020289 (LIRC Mar. 31, 2005), the Commission held that under the WFEA "the employer is liable for sexual harassment by its agent whether or not it addressed the matter and without regard to whether the complainant availed herself of opportunities to complain," such that there is "no affirmative defense available to the employer [under Wisconsin law] where the sexual harassment is perpetrated by its agent." Id.

The Commission's interpretation of Wisconsin law can be directly contrasted with the U.S. Supreme Court's interpretation of federal law prohibiting sexual harassment. Specifically, in 1998, the U.S. Supreme Court articulated an affirmative defense available to employers to avoid liability under Title VII—when a supervisor engages in sexual harassment but no tangible employment action occurs, an employer may avoid liability if it can demonstrate that (1) it exercised reasonable care to prevent and correct promptly the sexually harassing behavior, and (2) the alleged victim unreasonably failed to take advantage of any

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preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

According to the Commission's holding in Sanderson, the Ellerth/Faragher affirmative defense does not apply to harassment claims brought under the WFEA. Wisconsin joins Illinois, Missouri and Massachusetts in holding an employer strictly liable for sexual harassment perpetrated by its agents.

The Sanderson opinion emphasizes the crucial need for employers to provide both initial and periodic "refresher" anti-harassment training for all employees. In addition to implementing a well written and consistently enforced anti-harassment policy, an employer should train each of its employees as to what is and is not acceptable workplace behavior.

Another Federal Court Rules That Employees Cannot Waive Their FMLA Rights Without Court or U.S. Department of Labor Approval

In July 2005, the Fourth Circuit Court of Appeals—the federal appeals court for Maryland, North Carolina, South Carolina, Virginia and West Virginia— ruled that an employee who signed a separation agreement containing a release and waiver of all claims could still bring a lawsuit against her employer under the Federal Family and Medical Leave Act ("FMLA"). Taylor v. Progress Energy, Inc., 415 F.3d 364 (4th Cir. 2005). The Fourth Circuit reached this conclusion even though the employee received $12,000 pursuant to the terms of the release, which she did not return when she filed an FMLA action. The Fourth Circuit based its ruling on a federal regulation that provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." Id. at 368 (quoting 29 C.F.R. Section 825.220(d)). According to the Fourth Circuit, the regulation permits the waiver or settlement of FMLA claims only with prior approval of the Department of Labor or a court. A federal district court in Illinois has made a similar ruling. See Dierlam v. Wesley Jessen Corp., 222 F. Supp. 2d 1052, 1056 (N.D. Ill. 2002). The Taylor and Dierlam decisions directly conflict with a holding from the Fifth Circuit Court of Appeals, Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003), that Section 825.220(d) does not prohibit the post-dispute settlement of FMLA claims.

Employers should analyze their procedures/practices for responding to requests

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by employees for family and/or medical leave. Should the reasoning used by the Fourth Circuit in Taylor take hold, it will be more difficult for employers to minimize their exposure for FMLA violations after the fact.

Unpaid Leave for Spouses and Parents of Active Duty Military Members Under the New Illinois Family Military Leave Act

As of August 15, 2005, Illinois employers employing between 15 and 50 employees must provide up to 15 days of unpaid family military leave to qualifying employees who are the spouse or parent of a person called to military service lasting longer than 30 days. Illinois employers employing more than 50 employees must provide up to 30 days of unpaid family military leave. Employees must give at least 14 days advance notice if the leave consists of five or more consecutive workdays, or as much notice as is practicable if the leave is for less than five days. Eligible employees cannot take leave under this Act unless they have first exhausted all non-sick/disability time off otherwise available to them, including, for example, accrued vacation, personal leave and compensatory leave. Any employee who exercises the right to family military leave under the Act is entitled to be restored to the same or an equivalent position upon expiration of the leave, unless the employer can prove that restoration did not occur because of conditions unrelated to the employee's exercise of rights under the Act. Employers are prohibited from discriminating against any employee who exercises any right provided for in the Illinois Family Military Leave Act.

Paid Leave for Blood Donation Under the New Illinois Employee Blood Donation Leave Act

Beginning on January 1, 2006, local government and private employers employing more than 50 employees in Illinois must provide qualifying employees with one hour of paid leave to donate blood. An eligible employee may use leave authorized under this Act only after obtaining approval from the employer. Eligible employees may request time off for blood donation once every 56 days. The Illinois Department of Labor will be developing rules governing blood donation leave, including rules establishing the conditions and procedures for requesting and approving such leave.

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What Are Your Employees Instant Messaging?

Instant messaging by employees in the workplace is on the rise. Because instant messaging is more informal and conversational than traditional e-mails, it can expose an employer to all types of increased risks, such as an increased risk of transmitting inappropriate jokes, sexual or pornographic material and confidential information about the company or its clients. Additionally, employee productivity can suffer because employees are able to participate in real-time conversations with friends and family. Employers can reduce exposure to these risks by publishing and enforcing company policies regarding employee use of e-mail, the Internet and instant messaging.

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