

AUTUMN 2009

# Employment Update

e-news

## Department of Labor Budget Provides for Increased Enforcement

The White House proposed budget for fiscal year 2010 calls for substantial increases in enforcement activities. DOL will hire an additional 670 investigators with a focus on wage and hour issues. The stated purpose of this additional funding is to enhance “worker protection agencies” so as to “vigorously protect wages and working conditions of the 135 million workers.”

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## Registered Sex Offenders Cannot Proceed with Lawsuit

A federal court in Texas recently ruled that an employee’s status as a registered sex offender was not a disability under the Americans with Disabilities Act. The plaintiff, a female manager for Wal-Mart, was fired after the company discovered she was a registered sex offender. Prior to her employment with Wal-Mart, the plaintiff had worked as a high school teacher and coach and was charged with having an inappropriate physical relationship with a student. After pleading guilty, she was required to register as a sex offender. In addition to the claim of disability discrimination, the plaintiff raised the claim of sex discrimination on the theory that Wal-Mart employed male sex offenders. The court rejected the argument on procedural grounds because the plaintiff had failed to include the claim in her complaint with the EEOC, a pre-requisite to filing a discrimination claim under federal law.

## EEOC Opines that Mandatory Participation in Health Risk Assessment May Violate ADA

In a recent opinion letter the Equal Employment Opportunity Commission (“EEOC”) advised an employer that mandatory participation in a clinical health risk assessment as a condition of medical insurance likely violated the Americans with Disabilities Act. The employer required all employees to participate and included answering a short health-related questionnaire and basic blood work and blood pressure screening. If an employee did not participate, he or she was not eligible for medical insurance. The EEOC in response to an inquiry from the Employer opined that the practice appeared to be unlawful because it “does not appear to be job-related and consistent with business necessity.”

## If Employment Test Results Disfavor Minority Applicants, What Should the Employer Do?

In a recent 5-4 decision, the U.S. Supreme Court ruled that an employer should not set aside an employment test that seems to show an unequal effect on minority applicants, unless there is a “strong basis in evidence” that the employer will be subject to disparate impact liability. The employer, the city of New Haven, CT, had administered promotion exams to 118 firefighters seeking to fill 15 vacant lieutenant and captain positions. In an attempt to diminish any potential racial bias against minority applicants, the city paid an outside consulting firm \$100,000 to develop a test that would focus on skills relevant only to the position. Nevertheless, exam results showed that minority applicants had substantially lower pass rates than white applicants. Thus, the city set aside the exam because of the adverse impact on the minority applicants. Despite the city’s good-faith fear of disparate-impact liability, the Court held that the city was liable under Title VII of the 1964 Civil Rights Act for having discriminated against the employees who had passed the test; in other words, the city was liable for “reverse discrimination.”

## The FMLA Forbids Employers from Considering FMLA Leave in Adverse Employment Decisions

The U.S. Court of Appeals for the Sixth Circuit recently permitted a school custodian to proceed with her discrimination claim against the school for impermissibly considering the custodian’s use of FMLA leave in deciding to place her on involuntary leave. Between 2003 and 2005, the custodian took several leaves of absence to undergo surgeries for various injuries she had sustained in a car accident. As a result, in 2005 the school placed the custodian on involuntary, unpaid medical leave for one year based on her “excessive absenteeism” and limited ability to work. In its decision to sustain the discrimination claims, the court stated that an employer cannot consider the taking of FMLA leave as a factor in employment decisions; the employer may only consider permissible factors. Thus, the FMLA authorizes discrimination claims in which an improper consideration (i.e. taking FMLA leave) was a motivating factor for an adverse employment decision. Accordingly, once the employee presents evidence an employer has discriminated against him/her because of the taking of FMLA leave, the burden then shifts to the employer to prove that it would have made that decision absent leave.