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EMPLOYMENT MATTERS / ANNUAL REVIEW

There have been numerous legal developments within the past year that will have a significant impact on employment practices. This advisory highlights and summarizes these important developments, and provides practical information to assist companies in evaluating whether their employment practices are up to date.

The MCAD issued new Sexual Harassment Guidelines

In October 2002, the Massachusetts Commission Against Discrimination (MCAD) issued new Sexual Harassment Guidelines, in an attempt to clarify the state of the law in Massachusetts concerning this form of discrimination. The full text of these guidelines may be accessed at: http://www.state.ma.us/mcad/shguide.html.

The new Sexual Harassment Guidelines contain definitions and examples of *quid pro quo* and *hostile environment* harassment, highlight circumstances under which harassment outside the workplace may be actionable, and recommend specific sexual harassment policies and training programs.

Filing deadlines for state discrimination claims have been extended

Prior to 2002, an employee who believed he or she had been subjected to discrimination had six months in which to file a claim with the Massachusetts Commission Against Discrimination. As of November 5, 2002, this deadline was extended to 300 days. This expanded filing period applies to all claims that arise after this effective date.

The Massachusetts Sexual Harassment Act has been amended and clarified

Until recently, the Massachusetts Sexual Harassment Act has been less than clear with respect to filing deadlines and remedies that are available to persons who are entitled to recover under this statute. The statute was amended this past year to clarify these points. Now, all persons claiming to have been subjected to sexual harassment must adhere to the same deadlines for filing claims as persons who claim to have been subjected to other forms of discrimination. In addition, it is now clear that persons claiming to have been subjected to sexual harassment are entitled, if they succeed at trial, to all of the remedies available to other victims of unlawful discrimination, such as an award of punitive damages, attorney's fees, and costs.

An employee's lawyers now may talk to certain current and former employees

When a company is sued by an employee, a potentially valuable source of information for the claimant's attorney is other employees, both current and former. This past year, the rule that governs with whom an attorney may speak with has been clarified.

Now, a claimant's attorney is prevented from speaking only with three classes of persons: those persons who exercise managerial responsibility in connection with the alleged incident; those persons who are alleged to have committed the wrongful acts at issue; and those persons who have authority on behalf of the company to make decisions about the course of the litigation itself.

To minimize the risk that managers and other employees will speak with a claimant's attorney without the company's knowledge, request that all employees notify human resources or members of senior management in the event they are contacted by an attorney for any current or former employee.

HIPAA regulations go into effect April 14, 2003

The federal Health Insurance Portability and Accountability Act (HIPAA) imposes a number of responsibilities on employers covered by the Act, some of which become effective on April 14, 2003. In broad terms, HIPAA is intended to implement standards for health information privacy, health information security, and health data transaction efficiency.

Generally speaking, an employer will be subject to HIPAA if the employer operates a self-insured health plan with 50 or

more participants, or alternatively if the employer has an onsite doctor or nurse, or operates a clinic or counseling center that treats employees, visitors, or others, and also transmits electronic records of resulting medical records, bills, or insurance claims that identify treated individuals. The statute provides for significant monetary fines for a failure to protect and maintain the privacy of protected health information.

The standard for being classified as "disabled" under the Americans with Disabilities Act has been heightened

Courts (and consequently, employers) have struggled for many years with the definition of "disability," for the purpose of determining whether an employee is eligible for protection under the Americans with Disabilities Act (ADA). In the so-called *Toyota Motor* case, the U.S. Supreme Court announced a stricter approach which favors employers, thus making it more difficult for employees to prove disability discrimination claims.

In the *Toyota Motor* case, the court ruled that to be "disabled" under the ADA, an employee's physical impairment must restrict the ability to perform tasks of central importance to daily life (such as routine household chores, personal grooming, and the like), not just those tasks associated with the employee's job. In addition, the court stated that the impairment must be either permanent or long-term.

Though the bar has been raised to prove disability discrimination, employers must continue to evaluate each employee's circumstances on a case-by-case basis. An employee who submits a medical diagnosis of an impairment now must do more to establish that he or she is disabled. Employers are understandably reluctant to ask employees about personal matters that may not directly impact their working conditions to determine whether an employee's condition substantially limits the ability to perform tasks of central importance to daily life. Unfortunately, this new standard seems to place just that burden on employers.

Under most circumstances, a company's seniority rules will take precedence over an employee's request for a reasonable accommodation under the ADA

In another case closely watched by the business community, the U.S. Supreme Court ruled in *U.S. Airways v. Barnett* that under most circumstances, an employee's request for an accommodation that violates the provisions of a seniority system will not be reasonable.

The court did leave the door open, however, for an employee to show that "special circumstances" might warrant a finding that a requested accommodation is reasonable even if it conflicts with a seniority system. So, for example, if an employer retained the right to make exceptions to a seniority system, and if the employer made frequent exceptions to the point where employees' expectations about the benefits of the seniority system were diminished, then an additional exception to the system might be considered reasonable.

Employers should note that in October 2002, the federal Equal Employment Opportunity Commission issued a new Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act that responded, in part, to the U.S. Supreme Court's *Barnett* decision. The full text of this new Enforcement Guidance can be accessed at: ww.eeoc.gov/docs/accommodation.html.

Massachusetts now requires five-year disparity in age for the purpose of bringing suit for alleged age discrimination

The Massachusetts Supreme Judicial Court ruled recently that an age disparity of less than five years, without other evidence of age discrimination, is too insignificant to support a claim of age discrimination. This marks the first time that the SJC has adopted a so-called "bright-line" test in connection with age discrimination lawsuits.

CKRP&F partners James F. Kavanaugh, Jr. and Stephen S. Churchill successfully argued this case on appeal.