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Employment Alert

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IN THIS ISSUE:

U.S. Supreme Court Confirms That Employers Bear Burden of Proving Employment Decisions That Disparately Impact Older Employees Are Reasonable

In *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008), the United States Supreme Court held that under the federal Age Discrimination in Employment Act (ADEA), which prohibits discrimination against employees 40 years old or older, an *employer* bears the burden of proving that a reasonable factor other than age is behind employment policies or actions that have a disparate impact on workers over 40. Discrimination can take the form of either "disparate treatment," in which decisions are made based upon age, or "disparate impact," in which seemingly neutral employment decisions have a disproportionately negative impact upon older employees.

In "disparate impact" situations, the ADEA excludes employers from liability when the decision resulting in the disparate impact is based on "reasonable factors other than age" (RFOA). In *Meacham*, the court clarified that the burden of proof in an RFOA case is upon the employer, which must establish that the other-than-age factor was reasonable. In other words, the court held it is not the employee's burden to show that the neutral factor is unreasonable.

Should you have any questions regarding age discrimination, contact Michael Morea at (201) 525.6274, or mmorea@coleschotz.com.

United States Supreme Court Recognizes New Retaliation Claim

On May 27, 2008, the United States Supreme Court in *CBOCS West, Inc. v. Humphries* recognized a cause of action for retaliation under 42 U.S.C. § 1981 ("Section 1981"). Section 1981 is a Civil War era statute that grants all citizens the right to enter into and enforce contracts.

The plaintiff, an African-American assistant manager who alleged that he was terminated because of his race and because he complained to his employer that another African-American co-worker had been unlawfully terminated, asserted claims under Title VII (the federal civil rights law) and Section 1981. At the trial court, all of the plaintiff's claims were dismissed. On appeal, the Seventh Circuit affirmed the dismissal of the Title VII claims on procedural grounds, but reversed the dismissal of the Section 1981 claim. The Supreme Court affirmed the Seventh Circuit's ruling, finding that Section 1981 included claims for retaliation.

This decision is significant to employers because Section 1981 has a four-year statute of limitations, as opposed to the two-year statute of limitations for Title VII. Similarly, Section 1981 claims have no administrative prerequisites (as Title VII claims do).

Should you have any questions regarding retaliation, contact Michael Morea at (201) 525.6274, or mmorea@coleschotz.com.

Third Circuit Holds That Women Who Have An Abortion Are Protected Under Title VII of the Civil Rights Act

In *Doe vs. C.A.R.S. Protection Plus, Inc.*, 06-3625, 06-4508 (3d. Circuit May 30, 2008), the Third Circuit addressed for the first time whether Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act (PDA), extends to a woman who elects to terminate her pregnancy. In this case, Jane Doe received approval from her employer for various absences related to her pregnancy. She learned thereafter that the baby had severe deformities, and her doctor recommended that the pregnancy be terminated. At that point, Doe requested an additional week of vacation to recover from the surgery for the procedure. Instead of approving her request for additional vacation time, the defendant employer terminated Doe's employment, citing "job abandonment." Jane Doe filed suit in the United States District Court for the Western District of Pennsylvania under Title VII, and the court dismissed her complaint with prejudice.

In addressing this issue, the Third Circuit held that although the Circuit had never squarely addressed the issue of discrimination based on abortion, the legislative history surrounding the PDA provides that the act was intended to cover women who terminate their pregnancies. The

court also noted that the Equal Employment Opportunity Commission's guidelines include abortion as a right protected by the PDA. In finding Jane Doe to be protected by Title VII, the court also relied on the fact that there were numerous allegations by Doe that cast doubt on the company's proffered reason for terminating her employment – her alleged failure to follow the company's required call-off policy and abandonment of her position. Accordingly, the Third Circuit reversed the District Court's dismissal of Jane Doe's complaint of discrimination, thus allowing the case to go forward. This case further highlights the need for comprehensive and consistently applied personnel policies in the workplace.

Should you have any questions regarding Title VII of the Civil Rights Act, contact Randi Kochman at (201) 525-6309, or rkochman@coleschotz .com.

New Jersey Supreme Court Sets Standard For Assessing Religion-Based Harassment Claims

In our Spring *2007 Alert*, we advised of the New Jersey Appellate Division's decision in Cutler v. Dorn, in which the court held that certain anti-Semitic remarks did not give rise to a claim of religious harassment. In *Cutler v. Dorn*, A-51-07 (July 31, 2008), the New Jersey Supreme Court reversed the Appellate Division's decision and addressed plaintiff Cutler's claim that he was subject to harassment within the police department based on his religion of Judaism. In reversing the Appellate Division, which had found that the derogatory comments and epithets of which Cutler complained were not "severe or pervasive," the court confirmed the standard for assessing religious harassment cases. In short, the court held that the standard established in *Lehmann v. Toys "R" Us* for assessing sexual harassment claims also applies to harassment based on religion and ancestry. Applying the "severe or pervasive" analysis requires an examination of the totality of the circumstances, including the cumulative effect of discrete acts of discrimination. After *Cutler*, it is clear that all forms of harassment outlawed by the New Jersey Law Against Discrimination will be treated equally.

EEOC Releases Updated Compliance Manual on Religious Discrimination

On July 22, 2008, the EEOC adopted a new compliance manual section on religious discrimination in response to the 100 percent increase in religious discrimination claims between 1992 and 2007. The new section offers the EEOC's interpretation of religious discrimination and accommodation laws, and also provides a list of employers' "best practices" for dealing with these issues.

Should you have any questions regarding EEOC, contact Michael Morea at (201) 525.6274, or mmorea@coleschotz.com.

Genetic Information Non-Discrimination Act of 2008 Enacted

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employers, employment agencies and labor organizations from discrimination based on an employee's genetic information. GINA also prohibits retaliation against employees who allege violations of the act. The enactment of GINA brings federal law up to date with New Jersey law, which already prohibited discrimination based upon one's genetic information.

Should you have any questions regarding Genetic Information Non-Discrimination Act, contact Michael Morea at (201) 525.6274, or mmorea@coleschotz.com.

A New Poster Has Been Released by the Department of Labor Concerning Military Family Leave

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 ("NDAA"). The NDAA modifies the Family and Medical Leave Act (the "FLMA") by adopting two categories of military family leave. Currently, Section 585 (a) of the NDAA allows for a 12 week "qualifying exigency leave", and a 26 week military caregiver leave.

A "qualifying exigency" leave allows an employee to take up a total of up to 12 weeks leave due to a "qualifying exigency". The "qualifying exigency" must be the result of a spouse, son, daughter, or parent being on active duty, or having been notified of an impending call to active duty, in support of a contingency operation. A "contingency operation" is a military operation by which (1) "members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force," or that (2) results in the call or order to, or retention on, active duty of members of the uniformed services. The NDAA has not defined the term "qualifying exigency," however it does mandate that the Secretary of Labor issue regulations defining the term.

The service member family leave amendment applies to an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member recovering from a serious illness or injury sustained in the line of duty on active duty." The military caregiver leave allows an employee to take up to 26 weeks of leave in a single 12 month period in order to care for a service member.

A "covered servicemember" is defined as a member of the Armed Forced, National Guard, or Reserve who is "undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury

or illness." A "serious injury or illness" includes and is defined as "an injury or illness incurred by the member in the line of duty while on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." Furthermore, this amendment includes next of kin as a new category of covered employee." Next of kin" is defined as the "nearest blood relative" of the covered service member.

Importantly, the Department of Labor mandates covered employers to display a new poster insert which addresses "qualifying exigency" and military caregiver leave. Such posters may be found on the Department of Labor's FLMA poster website.

Should you have any questions regarding EEOC, contact Steven Adler at (201) 525.6273, or sadler@coleschotz.com.

New York Employers Must Give Employees Up to Three Hours of Annual Leave to Donate Blood

Effective July 8, 2008, New York employers must provide written notice to employees of their right to take leave for up to three hours per year to donate blood. The notice must have been posted or distributed personally to each employee by September 8, 2008. Following the first notification, the notice must be distributed to employees annually and provided to new employees at the time of their hire. The leave need not be paid unless the donation occurs at a time and place set by the employer, such as a blood drive at the place of business. Finally, the New York Commissioner of Labor guidelines state that the employee must provide reasonable notice when planning to take leave to donate blood.

Should you have any questions regarding leave, contact Randi Kochman at (201) 525-6309, or rkochman@coleschotz .com.

New York Adopts State Worker Adjustment And Retraining Notification Act (NY WARN)

New York's WARN Act is effective February 1, 2009. Although it mirrors federal WARN in many respects, there are also key differences. Unlike WARN, which requires employers with 100 or more employees to give 60 days' notice, NY WARN has stricter notice requirements, as it requires employers with 50 or more employees to give at least 90 days advance notice of a mass layoff, relocation, employment loss or plant closing. NY WARN also has tougher provisions regarding what triggers the required advance notice. For instance, a "mass layoff" under NY WARN occurs when there's a reduction in force that causes an employment loss at a single site of at least 33 percent of the employees *and* at least 25 full-time employees, or at least 250 full-time employees. This is in contrast to WARN's 50 employee and/or 500 employees threshold. Employers should also be aware of other key differences between NY WARN and WARN, including NY WARN's provision that notice is not required if the triggering event is a physical calamity or act of terrorism or war.

Both NY WARN and WARN provide for damages of up to 60 days' back pay, or, for employees with fewer days on the job, half the number of days the employee worked, for any period in which notice is not given.

Should you have any questions regarding NY WARN, contact Randi Kochman at (201) 525-6309, or rkochman@coleschotz .com.

New York Media Employees May Not Be Subject to Noncompetition Agreements

Effective August 6, 2008, under the New York Broadcast Employee Freedom to Work Act, certain media industry employers are prohibited from requiring or enforcing post-employment noncompetition restrictions. The law defines "broadcasting industry employers" as "television stations or networks," "radio stations or networks," "cable stations or networks," "Internet or satellite-based services similar to a broadcast station or network," "any broadcast entities affiliated with any of the employers of this paragraph," and "any other entity that provides broadcasting services such as news, weather, traffic, sports or entertainment reports or programming." The law excludes only "management employees." While non-competition provisions are restricted, the law does not prohibit the use of non-solicitation clauses that are narrowly tailored and specifically designed to protect customer and employee relationships. Moreover, the act permits confidentiality provisions. The act is important, as it is the first time that New York has had a statute regulating the use of non-competition agreements in any industry. (See, NY Labor Law, §202-k.)

Should you have any questions regarding noncompetition agreements, contact Randi Kochman at (201) 525-6309, or rkochman@coleschotz .com.

Employees Working on Public Projects in New York Are Required to Complete OSHA'S Ten-Hour Construction Course

On July 18, 2008, New York Labor Law Section 220-H became effective, requiring that all employees on public work projects of at least $250,000 be certified as successfully completing the Occupational Safety and Health Administration's (OSHA) ten-hour construction course. The law was passed in July 2007, but did not become effective until one year later.

The course is part of OSHA's outreach training program for construction personnel, consists of an introduction to OSHA, including recordkeeping requirements. Also

covered in the course are specific topics covering safety and health such as electrical hazards, fall protection, material handling, storage, usage and disposal, crane safety, scaffolding, excavations, and stairways and ladders. There is a core curriculum; there are also a number of elective courses that can be tailored to the specific work being performed. To obtain more information on OSHA's ten-hour construction course, check OSHA's website at *www.osha.gov*.

Should you have any questions regarding OSHA, contact Gerard Giordano at (201) 525.6306, or ggiordano@coleschotz.com.

New York Social Security Number Law Enacted on January 1, 2008

On On January 1, 2008 New York joined New Jersey and Connecticut in enacting legislation regarding the way that employers record and display information about their employees. Failure to comply with the law may impose harsh penalties. Essentially, the legislation prohibits the use and communication of Social Security numbers, or any other number obtained from a person's Social Security number.

The statute regulates two activities: (1) the release and communication of Social Security numbers; and, (2) the way in which records which contain Social Security numbers are maintained. As a means of minimizing any such danger resulting from communication of Social Security numbers, the statute regulates five specific areas of communication:

(1) It is impermissible to communicate an individual's Social Security number, or partial number to the public;

(2) It is impermissible to make access of services, benefits or products contingent on the use of access cards or tags containing all or part of an individual's Social Security number, including health access cards and building passes;

(3) It is impermissible to require an individual to transmit all or part of his/her Social Security number over the internet unless it is a secure encrypted connection;

(4) It is impermissible to require the use of all or part of an individual's Social Security number for authentication purposes for internet access or access to a web site; and;

(5) It is generally impermissible to include all or part of an individual's Social Security number on correspondences sent through the mail, unless it falls within the enumerated exceptions, including administrative documents sent in connection with employee benefits plans. In the event that a communication falls within the exception, it must be sent through the mail in an envelop through which the number cannot be viewed. Postcards containing all or part of an individual's Social Security number are prohibited.

The statute also requires that companies adopt "reasonable measures" to bar access to Social Security numbers.

Violators of the statute face harsh consequences. A first-time violator will face a penalty of $1,000 per violation, and up to a maximum of $100,000 for multiple violations stemming from a single incident. Second-time violators face will penalties of $5,000 per violation, with a maximum of $250,000 for multiple violations which stem from a single incident. Penalties may be imposed even if the individual's whose Social Security number was compromised suffered no personal harm.

Should you have any questions regarding EEOC, contact Steven Adler at (201) 525.6273, or sadler@coleschotz.com.

New Jersey Legislature Passes Paid Family Leave Law

On May 2, 2008, the New Jersey Legislature expanded New Jersey's Temporary Disability Insurance Law to provide for up to six weeks of paid leave per year for workers who are required to care for sick family members or newborn and newly adopted children. While the paid family leave law is a benefits law and does not provide for additional time off, it must be interpreted in conjunction with other New Jersey employment laws, such as New Jersey's Law Against Discrimination and Family Leave Act. As the law applies to all employers, regardless of size, New Jersey employers are well-advised to become aware of the law's provisions. New Jersey is the third state in the nation to have a form of paid family leave.

Should you have any questions regarding family leave, contact Michael Morea at (201) 525.6274, or mmorea@coleschotz.com.

Would you like to receive future issues of the Cole Schotz Employment Alert via e-mail? If so, please send your e-mail address to alevine@coleschotz.com

FOR THE RECORD

Steven Adler (Chair) and **Randi Kochman** (Member) took part in a "9 H.R. Topics in 90 Minutes," a program sponsored by the Law Office Management Committee, the Association of Legal Administrators and the Institute for Continuing Legal Education, at the New Jersey State Bar Association Annual Meeting and Convention.

Randi Kochman, who was recently named a New Jersey Superlawyer "Rising Star," spoke on a panel at the New Jersey Business & Industry Association's Employee Handbooks and Policies Seminar.

Steven Adler and **Jessica Juste** (Associate) authored "Accommodating Religious Beliefs in the Workplace" for the *New Jersey Law Journal*.

Steven Adler spoke on avoiding discrimination and harassment at a seminar sponsored by the New Jersey Business & Industry Association, called "Hot Legal Topics for Employers."

Steven Adler and **Michael Morea** (Special Counsel) spoke on "How to Try a Discrimination Lawsuit" for the Passaic County Bar Association.

Steven Adler and **Randi Kochman** presented a seminar, "How to Strengthen Your Company During a Down Economy," in association withthe Meadowlands Regional Chamber of Commerce. Randi was a speaker at the seminar, "Floods, Power Outages and Other North Jersey Disasters: Is Your Business Ready?," also presented in association with the Meadowlands Regional Chamber of Commerce.

Randi Kochman spoke on background checks for the Commerce & Industry Association of New Jersey.

Cole, Schotz, Meisel, Forman & Leonard, P.A.
A Professional Corporation
Attorneys at Law

Court Plaza North
25 Main Street
Hackensack, NJ 07602-0800
201.489.3000

900 Third Avenue
16th Floor
New York, NY 10022
212.752.8000

1000 N. West Street
Suite 1200
Wilmington, DE 19801
302.652.3131

111 South Calvert Street
Suite 2350
Baltimore, MD 21202
410.230.0660

www.coleschotz.com

COLE SCHOTZ
COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.
Attorneys at Law
A Professional Corporation

Court Plaza North
25 Main Street
Hackensack, NJ 07602

900 Third Avenue
New York, NY 10022

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