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Welcome to Legal Briefs for HR, an update on employment issues sent to over 4000 HR professionals, in-house counsel and business owners to help them stay in the know about employment issues. Anyone is welcome to join the email group . . . just let me know you'd like to be added to the list and you're in! Back issues are posted on my firm's website at www.munckcarter.com under E-Newsletter. Welcome to new subscribers who attended my luncheon keynotes for Dallas HR and Corpus Christi HRMA last month!

1. **The I-9 is In** – Finally! Effective April 3, employers began using the new version of Form I-9 (in English and Spanish) which updates the list of acceptable documents for proof of identity, employment authorization or both. Just go to www.uscis.gov/i-9 for fresh copies. While you're on the website, scroll up to the right hand side and click on "Handbook for Employers, M-274" for a dandy document which answers a lot of the questions you may have about proper use and retention of the Form I-9.

2. **Choice Cut?** – With the defection of Sen. Arlen Specter and several more Dems from their supporting roles (most recently, Sen. Blanche Lincoln of AR), the Employee Free Choice Act juggernaut appears to have lost steam. Savvy employers will see this as a lull in the action and not outright defeat since there are plenty of reasons why the fortunes of organized labor may improve soon. Among them are the change in the administration to one that is unabashedly pro-labor, a fatter budget at NLRB, possible passage of the RESPECT Act (which will convert some current voting leads and first-line supervisors into nonvoters) and growing sentiment that change is needed. A recent Parade magazine survey asked "Does America still need labor unions?" and 92% said "Yes." Shocked? Positive changes in pay, benefits and other workplace conditions after organizing begins may prompt unfair labor practice claims, so do what it takes now to know what will satisfy your workers and then try to achieve it. Here's a hint . . . it's not always about more money. If you are union-free and want to stay that way, make sure you and your management team are creating the kind of environment for and with your workers where three's a crowd.

3. **Taxing Situation** – As expected, a federal bill touting 12 weeks of paid leave annually for FMLA-qualifying reasons has been re-filed (H.R. 1723) but with a twist from last year's version. This time around, both employers and employees will chip in via payroll taxes and the funds will be paid to the individual via a federal agency (similar to how unemployment comp is currently handled) rather than directly from the employer. In a recent survey of "routine moral choices" conducted by Parade magazine, respondents were asked "Would you take a sick day when you're healthy?" 63% said "yes." What do you think that number will be if there's a carrot shaped like 12 weeks of paid time off each year dangling out there? Go to http://thomas.loc.gov and put in HR 1723, if you'd like to read full text of the bill and monitor its progress in Congress.

4. **More Ups and Downs in the E-Verify Roller Coaster** – Employers have been watching, with a mixture of humor and horror, as the federal government and state governments assert competing rules governing employers' use of the E-Verify (fka Basic Pilot) system. Basic Pilot was created as a voluntary system that would enable employers to electronically confirm that a new hire is eligible to work in the U.S. The system was rolled out to a few test states (including TX) and eventually made available in all 50 states. Some states enacted legislation forcing employers to use E-Verify (think AZ), while others enacted bills prohibiting that same usage, citing responses that were slow, incomplete or incorrect. Illinois was one state that banned employers' use of E-Verify until the system could attain set speed and accuracy standards (but the state

did not enforce the law, citing pending litigation). The litigation ended (for now) on March 12 when the court found that the IL law is preempted by federal law and is invalid because it frustrates Congressional intent to make E-Verify available to all U.S. employers. *United States v. Illinois* (C.D. Ill. 3-09).

1. **Stop** – Federal contractors (contract of $100,000+) and subcontractors (contract of $3000+) were to begin using E-Verify within 30 days of receiving the contract/subcontract to verify new and existing employees who would work on the contract, but the effective date of the measure was pushed from January 15, to February 20, and then to May 21.
2. **Go** – DHS started incorporating U.S. Dep't of State passport data into the E-Verify system in February, to cut down on the number of tentative nonconfirmations (which were more likely among foreign-born citizens).

5. **Speaking of Passports** – If you'll be exiting the U.S. for personal and/or business travel this summer, don't forget that you'll be required to present a passport or other approved document proving your citizenship and identity when re-entering the U.S. on or after June 1, whether by land or by sea. For more info, go to www.travel.state.gov and click on Western Hemisphere Travel Initiative under Passports for U.S. Citizens. Then go and get yourself a good haircut and get that picture taken now!

6. **One for the Record Books** – The EEOC uses a fiscal year that ends each Sept. 30, so it's just now releasing charge-filing and litigation stats for 2008. The 95,402 charges filed in the private sector represent a 15% increase over Fiscal 2007, with race, sex and retaliation chalking up the highest number of claims and age and retaliation showing the most rapid increase in the number of claims filed. Complete stats are posted at www.eeoc.gov. Beyond morbid curiosity, you may want to eyeball and use this data to lobby for the time and budget needed to train your supervisors in employment law basics. You probably understand the actions (or failures to act) that are behind many of these claims, but if that knowledge has not been passed to your first-line supervisors and their managers, you may end up as part of Fiscal 2009's record book.

7. **Bigger in Texas** – Your Texas legislators filed 7,136 bills prior to the filing deadline . . . a 15% increase from the 2007 session. If you'd like to read full text of the bills and receive FREE automatic email updates of any action taken on the bill(s) you specify, go to www.capitol.state.tx.us. Some of the bills employers are most interested in include:
   1. HB 5 – Bans smoking in all workplaces and public places
   2. HB 48 & SB 357 – Suspension of employer's tax permits and license to do business for "knowing" employment of undocumented worker (very similar to the AZ statute which the 9th Cir. upheld; Texas AG has opined that, unlike the 2007 version of this bill, the 2009 version is likely constitutional; scheduled for public hearing on April 15, for anyone who's in Austin on that date!)
   3. HB 162 – Adopts alternate base period for computation of unemployment compensation benefits (in a manner that makes more short-term workers eligible to collect benefits)
   4. HB 164 – Allows distribution and use of "medical marijuana"
   5. HB 226 – Employer may not terminate, suspend or discriminate against employee who declines to participate in employer's charitable fund-raising campaign; so, is "discrimination" the cold shoulder given to persons who cause employer to achieve less than 100% participation?
   6. HB 253 – "English only" rule at work not discriminatory under certain circumstances
   7. HB 266 – Government entities and businesses who contract with them must use E-Verify or similar federal program on all new hires
   8. HB 308 – Employer must offer pay continuation for employee's first day of jury duty ($40 max)
   9. HB 538 – Prohibits employment discrimination based on sexual orientation or

gender identity or expression

10. HB 615 – Job protected leave for parents of children in special education
11. HB 1005 & SB 649 – Job protected leave for parents to attend kids' school activities or meet with school personnel
12. HB 1057- Eligibility to collect unemployment compensation benefits for employee on leave due to birth, adoption or foster placement of child with the employee
13. HB 1301 & SB730 – Employers must allow employees who are licensed to conceal/carry to keep guns and ammo in their parked vehicles on employer's premises
14. HB 3623 & S 1713 – Prohibits physician covenants not to compete, with exceptions
15. SB 60 – Paid job protected time off for employee who is victim of a crime
16. SB 222 – Limits on use of arbitration agreements to resolve employment disputes
17. SB 377 – Allows claimants available for only part-time work to be eligible to collect unemployment compensation benefits

8. **Are You Insecure?** – When is an electronic signature on an arbitration agreement not binding? When the employer fails to adequately secure intranet passwords. Here's the story. Employer has arbitration agreement which it distributed and asked employees to sign electronically. Employee (we'll call her "Sue") sues for race discrimination and employer tries to move the case to arbitration, citing a signed arbitration agreement. Sue denies signing it. Employer had a pretty tight on-line process, requiring Sue to enter her SSN or ID number, her secret password and then click "Accept" button. The system records the date and time of the "accept" and sends Sue a nice thank-you email with a procedure to revoke, if she accepted in error. Records show this email was received and opened . . . but by whom? It turns out that the system allows supervisors to access their employees' account by resetting the employee's password and using the employee's default password, and Sue's account had been accessed by her supervisor while demonstrating the system to her. Sue claimed the supervisor "accepted" the arbitration agreement for her during this demo. The court agreed the company had not proved that Sue opened the email and would not attribute the electronic signature to the plaintiff. No signature, no arbitration of employment beefs. *Kerr v. Dillard Store Services* (D. Kan. 2-09) Lesson learned? Technological advances to streamline employment procedures are wonderful, but IT and HR should not be the only folks involved in setting up these systems. Get your lawyer involved.

9. **You're IT!** – Speaking of those helpful folks in your IT department, NJ is considering a bill which, if passed, would require public sector IT professionals and employees who happen upon child porn on workplace computers to report their discovery to law enforcement. You may recall that in 2005 the NJ Superior Court held that an employer with knowledge of a child porn-surfing worker had a duty to investigate the improper use of the work computer and to take prompt and effective action to stop the employee from engaging in that activity. Like notifying law enforcement and/or firing his tail. *Doe v. XYC Corp.* (NJ Super Ct. 12-27-05).

10. **Pot Party, er, Policy** – The new U.S. Attorney General, Eric Holder, recently signaled a change in the tug-of-war between federal law which criminalizes marijuana use/possession and states' "medical marijuana" laws which allow use when the substance is prescribed by a physician for medical reasons, such as alleviating glaucoma symptoms or nausea from chemotherapy. Both the prior and current administrations raided dispensaries in CA that had complied with the state's law, but the AG now says only those who violate both federal and state law will be will targeted for prosecution. Employers can rest easy . . . most state statutes allowing medical marijuana contain provisions supporting employers' right to ban possession in the workplace and to take corrective action against workers who are under the influence while on the job. So, no need to create pot-smoking lounges as an ADA reasonable accommodation.

11. **For the Birds** – If you like being "tweeted" and want breaking news on employment law changes, follow me on Twitter. I'm at @amross.

Until next time,

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