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SUPREME COURT DECISIONS ADDRESS EMPLOYMENT ISSUES: The United States Supreme Court has issued several decisions that will impact employers. First, regarding an age discrimination claim, the court has ruled that a charge questionnaire filed by an employee with a civil rights agency may be enough to actually be a filed charge. This decision poses the possibility that a wider range of documents filed with such agencies, short of formal charge documents, will have to be considered by the agencies, most of which now face charge backlogs. Second, in another age discrimination case, the Court has ruled that courts can allow, but must carefully consider whether to allow, so-called "me too" evidence, i.e. evidence of another employee who also has claimed that the employer is biased in a context unrelated to the pending lawsuit (e.g. involving other employees, other supervisors and another department of the employer). Finally, the court has expanded the type of lawsuit that can be filed regarding retirement benefits. The Court ruled that a 401(k) plan participant may sue to recover losses allegedly caused by a plan's failure to properly implement investment directions. The plaintiff in that case claimed that the plan's investors had not followed his directions on how to invest his 401(k) funds and thus should be liable for the related losses.

NATIONAL LEGISLATIVE UPDATE: Congress is now considering the Civil Rights Act of 2008 (S. 2554/H.R. 2159), which among other things would do the following: (1) eliminate the present caps on damages that can be awarded against employers violating

the discrimination laws; (2) make it more difficult for an employer sued for alleged equal pay violations to show that its actions were based on a legitimate factor other than sex; (3) limit the use of mandatory arbitration agreements only to those that are part of a collective bargaining agreement; (4) allowing prevailing plaintiffs in employment cases to recover reimbursement of expert witness fees; and (5) permit back pay awards to undocumented immigrants when their employer violates the employment laws. Congress is also considering a bill (H.R. 1643) requiring employers to provide up to fourteen days per year of unpaid leave for first responders (police, firefighters, etc.) involved when disasters strike. National SHRM has testified asking Congress to clarify various aspects of the proposed legislation. Finally, SHRM is backing proposed legislation creating a new way for employers to check the work eligibility status of new hires. The New Employee Verification Act (H.R. 5515) would revamp the new hire registry system to allow its use in work eligibility verification in combination with unemployment compensation and Social Security databases.

UTAH LEGISLATURE UPDATE: The Utah Legislature remains in session until March 5, 2008. Here is a summary of the status of several employment-related bills now pending.

Weapons at work- S.B. 67 would require employers and other businesses and private property holders (but not homeowners) to allow a concealed weapon on their property (such as a parking lot) as long as the weapon is concealed and secured in the car of the involved employee/visitor. It passed the Senate but was tabled by a House committee and appears to be dead for this year. Here is a link to the text of the bill:
<http://le.utah.gov/~2008/bills/sbillint/sb0067.htm>

Immigration issues- HB 98 (<http://le.utah.gov/~2008/bills/hbillint/hb0098.htm>) requires that all Utah public employers use the federal system (called E-verify) for verifying the validity of a Social Security number (SSN). This bill has passed the House and is pending in the Senate. HB 257 (<http://le.utah.gov/~2008/bills/hbillint/hb0257.htm>) would impose this requirement on any private employer receiving certain economic incentives from the State. This bill has passed the full House and been approved by a Senate committee. HB 239 (<http://le.utah.gov/~2008/bills/hbillint/hb0239.htm>) would repeal driving privilege cards for undocumented immigrants. This bill was approved by the House but apparently will not pass the Senate and will be displaced by a bill that will disallow use of the driving privilege card for identification purposes. SB 97 (<http://le.utah.gov/~2008/bills/sbillint/sb0097.htm>) would set up a legislative task force to consider a wide range of immigration issues. This bill has been passed by the Senate and is now pending in the House. As noted in previous updates, S.B. 81 (<http://le.utah.gov/~2008/bills/sbillint/sb0081.htm>) attempts to address a broad range of issues related to illegal immigration, including some employment issues. The bill has been approved by a Senate Committee and is now being considered by the full Senate.

Minimum wage- HB 114 (<http://le.utah.gov/~2008/bills/hbillint/hb0114.htm>) would raise the Utah minimum wage to \$7.25 per hour with annual adjustments for inflation. This bill is pending in a House Committee and probably will not go further.

Discrimination- HB 89 (<http://le.utah.gov/~2008/bills/hbillint/hb0089.htm>) would prohibit employment discrimination based on gender identity and sexual orientation. This bill is pending in a House Committee and probably will not go further. SB 166 (<http://le.utah.gov/~2008/bills/sbillamd/sb0166s01.htm>) prohibits employment discrimination on the basis of military service. The bill has been approved by the Senate and recommended for approval by a House committee.

Watch for emerging details on these topics and other topics as the legislative session progresses.

ANTI-DISCRIMINATION AGENCY ACCUSED OF DISCRIMINATION: One state government entity is getting an up-close and personal look at the challenges posed by the laws it must enforce. Ironically, the Utah Antidiscrimination and Labor Division (UALD), the state agency charged with enforcing the state's employment discrimination laws, now has been accused of committing employment discrimination and retaliation itself. In a lawsuit filed recently in Utah federal court, a former UALD claims investigator says she was subjected to discrimination and sexual harassment along with other female employees. She also alleges the UALD retaliated against her by terminating her employment after she registered her complaints. According to the filed court complaint, the federal Equal Employment Opportunity Commission (EEOC) considered the matter and decided there was reasonable cause to believe that the UALD violated the law in its conduct towards the plaintiff. The case will now play out in federal court.

EMPLOYERS CANNOT BAR PAY FOR UNAPPROVED OVERTIME: A Federal appeals court in New York has ruled that employers must pay for overtime worked even if the employer did not approve it in advance. The case involved a nursing staffing agency's policy refusing to pay for overtime not approved by a supervisor. Although it must pay for the time worked, an employer remains free to have a policy requiring pre-approval of overtime and to discipline an employee for violating a rule that overtime must be approved in advance. Note that such discipline must be imposed consistently and in proportion to how similar offenses are handled in order to minimize the risk of a retaliation claim under the Fair Labor Standards Act (FLSA).

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Legal-mail is a legal and legislative update service sent out about twice a month to various Utah SHRM members and chapters. As a courtesy to SHRM, the Utah law firm of Jones Waldo Holbrook & McDonough P.C. underwrites the costs of the service. If you have any questions or comments, please contact Michael Patrick O'Brien.

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