



September 19, 2007

This is Utah SHRM Legal-mail no. 2007-21 prepared for Salt Lake SHRM, the Human Resources Association of Central Utah (HRACU), the Northern Utah Human Resources Association (NUHRA), the Color Country Human Resources Association (CCHRA), the Bridgerland Society for Human Resource Management and Utah at-large members of the national Society for Human Resource Management (SHRM). This update is best viewed in a HTML format. Please reply with "UNSUBSCRIBE" in the subject field if you no longer wish to receive this message.

CONTENTS:

- **BUSY FALL LEGISLATIVE AGENDA FOR CONGRESS**
- **MENTAL HEALTH PARITY LEGISLATION ADVANCES**
- **ADA AND THE REASSIGNMENT OF EMPLOYEES**
- **EMPLOYMENT LAW ISSUES AT HIGH PROFILES AND WHERE UNEXPECTED**
- **NO RODENTS NEED APPLY**

BUSY FALL LEGISLATIVE AGENDA FOR CONGRESS: Back now from its August Summer recess, the United States Congress has planned a busy Fall legislative agenda, considering a number of issues that will impact employment law and those who must deal with it. The Senate has passed a bill requiring parity of sorts in mental health benefits provided to employees. Another parity bill with differing provisions is pending in the House of Representatives (see more detailed discussion below). The House has held hearings on a bill precluding, on a national basis, job bias based on actual or perceived sexual orientation. This bill is not likely to pass this year, but may get new life depending on the outcome of the 2008 elections. Also pending are a bill prohibiting employment discrimination based on genetic status (passed by the House and pending in the Senate, where it likely will pass), a bill eliminating the use of arbitration in employment disputes and a bill seeking to overturn a Supreme Court case that imposed a rigid deadline on when gender wage discrimination lawsuits can be filed (this passed the House but President Bush says he will veto it). No further news regarding federal action on immigration reform, but watch for this to be a hot topic in various state legislatures. My past updates have discussed the new Department of Homeland Security regulations

on what an employer should do when getting notice that an employee's Social Security number does not match the government's database. These have not yet gone into effect, due to a holding order issued by a federal judge presiding over a lawsuit challenging the legality of the regulations.

MENTAL HEALTH PARITY LEGISLATION ADVANCES: As briefly discussed above, the United States Senate has passed a bi-partisan mental health parity bill (S. 558). Legislation on the same issue pending in the House has many different features, so this matter likely will only be resolved by a House-Senate conference committee. According to national SHRM, the enacted Senate bill impacts HR professionals in the following key ways: (1) "Health Plan Requirements—S. 558 does *not* require group health plans to provide mental health coverage; however, if a plan does offer mental health coverage, then the plan must ensure that the financial requirements (deductibles, coinsurance, out-of-pocket expenses) and treatment limitations (frequency of treatment, number of visits, days of coverage) applied to mental health benefits are no more restrictive than the financial requirements and treatment limitations applied to all medical and surgical benefits that the plan covers." (2) "Scope of Coverage—The mental health parity requirements apply to group health plans with 50 or more employees." (3) "Cost Exemption—Plans may elect to be exempt from the parity requirement if it is projected that the health plan will experience increased actual total costs of coverage under the plan that exceed two percent of the actual plan costs during the first year or exceed one percent of the actual total plan costs each subsequent year." (4) "Effective Date—The requirements of the bill will be effective in the first plan year that begins on or after January 1st of the first calendar year that begins more than one year after the date of the enactment of this Act." (5) "Relationship to State Laws—S. 558 applies the current law HIPAA standard which establishes the federal requirements as a floor and permits states to enact more extensive requirements for insured plans." Stay tuned for further developments.

ADA AND THE REASSIGNMENT OF EMPLOYEES: The Americans With Disabilities Act (ADA) requires, in some circumstances, that an employer reassign a disabled employee to another open position as a reasonable accommodation. A federal appeals court recently ruled that an employer need only "consider" and does not necessarily have to make such a reassignment, however, if the disabled employee is not the most qualified person for the job. The case involved an employee who worked as an order filler and injured her arm and sought reassignment, as an accommodation, to another job as a router. The employer declined to just give the disabled employee the job and instead made her compete for it with other applicants. Ultimately, the employer picked a more qualified candidate for the router job and the disabled employee was put into a janitorial position. She sued, claiming the ADA required that she get the router job even if she was not the most qualified candidate. However, the courts disagreed and ruled in favor of the employer in this case. Note that the federal appeals court that governs Utah, the Tenth Circuit Court of Appeals, has issued a somewhat conflicting opinion saying that the ADA requires something more than merely giving the disabled employee the chance to compete for a job. Another federal court has said the disabled employee must get the job as long as the employer does not have to turn away a "superior

applicant.” The United States Supreme Court may have to resolve this possible conflict among the federal courts.

EMPLOYMENT LAW ISSUES AT HIGH PROFILES AND WHERE

UNEXPECTED: It may be small consolation, but no, it is not just your workplace that has employment law problems. Yes, indeed, employment law compliance problems occur at high profiles and in unexpected places. Regarding high profiles, NBA Coach Isiah Thomas and the New York Knicks professional basketball team are being sued for sexual harassment by a female former employee of the team. Thomas allegedly trash talked the employee, asserting his power over her within the organization, but then a few months later allegedly starting expressing his love for the same woman. The plaintiff also claims she was fired when she complained about this alleged behavior. Regarding unexpected places, how about an employee whose job at an agency is to enforce the employment laws? A male employee of the Ohio Department of Transportation, whose job included coordinating EEO issues, allegedly sent out email that joked about hiring female employees with certain large physical features; made fun of Hispanics, mocked women, depicted nude females and joked about overweight persons. He was reprimanded, but still has his same job.

NO RODENTS NEED APPLY: A New Jersey court has ruled that a union protester can be prohibited from hoisting a ten foot balloon in the shape of a rat during a labor protest. The court held that the town ordinance at issue was still enforceable even though it allowed large inflatable balloons at store grand openings, but not labor protests. The dissenting judge pointed out that the opinion was flawed, because a new Disney store could display a ten foot balloon rat to promote the movie “Ratatouille” but the same rat would be illegal at a labor protest. When told of the court’s opinion, the disappointed balloon-hoisting labor protester reportedly exclaimed, “Rats!”

Written by: Employment Attorney, Michael Patrick O'Brien
Utah State and Salt Lake SHRM legal director
Email: mobrien@joneswaldo.com
Phone: 801-534-7315
Website: www.joneswaldo.com



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.

Disclosure: These updates are merely updates and are not intended to be legal advice. Receipt of this information does not create an attorney-client relationship.