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This Update
is brought to you by the
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Missouri Legislative Update

A number of bills are pending in the Missouri Legislature, which would affect the way Missouri employers do business if they are passed. Here is a sampling of employment-related bills:

- **Anti-Hostile Work Environment Bill:** HB376 would make any “hostile work environment” illegal. Now, a hostile work environment is illegal only if it is based on someone’s race, gender, or other protected characteristic. Employees tend to complain about vague hostile work environments, but now they are not illegal unless co-workers are harassing an employee because of that employee’s protected trait. This bill would expand liability to Missouri employers.
- **Sexual Orientation Protection:** SB266 would add “sexual orientation” to the list of protected traits in the Missouri Human Rights Act, which includes race, gender, religion, disability, etc. Now, Missouri does not protect gays and lesbians from employment discrimination for that reason. This bill would protect discrimination based on heterosexuality, homosexuality, bisexuality, and transgenderism. This bill is identical to one introduced in 2006, which did not pass.
- **Whistleblower Protections:** SB168 would make it harder in one way but easier in another way for an employee to prove he or she was terminated in retaliation for blowing the whistle on illegal conduct. On one hand, this bill would require an employee to prove that he or she was correct in blowing the whistle. That is, now an employee only needs to prove that he or she believed the company was violating the law and he or she in good faith reported that to the authorities or to superiors in the company. He or she does not need to prove the company was actually violating the law. This new law would require the employee to prove he or she was correct and that an actual violation occurred. On the other hand, now the law requires an employee to prove the only reason for his or her termination was the whistleblowing. This new law will make it easier for an employee or prove his or her case by requiring only a showing that the whistleblowing was one reason of possibly many for the termination.
- **Employing Illegal Aliens:** SB348 would create the Missouri Omnibus Immigration Act, which, among other things, makes it illegal to employ unauthorized aliens.

SPvG's attorneys
are available to speak
on a wide range of
law-related subjects.

For more information, call the
"SPvG Speakers Bureau"
(Mary Jennings) at
314-446-4215

If these bills become laws, they could have a significant impact on the day-to-day operations of a Missouri employer. We will keep you up-to-date about whether these bills are passed.

Bill Introduced To Enact Illinois Family And Medical Leave Act

The 95th General Assembly for the State of Illinois was recently convened and a bill has been proposed seeking to enact the right of certain employees to take a family and/or medical leave as a matter of State law. While House Bill 374 is largely patterned after present Federal law, 29 USC, § 2601, et seq., this Bill would broaden the right to take a family/medical leave arising from the serious health condition of either of a son-in-law, daughter-in-law, mother-in-law and/or father-in-law. The Illinois Chamber of Commerce has already determined to oppose this legislative attempt to expand the present Federal FMLA leave obligations and employers should contact their local legislators reiterating the legitimate concerns regarding the additional disruption and burden on staffing and related issues.

Illinois Employer violates FMLA by forcing employee to use sick and vacation time while she was receiving disability benefits.

Roadway Express, Inc. violated the FMLA when it required an employee on FMLA leave to use her paid sick and vacation leave while on leave, because she was also receiving disability benefits. So ruled the 7th Circuit Court of Appeals in Repa v. Roadway Express, Inc. The FMLA forbade Roadway from requiring the employee to substitute paid leave for unpaid FMLA leave because the employee was receiving disability benefits from a union health and welfare benefit plan.

The employee in this case was hurt off-the-job and took six weeks off work. During those six weeks, she was receiving disability benefits in the amount of \$300 per week from her union's health and welfare fund. At the same time, she was receiving FMLA leave from Roadway. Roadway notified her that she was required to substitute any accrued paid leave for any unpaid FMLA leave. When she returned to work, Roadway paid her for one week of sick leave and two weeks of vacation. The employee received this in addition to the \$300 per week she had received from the welfare plan.

The employee sued, claiming Roadway could not force her to use her sick and vacation time since she was receiving disability benefits during the FMLA leave. Roadway claimed the FMLA permitted it to substitute paid leave for FMLA leave. The court ruled for the employee.

While the court acknowledged the FMLA, in general, allows employees to choose or employers to require the employee substitute accrued paid sick or vacation leave for FMLA leave, the court noted that substitution applies only when the leave is otherwise unpaid. In this case, since the employee was receiving disability benefits (even though not directly from Roadway), the leave was not unpaid, and Roadway could not force her to use sick and vacation time.

Employers subject to the FMLA need to take note of this case. It is common for an employer to require an employee to substitute paid sick and vacation leave for FMLA leave to avoid an employee being entitled to more than the 12 weeks leave. But based on this case, if an employee is receiving disability pay, the employer cannot do so. The effect will be that an employee may be entitled to more than 12 weeks of leave (12 weeks of FMLA plus any other paid leave the employer offers, such as paid vacation, sick, family leave).

EEOC issues new guidelines for disabled health care workers

The U.S. Equal Employment Opportunity Commission ("EEOC") recently issued a new Q&A sheet on the application of the Americans with Disabilities Act ("ADA") to job applicants and employees in the health care industry. The new publication, part of a series of Q&A documents about specific disabilities in the workplace and specific industries, is available on the EEOC's web site at http://www.eeoc.gov/facts/health_care_workers.html.

The EEOC is focused on employment law compliance in the health care industry, as it recognizes that industry as the largest industry in the American economy. The new Q&A fact sheet provides practical information about applying ADA employment rules in health care jobs, in a variety of settings - from public and private hospitals and nursing care facilities to doctors' and dentists' offices and diagnostic laboratories.

This new Q&A sheet explains how the ADA applies to some unique situations that may arise in the health care setting. Many of the real-life examples in the fact sheet are based on real cases. Topics discussed in the new publication include:

- When someone is an "employee" covered by the ADA (as opposed to an independent contractor);
- When someone is an "individual with a disability" under the ADA;
- How to determine if a health care applicant or employee with a disability is qualified for ADA purposes;
- What types of reasonable accommodations health care workers with disabilities may need and the limitations on a health care employer's obligation to provide reasonable accommodation;
- When an employer may ask health care applicants or employees questions about their medical conditions or require medical examinations; and
- How a health care employer should handle safety concerns about applicants and employees.

SPvG News . . .

Elizabeth Murphy has become an Associate with the firm and she will concentrate her practice in the Business area.

Jonathan Barton spoke at a National Business Institute event on the topic of *The Art of Settlement*, regarding successful negotiation tactics.

Tom Berry, Bryan Cavanaugh, and Stacie Owens will present a seminar on May 8, 2007 in St. Louis entitled, *Untangling the FMLA, ADA, and Workers Comp.*

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