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I.

ADMINISTRATIVE/LEGISLATIVE UPDATE

The ADA Amendments Act

On September 29, 2008 President Bush signed into law the ADA Amendments Act of 2008 (“ADAAA”), which modifies certain portions of the Americans with Disabilities Act (“ADA”). The changes, which become effective on January 1, 2009, dramatically expand the ADA’s current scope.

To constitute a covered “disability” under the ADA, an impairment must substantially limit one or more “major life activities.”¹ In 1999, the U.S. Supreme Court issued opinions in three cases, including *Sutton v. United Airlines* (1999) 527 U.S. 471. In what became known as the “*Sutton* Trilogy,” the Court held that in determining whether an individual is properly classified as having a disability, a trier of fact must consider whether “mitigating measures” (eyeglasses or medication, for instance) permit the employee to properly perform his or her job. The Court later interpreted the definition of “disability” to exclude persons whose impairments did not “significantly restrict” major life activities. The ADAAA overturns these interpretations providing that an impairment’s “substantial limitation” on enjoyment of major life activities is determined by examining the impairment *without* regard to whether “mitigating measures” correct the impairment. The purpose of the amendment is to protect those individuals with disabilities who may not need an “accommodation,” but who nevertheless are subjected to discrimination because of an impairment.

¹ The ADAAA defines the term “major life activities” as including: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. It also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

While applicants and employees who wear eyeglasses or contact lenses may not have ADA defined “disabilities,” the ADAAA seeks to protect employees whose poor, uncorrected vision would result in disqualification from certain employment opportunities. The ADAAA prohibits “qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless the standard, test, or other selection criteria, is shown to be job-related for the position in question and consistent with business necessity.” Thus, vision tests will be evaluated under the strict “business necessity” standard applicable to medical examinations.

It should be noted that in 2000, the California Legislature amended California’s Fair Employment and Housing Act (“FEHA”) to reject various interpretations of the ADA. The FEHA’s interpretation of “disability” remains broader than even the ADAAA’s. Therefore, California employers will still be required to comply with the FEHA’s more stringent mandates.

II.

JUDICIAL UPDATE

EEOC’s Subpoena Power Addressed by Ninth Circuit

The Ninth Circuit Court of Appeals recently held that the U.S. Equal Employment Opportunity Commission’s (“EEOC”) subpoena power does not cease when the EEOC issues a right-to-sue letter and the charging party initiates litigation based upon that charge. Further, an EEOC subpoena which does not seek direct evidence of discrimination but instead seeks general employment files in order to help the EEOC draft future information requests is “relevant” to a charge of systematic discrimination and is therefore enforceable.

In *Equal Employment Opportunity Commission v. Federal Express Corp.*, a Federal Express (“FedEx”) employee filed an EEOC charge of discrimination on behalf of himself and similarly situated individuals, alleging that FedEx’s Basic Skills Test, a cognitive ability test which employees were required to pass to be eligible for promotions, had a statistically significant adverse impact on African American and Latino employees. Although the EEOC issued the employee a right-

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to-sue letter as requested, the letter indicated that the EEOC would continue to process the employee's charge. Pursuant to its continuing investigation, the EEOC issued an administrative subpoena to FedEx, directing the company to identify basic information about the computer files it maintains. The EEOC did not request any specific information about employees, but rather sought information that would aid it in fashioning a more detailed request if the need for more information should arise later in the investigation. FedEx refused to comply with the subpoena, claiming among other things that the EEOC lacked the authority to investigate since it had already issued a right-to-sue letter and that the evidence sought by the EEOC was not relevant and material to the investigation at hand.

In holding that the subpoena was valid and enforceable, the court stated that while the EEOC's issuance of a right-to-sue notice generally terminates its processing of a charge, the EEOC's investigation *may* continue if it determines at that time or at a later time that further processing would effectuate the purpose of Title VII and/or the Americans with Disabilities Act. In such circumstances, the EEOC retains the authority to subpoena information relevant to the charge. Moreover, because the "EEOC is not merely a proxy for victims of discrimination, but acts also to vindicate the public interest in preventing employment discrimination," and because the employee's charge alleged a pattern and practice of racial discrimination on a large scale, the EEOC had the power to investigate instances of discrimination beyond the alleged discrimination specifically committed against the employee. As such, the subpoena requiring production of computerized personnel files was enforceable because it sought information relevant and material to the EEOC's broader investigation.

Pettit Kohn Ingrassia & Lutz PC's

2nd Annual

Employment Law Symposium on November 19, 2008.

Please contact Cathy Johnson (858) 755-8500 x129 with any questions.

We look forward to seeing you there!

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This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Cara Patton, or Tyler Theobald at (858) 755-8500 or Eric DeWames at (310) 417-1136.