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EMPLOYMENT ALERT

Recent Developments in the Law Will Have Significant Impacts on Employers

Medical Marijuana, Drug Testing, Genetic Testing, Discrimination and E-Verification of Employment Eligibility

I. Accommodation of Medical Marijuana Use by Disabled Employees

In *Emerald Steel Fabricators, Inc. v. BOLI*, the Oregon Court of Appeals upheld a ruling by the Oregon Bureau of Labor and Industries (BOLI) that an employer must make reasonable accommodation of the use, by a disabled individual, of medical marijuana under the Oregon Medical Marijuana Act (OMMA).

BOLI issued an order finding that the employer, which had a drug-free workplace policy that included mandatory drug testing, improperly failed to make a reasonable accommodation for a disabled temporary employee. When the temporary employee, who had otherwise performed satisfactorily, disclosed his use of medical marijuana and asked if his use of medical marijuana would affect his becoming a regular employee, the employer advised him that his services were no longer needed.

Emerald Steel Fabricators argued it was not required to accommodate the use of marijuana because marijuana is a controlled substance and its use is illegal under federal law. The Court of Appeals declined to consider the employer's argument on the ground that the argument was not properly presented to BOLI.

This case serves as a reminder to Oregon employers that there are circumstances under which Oregon employers may be required to reasonably accommodate a person's disability by tolerating the medical use of marijuana outside of the workplace.

Whether this case will be appealed to or considered by the Oregon Supreme Court remains to be seen. For now, when a disabled employee holds an OMMA card and treats his or her disabling symptoms by using marijuana, an employer must make reasonable accommodation for that employee, subject to certain exceptions. Under this ruling, reasonable accommodation may include *not* testing the employee for marijuana use or not disciplining the employee for testing positive for marijuana. An employer may still prohibit any employee from using marijuana during work hours or on the employer's

property. Additionally, an employer of a DOT driver is not obligated to reasonably accommodate medical marijuana use.

II. *Lanier v. City of Woodburn*: 9th Circuit Rules it is not Permissible for Public Entities to Conduct "Blanket" Pre-Employment Drug Testing

In *Lanier v. City of Woodburn*, the plaintiff applied for a position as a library page with the City. The position was not safety sensitive and involved only minimal contact with children. Lanier was offered the position but was told that, pursuant to the City's drug/alcohol-testing policy, which required testing for all individuals who were offered a job, she had to pass a pre-employment drug and alcohol screening test to qualify for the job. She refused to take the test on the grounds that it violated her rights against unlawful searches under the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Oregon Constitution.

The United States District Court and the Ninth Circuit Court of Appeals agreed with Lanier's argument and held that the City's pre-employment drug and alcohol testing policy as applied to Lanier was unconstitutional, because the testing constituted a search under the Fourth Amendment. As such, it was not lawful without a warrant or reasonable suspicion of alcohol or illegal drug use.

If a public employer has a general policy of pre-employment drug and alcohol testing as a condition of the job offer for every position, such a policy is no longer valid. A public employer may still conduct pre-employment testing for certain positions, but for each position a public employer must determine whether it involves safety or some other "special need" justifying routine pre-employment testing. Law enforcement officers and school bus drivers are examples of "special needs" positions for which routine testing would be justified.

III. The Genetic Information Nondiscrimination Act (GINA)

GINA was signed into law by President Bush on May 21, 2008. The provisions of GINA which impact employment become effective November 21, 2009, and severely limit an employee's ability to obtain and use employees' genetic information.

GINA makes it a violation of federal law to hire, discharge, or discriminate against an employee with respect to pay, benefits, and other terms and conditions of employment based on the employee's genetic information. GINA also makes it illegal, in most instances, for an employer to obtain employees' genetic information through request, testing, or otherwise. An employer does not violate the law by inadvertently obtaining the information, by requiring it in compliance with the Federal Family and Medical Leave Act,

or by using genetic information to monitor the biological effects of toxic workplace substances.

Oregon law already prohibits employers from attempting to obtain or obtaining genetic information about an employee or prospective employee, and from discriminating against employees or prospective employees based on genetic information. When the employment provisions of GINA take effect in November 2009, genetic information discrimination will also violate federal law.

IV. *Engquist v. Oregon Department of Agriculture:* U.S. Supreme Court Says No to "Class-of-One" Public Employee Discrimination Claims

A public employee employed by the State of Oregon alleged that she had been "arbitrarily treated differently from other similarly situated employees" in violation of her rights under the Equal Protection Clause of the United States Constitution. A jury awarded her damages, but the Ninth Circuit Court of Appeals and the United States Supreme Court rejected her argument.

The U.S. Supreme Court held that, while government employees do have the protection of the Equal Protection Clause if they are members of a protected classification, the "class-of-one" theory of equal protection does not apply in the public employment context. The Court, previously, has upheld "class-of-one" treatment as a viable legal claim in situations in which governmental regulations. The Court, in *Engquist,* however, re-emphasized the "crucial difference between the government exercising 'the power to regulate or license, as lawmaker,' and acting 'as proprietor, to manage [its] internal operation" and held: "Thus, in the public employment context, the Court has recognized that government has significantly greater leeway in its dealings with citizen employees than in bringing its sovereign power to bear on citizens at large." The Court noted that subjecting the government, in its role as employer, to the same standard as applies to the government in its role as a regulator/lawmaker would make every governmental employment decision potentially subject to judicial review and make the courts function as a "super-HR" department for public employment.

Engquist clarifies that public employers have the discretionary authority to make employment decisions without fear that those decisions can be challenged by an individual employee on the basis that the employee is a "class-of-one." Of course, employment-related decisions made by public employers that arguably are based on an employee's protected classification are still subject to possible Equal Protection and discrimination claims.

V. President Bush Issues Executive Order Requiring Federal Contractors to Use Electronic Verification to Determine Employment Eligibility

On June 9, 2008, President Bush signed an Executive Order, amending a previous Executive Order, to require the use by contractors who contract with the federal government of the "E-Verify" system to determine the employment eligibility of the contractor's employees.

Secretary of State Chertoff stated that approximately 70,000 employers are currently enrolled with E-Verify, and that, for 99.5% of employees, verification is almost instantaneous. For those remaining employees who register a mismatch, and thus show up as ineligible for employment, the mismatches caused by clerical errors can usually be cleared up within two days. Secretary Chertoff stated that remaining mismatches represent employees who are either here illegally or who are using false names, and, therefore "shouldn't be working."

To contract with the federal government, contractors now are required to use the E-Verify system to verify that employees are eligible to work in the United States. Regulations are being drafted to address the impact of this program on sub-contractors. Given Secretary Chertoff's stated goal of future regulation, subcontractors, at a minimum, should be prepared to comply with the E-Verify system.

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