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NEW ADA REGULATIONS PROPOSED. As you all know from regularly reading these updates, Congress amended the Americans with Disabilities Act (ADA) effective on January 1, 2009. The new law retains the traditional and familiar definition of disability (an impairment that substantially limits a major life activity) but now interprets it much more broadly to give the law wider coverage. Thus, more people will likely now fit within the definition, meaning employers must apply the law's protections (essentially nondiscrimination and reasonable accommodation) to more employees. On September 23, 2009, the Equal Employment Opportunity Commission (EEOC) issued draft regulations to implement the newly-amended ADA. Among other things, the proposed regulations do the following: (1) revise the phrase "substantially limits" so that it no longer means a "severe" or "significant" restriction as it did before the amendments; (2) add expanded and non-exhaustive lists of major life activities for use in determining if someone is disabled; (3) lists impairments that presumptively will be disabilities; (4) instructs investigators, courts, etc. to disregard ameliorative effects of mitigating measures when determining if someone is disabled; (5) instructs that impairments that are episodic are still disabilities even if they are not active or are in remission. The intended bottom line of the draft regulations is that the focus in ADA compliance and

litigation should shift more away from the question of whether someone is disabled and more towards the question of what an employer did to try to help someone. Here is a link to a Q & A from the EEOC intended to help explain the proposals:

http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html

NEW I-9 FORM VALID THROUGH 2012. The United States Citizenship and Immigration Services Agency (USCIS) has issued an updated I-9 form. The I-9 form is used to verify the eligibility of new employees to work in the United States. The form must be filled out within three days of when a new employee starts work. The new form, available at <http://www.uscis.gov/files/form/i-9.pdf>, expires on August 31, 2012.

LEGISLATIVE UPDATE. Congress continues to consider new employment law initiatives. First, the Senate has approved (and the House is now considering) a provision (S.A. 2588) that would prohibit federal contractors who receive defense funds from requiring employees and independent contractors to sign arbitration agreements. Specifically, such contractors cannot require pre-dispute agreements requiring arbitration for discrimination and tort claims. Second, the Mental Health Parity Act of 2009 was passed by both houses of Congress and is effective on January 1, 2010. This law requires private group health benefit plans that provide mental health and/or substance use disorder benefits to offer them on a basis equivalent to the medical and surgical benefits provided. Another new law, effective on the same date, called Michelle's Law, similarly imposes certain coverage requirements on group health benefit plans. In essence, this new law extends the health plan benefits coverage to a dependent child who is over the age of 18 and enrolled in college and would otherwise lose coverage in the event a medically necessary leave of absence would cause the child to lose full-time student status. Moreover, Congress is considering the Protecting Older Workers Against Discrimination Act (H.R. 3721, S. 1756), which would return a recent United States Supreme Court decision that made it more difficult for employees to prevail in age discrimination cases. Finally, the United States Department of Justice has announced it will be devoting more resources to enforcement of the civil rights laws, which include the employment discrimination laws. The Equal Employment Opportunity Commission has received similar increased budget resources.

NO MATCH RULES BURN OUT. About two or so years ago, the United States Department of Homeland Security (DHS) issued "no match" regulations giving detailed instructions on what employers should do when the Social Security administration tells them that the Social Security numbers (SSN) of its employees do not match reported employee names also using those SSNs. The implementation of the regulations was delayed by a lawsuit filed in 2007. Since then, the future of the regulations has been uncertain. The Obama administration has now settled the issue and withdrawn the regulations. DHS now says it will focus on other tools to enforce laws regarding undocumented workers, such as E-Verify. Speaking of E-Verify, use of it is now required for federal procurement contractors and DHS has issued a guideline for use of the same, which is available here: <http://www.uscis.gov/USCIS/E-Verify/Federal%20Contractors/Supplemental%20Guidance%20for%20Federal%20Contractors%20082709%20FINAL.pdf>

DANGEROUS TIMES FOR EMPLOYERS. There has been a steady stream of big verdicts/settlements announced against employers in employment law disputes. A national dollar discount retailer has apparently failed to overturn a jury verdict of \$36 million on a claim that it misclassified its store managers as exempt and instead should have paid them overtime. The evidence in the case showed that the managers only spent about a fifth of their time on exempt work. A national insurer has agreed to pay \$4.5 million to settle claims of age discrimination pending before the Equal Employment Opportunity Commission (EEOC). The case involved claims that a hiring moratorium disproportionately impacted workers age 40 or older. A famous national retailer is going to pay over \$6 million to settle disability discrimination claims brought before the EEOC. According to news reports, the retailer allegedly maintained an inflexible worker's compensation leave exhaustion policy and, instead of accommodating them, terminated the employment of disabled workers. Finally, a national home improvement chain store has agreed to pay \$1.7 million to settle EEOC claims of sexual harassment and retaliation. October is already a scary month, with Halloween and all, but all this verdict and settlement news makes it even a more frightening time for employers...let's all really be careful out there!

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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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