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Welcome to e-News: From the Labor, Employment and Benefits Group of Robinson & Cole

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President Bush Announces New Head of EEOC

On May 10, President Bush announced that he intends to name Cari Dominguez to head the [U.S. Equal Employment Opportunity Commission](#). Dominguez is the former director of the Labor Department. She also served in the previous Bush administration as secretary of labor for employment and as head of the Office of Federal Contract Compliance Programs from 1989 through 1992. Dominguez is the first member of the EEOC named by the current Bush administration. Once appointed, she will serve a five-year term ending on July 1, 2006. Dominguez will replace Ida Castro as head of the EEOC.

President Bush Appoints Two New Members to the NLRB

On May 16, 2001, President Bush issued a [Press Release](#) naming John E. Higgins to serve as acting general counsel for the National Labor Relations Board. Higgins replaced Leonard R. Page, the acting general counsel. Higgins has held several top-level positions with the

NLRB. With his appointment, the NLRB will now be able to resume issuing complaints alleging unfair labor practices and carrying out other prosecutorial functions.

President Bush also designated Peter J. Hurtgen, who has been serving as member of the NLRB since 1997, as the new chairman of the agency. Hurtgen replaced John Truesdale, a Democrat who has held the chief position of this agency since 1988.

Age-Based Comments of Company's Chairman May Be Used to Prove Age Discrimination

Eugene Slattery, age 46, was hired to work at Swiss Reinsurance America Corporation as an account executive. Several years later, the new chairman at Swiss Re, Walter Kielholz, reorganized the company. He later gave a magazine interview. The magazine reported that "Kielholz has been concerned to dispel the perception of Swiss Re as a multinational collection of grey suits and encourage young dynamic staff to join the company. The average age has dropped significantly over the last few years to 39. Kielholz firmly believes that a younger workforce will be more in tune with the knowledge worker spirit."

About two years after this magazine interview, Slattery's employment at Swiss Re was terminated. According to Swiss Re, Slattery was terminated due to unsatisfactory job performance. The company maintained that Slattery's performance issues, which included his failure to generate new business and lack of leadership, were documented in his performance evaluations.

Slattery sued Swiss Re for age discrimination. In support of his case, Slattery offered the statements that Kielholz had made during his magazine interview as evidence of age discrimination. The lower court dismissed Slattery's claims noting that there was no nexus between Kielholz's statements and his termination mainly because Kielholz was not involved in the termination decision. In [Slattery v. Swiss Reinsurance America Corporation](#) (5/3/2001), the U.S. Court of Appeals for the Second Circuit affirmed dismissal but decided that Kielholz's statements that "he intended to make the image of Swiss Re younger and that he in fact reduced the average employee age to 39" could be used to prove age discrimination. The appeals court noted that policy statements made by a senior executive may be implemented by lower level employees. Therefore, statements by senior executives may be used to prove age discrimination.

Allergy Sufferer Is Disabled under the ADA

William Woods worked as a driver for United Parcel Service. While working at its facility in Austin, Texas, he developed a serious reaction to a local allergen. The reactions were quite severe and constant and included fever, swollen eyes, nasal and lung congestion, fever blisters, fatigue and depression. His allergies made it difficult for him to sleep, eat and breathe. Woods' doctor advised him that relocation might be the only possible solution because all other treatments had failed.

Woods requested a relocation to Kentucky due to his medical condition. Woods explained that he had lived there in the past and had not had any allergy problems there. A human resources representative at UPS informed Woods that company policy did not allow for a transfer. He was further told that, if he resigned from his position in Texas, he would be rehired at a UPS location in Ohio or Kentucky. Relying on these statements, Woods resigned and moved with his family to Kentucky. When he applied for a UPS position in Cincinnati, he was told that he could not be hired due to UPS's policy of not rehiring former employees.

The U.S. Equal Employment Opportunity Commission sued UPS on behalf of Woods under the Americans with Disabilities Act. The lower court dismissed the EEOC's claims and the EEOC appealed. In [EEOC v. United Parcel Service, Inc.](#) (5/7/2001), the U.S. Court of Appeals for the Sixth Circuit decided that Woods was disabled under the ADA because of the substantial limitations his allergy placed on his ability to perform his job for UPS while he worked in Texas. The court also concluded that UPS's failure to rehire Woods constituted an adverse employment action. UPS's actions resulted in the involuntary loss of Woods job due to its failure to reasonably accommodate his disability. Accordingly, the appeals court reversed the dismissal.

OSHA Announces Outreach Program on Needlestick Prevention and Extends Enforcement Deadline for Provisions of New Bloodborne Pathogens Standard

On May 9, 2001, the U.S. Occupational Safety and Health Administration announced an [outreach program](#) designed to educate employers, health care workers and the general public about OSHA's revised bloodborne pathogens standard. The revised standard, issued on January 18, 2001, emphasizes the importance of choosing safer needle devices. The new rules require employers to keep a log of all injuries from contaminated sharp devices and maintain the privacy of employees who have suffered these injuries. Other provisions explain how to handle and dispose of contaminated needles and sharps and how to communicate workplace hazards to employees.

OSHA's new outreach effort includes a collection of written materials that explain the specific aspects of the revised bloodborne pathogens standard in greater detail. The materials can be found at [OSHA's website](#). OSHA also has a presentation package on these new rules, which includes training courses for public and private sectors.

OSHA announced that, until July 17, 2001, it will not enforce new provisions of the bloodborne pathogens standard requiring employers to maintain sharps injury logs and to involve non-managerial employees in the selection of safer medical devices.

Plan Amendment and Submission Deadline Nears

The U.S. Internal Revenue Service reminded employers last week that there WILL NOT be an extension of the requirement that qualified plans, including 401(k), profit sharing, pension plans and ESOPs, be amended and submitted to the IRS by the last day of the plan year beginning in 2001. For most employers this, deadline will be December 31, 2001. Employers who currently have a prototype document will have a later date (12 months after the IRS approves the prototype). For prototype plans the deadline will be sometime between the middle of 2002 and early 2003.

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