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LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

New Legislation

COBRA and Unemployment Compensation Benefits Extended

The Continuing Extension Act of 2010 was signed by the President on April 15, 2010, guaranteeing several extensions to government programs including COBRA assistance and emergency unemployment benefits. Unemployed individuals may file application for emergency unemployment from April 5 to June 2, 2010 and may collect until November 6, 2010. The 65% subsidy for individuals who have lost their jobs is extended through May 31, 2010. H.R. 4213 is currently being considered in Congress which would extend COBRA benefits through the end of 2010.

Harassment

Failure to Take Action on Complaint

An employee complained to an official of the employer that she was being harassed by her

store manager. The employer defended against a claim of vicarious liability by stating that the store manager had no authority to make decisions that had an economic impact on the employee and no power to fire, promote or demote the employee. The Fourth Circuit Court of Appeals found that because the alleged harasser had the title of "store manager" where the employee worked, was the highest ranking employee in the store, and had authority to give her work assignments and schedules pointed to the fact that he was her supervisor. Therefore, the court held, the employer is subject to vicarious liability for the alleged harassment. *Whitten v. Fred's Inc.*, No. 09-1265 (4th Cir. 4/1/10)

Wage and Hour

Combination Exemption

A former employee classified as exempt filed suit for unpaid overtime alleging her employer misclassified her as outside sales. The court, finding in favor of the employer, held that the representative was exempt and not entitled to

overtime because her position was a combination of outside sales and administrative exemptions. While she was not out selling, she performed such administrative duties as developing advertising and marketing plans, managing customer complaints, administering the customer database, and dealing with issues that would have been handled by the employer had he been in the office, such as approving an order of parts for broken machinery. This office work was directly related to the management and general business operations of the employer. *Schmidt v. Eagle Waste & Recycling Inc.*, No. 09-1902 (7th Cir. 3/22/10)

Tipped Employees Doing Non-Tipped Activities – the 20% Rule

The U.S. Department of Labor guidelines state that an employer may not take a tip credit for the time spent by its tipped employees when they are doing general preparation or maintenance work if those duties exceed 20% of the employee's shift time. Plaintiffs contend that Applebee's routinely assigned its servers and bartenders substantial general preparation and maintenance work. According to Plaintiffs, they regularly spent more than 20% of their time on general preparation and maintenance. For example, there is evidence that Applebee's required its servers and bartenders to clean and set up the restaurant before it was opened and after it was closed which the Court considered maintenance work. In addition, it required servers to clean bathrooms during their shifts, to sweep the restaurant, to clean and stock service areas, roll silverware, and to do other duties not directed to specific customers. Applebee's took a tip credit for all work performed by its servers and bartenders, including this general preparation and maintenance work even when it amounted to more than 20% of the employee's work. Plaintiffs contend that this is a violation of the FLSA and that Applebee's was not entitled to take the tip credit under these circumstances. Applebee's contends

that all work done by its servers and bartenders was part of their tipped occupation because anything that contributes to their customer's enjoyment is related to the occupation of server or bartender.

Congress has stated that employees engaged in commerce shall be paid a minimum wage of \$7.25 per hour. As for "tipped employees" further guidance is provided by Congress in 29 U.S.C. §203(m). That section permits the employer to use the employee's tips to satisfy part of the employer's minimum wage obligation. Congress defines a "tipped employee" as one who engages "in an occupation in which he customarily and regularly receives more than \$30 a month in tips." The parties all agree that bartending and serving are tipped occupations. However, the parties disagree on what duties are properly assigned to the occupation of bartender and server.

The FLSA does not specifically define the term "occupation." Having considered the language, context and history of the FLSA, the Court concluded that Congress intended for the tip credit to be taken when employees are primarily engaged in tip producing duties. The regulation gives an example of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes and glasses. This suggests that as long as the waitress is doing work generally assigned to waitresses, the tip credit can be taken even if there is not a direct link between the work and the tips. However, the Department of Labor has said "where the facts indicate ... that tipped employees spend a substantial amount of time (in excess of 20%) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties."

Employers are expected to keep track of the time employees spend in tipped and non-tipped work to make sure the non-tipped work does not exceed 20% and if it does, the

employee must be paid the full minimum wage for the non-tipped work. *Fast v. Applebee's International Inc.*, No. 06-4146 (W.D. Mo. 3/4/10)

Religious Bias

Conduct not Religion Was Reason for Discharge

An employer discharged a Seventh Day Adventist for rule violations. The employee alleged that she was discharged because she requested Saturdays off. The employee alleged she was entitled to have all Saturdays off as an accommodation for her religion. However, the employer said to allow all

Saturdays off would create an undue hardship on the company because she was a manager and all managers must work on Saturdays. The employee refused to give up her management position. Furthermore, the employer stated, the employee was discharged after her third disciplinary infraction under the company's three-strike policy. The disciplinary actions were based on conduct unrelated to her religious beliefs or her requests for Saturdays off. The court held that the employer had not deviated from its disciplinary policy and showed that other employees were disciplined for similar issues. *Burdette v. Federal Express Corp.*, No. 09-5596 (6th Cir. 3/3/10).