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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.



Disability Discrimination

Pre-Offer Inquiry about Failed Drug Test

The Americans with Disabilities Act specifically states that drug tests are not medical tests. However, an employer in Alabama found out the hard way that following up with an applicant on a drug test that revealed a legal prescription for barbiturates was going too far. The applicant was not hired for a permanent position. The job applicant sued the employer when the inquiries revealed the applicant was an epileptic. The regulations state that it is appropriate for an employer to inquire into an applicant's ability to perform job related functions but it is not law for to make targeted disability-related inquires at the pre-offer stage. Health related inquiries can only be made after a conditional offer of employment, and before the individual begins work. After the individual begins to work, the employer must have a justifiable business reason for making such inquiries. *Harrison v.*

Benchmark Elecs. Huntsville, Inc., No. 08-16656 (11th Cir. 2010).

Proposed Legislation

Proposed Further Extension of COBRA Subsidy

The President has proposed another COBRA extension beginning March 1, 2010, that would continue to reimburse employers or health plans to subsidize 65% of the premium for workers who lose their jobs. If passed, the subsidy would be available for up to 12 months to people laid off between March 1 and the end of 2010. As originally passed, the subsidy was for up to nine months. Then in December 2009, the period was extended to a total of 15 months. Should the proposed extension pass, the period would be 12 months. Make sure your COBRA administrator is planning for the possible adoption of this COBRA extension because it may be retroactive to March 1, 2010.

Miscellaneous

IRS to Perform Random Audits of 2008 Records

The IRS announced that its Small Business/Self-Employed Division will be conducting random employment tax compliance audits of companies beginning in February 2010. It plans to conduct 2000 audits per year over the next three years which will include approximately 1500 tax-exempt organizations. Their purpose is to scrutinize employer's treatment of workers as independent contractors or employees, as well as fringe benefits, and expense reimbursement. The audits will be comprehensive including line by line reviews of employment tax returns and information returns. They will also be scrutinizing employers' executive compensation policies and other employment tax matters.

Wage and Hour

Staples Pays \$42 Million to Settle Overtime Suits

Staples settled overtime suits brought by assistant store managers in California in 2007. In another settlement covering all other states in which Staples does business, the company

agreed to a \$42 million global settlement on behalf of 5000 current and former assistant store managers. Staples made no admission of wrongdoing. The settlement still needs to be approved by the court.

Stores Fined for Child Labor Violations

As part of an ongoing child labor initiative, store chains in California and Mississippi have been fined by the Department of Labor for allowing workers under age 18 to operate hazardous equipment such as scrap paper balers, paper box compactors, and forklifts. In the Mississippi settlement, a store was fined for allowing an underage worker to operate similar equipment. However, the most objectionable to the employer was a fine for allowing a worker under 18 to put trash into a compactor even though the worker did not operate the compactor. The unfortunate outcome from these cases is that neither store chain is willing to hire anyone under 18.

As a side note, Florida's Civil Rights Act prohibits employers from discriminating against individuals on the basis of their age—any age. Making the decision not to hire individuals under 18 in Florida would violate the law unless the only work available was hazardous under the Child Labor Laws.