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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

Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008

Governor Crist signed this bill, labeled by some the "take your guns to work bill" into law on April 15, 2008. A constitutional challenge by the Florida Chamber and others in the business community could postpone implementation which is currently set for July 1, 2008. If the law is not stopped, all employers will need to revise their policies that prohibit weapons on company property. We will watch the progress of this case closely and report any updates. *Florida Statutes §790.251*

Wage and Hour

Time Spent at Required Doctor's Visit is Compensable Time

An employee had work related injuries and was instructed by the employer's workers'

compensation administrator to be re-evaluated by the doctor. The employee left work to attend a doctor's appointment, which was scheduled during her regular shift. Because the employee chose to take an unpaid absence, she was never compensated for the 3.8 hours of time missed due to the appointment. The employer defended saying that it played no part in requiring the employee to see the doctor and should not be required to compensate her for the time. The court disagreed stating that the appointment was scheduled by a third-party administrator of the employer's workers' compensation claims which was an agent of the employer. *Howser v. ABB Inc.*, 2008 U.S. App. LEXIS 6282 (8th Cir. 3/27/08).

Managers at Convenience Store Not Exempt Executives

Managers working for a convenience store chain alleged that their primary duties were not "management" and that their stores were actually run by their district managers.

In determining whether an employee is an exempt executive, the first hurdle is a determination that the employee's primary duty is management of an establishment, a department, or a division of the employer. Factors to consider when deciding whether management is the primary duty are: 1) the amount of time spent performing managerial duties; 2) the relative importance of an employee's managerial and non-managerial duties; 3) the frequency with which an employee may exercise discretionary powers; 4) the employee's relative freedom from supervision; and 5) the relationship between the purportedly exempt employee's wages and the wages paid to other employees performing similar, non-exempt work. In this case, the managers were able to show that a very small percentage of their time was spent managing and that, in fact, they were doing the same work as those they supervised. They also testified that they were not able to make decisions without first checking with the regional managers. Therefore, the managers were entitled to overtime compensation. *Rodriguez v. Farm Stores Grocery Inc.*, 2008 U.S. App. LESIX 4817 (11th Cir. 3/6/08)

Family & Medical Leave Act

FMLA Charged During Workers' Comp Absence

An employee who was out on medical leave for approximately seven months after a workplace injury was required to take Family & Medical Leave to cover part of his absence. He was later discharged and alleged the discharge was in retaliation for filing a workers' compensation claim. The employee had less than a month of FMLA left because he had used more than half of his FMLA allotment for a prior unrelated issue. The employee argued that he should not have been forced to take FMLA nor was the employer permitted to count his workers'

compensation absence toward FMLA. The court disagreed saying that if the employer provides an adequate notice to the employee, it may designate a workers' compensation absence as FMLA. *Dotson v. BRP US Inc.*, No. 07-1375 (7th Cir. 3/21/08)

Discrimination

Employee Can Sue for Retaliation Based on Fiancée's EEOC Charge

An employee claimed he was terminated because his fiancée filed an EEOC charge against their joint employer for gender discrimination. The retaliation provision of Title VII provides that it is an unlawful employment practice for an employer to discriminate against an employee because he has opposed an unlawful employment practice or because he has filed a charge of discrimination. In this case, the discharged employee did not file a charge or oppose an unlawful employment practice—his fiancée did. Relying on the U.S. Supreme Court's decision in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Court ruled that a literal reading of the retaliation provision defeats the plain purpose of the statute and there is no doubt that retaliation against a family member after an employee files a charge would dissuade reasonable workers from such action. *Thompson v. North American Stainless LP*, 2008 U.S. App. LEXIS 6776 (6th Cir. 3/31/08)

Employer's Inadequate Documentation Forces Trial

A Middle District of Florida federal judge recently decided that a female employee fired weeks after she informed her employer she was pregnant raised an issue of unlawful discrimination under Title VII. The employer's argument, that the employee was terminated for poor job performance, did not prevent the case from going to trial

because the employee's documentation was inadequate. Brockman alleged that she was terminated because of her pregnancy. The employer argued that she was terminated as a result of her slipping performance ratings, claiming that its initial decision to discharge Brockman had been made three days before she announced she was pregnant. However, the court held that the company's records failed to support its argument. First, there was no written documentation of the decision to discharge Brockman before she announced her pregnancy. Second, Brockman's supervisor failed to document any of the coaching sessions he had with her, in violation of company policy. Third, Brockman's personnel file was missing. Finally, prior to receiving her last performance evaluation of 65 ("needs improvement"), Brockman had received an evaluation of 87, meaning "effective." *Brockman v. Avaya Inc.*, No. 3:06-cv-923-J-16JRK (M.D. Fla. 2008.)

Privacy

Employer Had Right to Examine Personal Data on Company Laptop

A software consulting company performed a forensic search of a terminating employee's company laptop and in so doing, accessed personal e-mails stored to the hard drive. The employee then left to start a competing company and the employer allegedly thwarted the new business. The employee sued and the company countersued resting its arguments on evidence it obtained during the forensic search. The employee counterclaimed for violation of his privacy rights and the Stored Communications Act.

The court said that the laptop belonged to the company and its search of personal data stored on the computer did not violate the employee's privacy rights. Additionally, the court held that the searches did not offend the Stored Communications Act because the company accessed only saved e-mails and did not log onto the employee's personal e-mail account. *Hilderman v. Enea TekSci Inc.*, 05cv1049 BTM (S.D. Cal. 3/12/08.)

Disability Discrimination

Employee Could Not Prove Qualified

A packer at a plant who was diagnosed with diabetes and neuropathy could not proceed with her claims under the Americans with Disabilities Act. She failed to show her request for additional medical leave would result in regular attendance—an essential job function. The court said that employers are not required to provide unlimited leaves or otherwise to accommodate her unlimited absenteeism. *Brannon v. Luco Mop Co.*, No. 07-1434 (8th Cir. 4/3/08)

EEOC Settlement

The Equal Employment Opportunity Commission reached a settlement with a bar owner who fired an employee for not wearing her uniform. The employee had undergone breast cancer treatment and requested an accommodation. The settlement agreement requires payment to the employee, reinstatement, and employee training. *EEOC v. Mears Marina Associated Ltd. Partnership, d/b/a Red Eye's Dock Bar*, No. 1:07-cv-02516-RDB (D. Md. 3/17/08)