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December 2006

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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.

**REMINDER: Florida's minimum wage increases to
\$6.67 per hour effective January 1, 2007**

Family & Medical Leave Act

On-Call Time Not Counted for FMLA Eligibility

An airline pilot cannot count her time spent on reserve duty as compensable hours for the purpose of determining her eligibility for FMLA, even though the time was paid. The FMLA adopted the principles established under the Fair Labor Standards Act for determining compensable hours of work, according to the court. The pilot was free to move about and go on with her life except she could not drink alcohol. She just had to be available by phone and report to work within one hour after receiving a call. The Fair Labor Standards Act does not count on-call time under these circumstances as compensable time. Therefore, it is not counted toward the pilot's 1250 hours worked in the prior one year time frame.

Knapp v. American West Airlines, 12 WH Cases2d 6 (10th Cir. 11/24/06) unpublished.

Teacher's Doctor's Note and Request for Forms Triggered FMLA Rights

A teacher presented a doctor's note to her employer diagnosing depression and excusing her from work for three weeks. The teacher then requested FMLA forms indicating her need for time off for medical reasons. The court said that these two things were sufficient notice under the FMLA to allow her to take protected time off from work. The employer objected saying this was insufficient notice but the court said the Act is silent regarding the type of notice an employee must give to her employer when the need for leave is unforeseeable. *Hemenway v. Albion Public Schools*, 12 WH Cases2d 1 (W.D. Mich. 11/15/06)

Dental Plan is Group Health Plan to be Continued while on FMLA

The Department of Labor has issued an opinion letter (FMLA2006-6-A) concluding that a dental plan provided by a school district qualified as a group health plan because it was provided by the employer. During any FMLA leave, an employee has the right to continue the dental plan coverage. The DOL developed a test to determine when an insurance plan is excluded from the definition of group health plan:

- The employer makes no contribution to the plan
- Participation in the program by employees is completely voluntary
- The employer does nothing but advertise the program and collect premiums through payroll deductions
- The employer receives no payments beyond administrative costs; and
- The premium charged to the employee does not increase in the event the employment relationship ends.

Using this test, most if not all employer sponsored group insurance plans that touch on health issues would be included in the definition of "group health plan" and employers would be required to continue them during an employee's FMLA leave.

Disability

Temporary Restriction from Duties not Regarded As Disabled

A flight attendant suffered from depression and anxiety and had a history of closed-head trauma. He was also on various medications. The airline restricted him from working in his position due to an alleged cognitive impairment that would prevent him from acting quickly in an emergency. The attendant could perform other jobs for the

airline. The Appeals court found insufficient evidence that the airline regarded the attendant as disabled in the major life activity of working because the airline was able to show that it regarded his condition as temporary basing its decision on two screening tests interpreted by an independent psychologist. *Pittari v. American Eagle Airlines*, 18 AD Cases 1089 (8th Cir. 11/9/06)

Wage and Hour

IBM Agrees to \$65 Million Settlement

IBM was sued by 32,000 technology workers alleging that they were required to work overtime without additional pay. IBM said it considered the employees as highly-skilled professional employees exempt from overtime. The settlement still must be approved by a federal court in San Francisco. *Rosenburg v. IBM*, No. 06-0430 (N.D. Cal. 11/22/06). Technology workers may be exempt from overtime if they are highly-paid hourly programmers or they meet the duties and salary basis test for professional or administrative exemptions.

Discrimination/Harassment

Affirmative Defense Available in Race Harassment Case

A black employee failed to establish that he was subjected to a hostile work environment when he was subjected to racially offensive comments by a coworker and his supervisor. The alleged comments by the coworker consisted of a few statements and were not considered sufficiently pervasive to establish unlawful harassment. The employee failed to use the employer's complaint policy concerning the supervisor's alleged comment. The appellate court found that the employer was entitled to the *Ellerth-Faragher* affirmative defense because the employer had a policy prohibiting discrimination and harassment and the employee failed to use the

employer's remedies. *Gordon v. Shafer Contracting Co., Inc.*, No. 06-1963 (8th Cir. 12/6/06)

Miscellaneous

Summary Refresher on USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to virtually all civilian employers regardless of size. It covers discrimination by an employer because of past, current or future military service, as well as retaliation. After reemployment, the service member is entitled to the seniority and pay that s/he would have received had s/he never left. Returning service member's rights are contingent on their being eligible for reemployment, including giving advance notice to the employer of the military service, the service member's timely return to work after the service is completed, and honorable discharge. Generally, the combined length of military service cannot exceed five years. However, the limit does not apply to any service member serving in Iraq, Afghanistan or the war on terror. Service under USERRA is any kind of service, whether on a voluntary or involuntary basis that can include active duty for training, national guard duty, and other forms of military participation. It also includes absences for fitness for duty exams.

Proposed Legislation

Union Friendly Bills to be Re-introduced

Senator Edward Kennedy and Representative George Miller have

introduced legislation that would help labor unions eliminate secret ballot elections. The bills (S.B. 842 and H.B. 1696) are just the beginning of labor-friendly legislation expected to come from the Democratic Congress. The bills would allow certification of a bargaining unit without a secret election if an individual or labor organization files authorization cards from a majority of the employees. The NLRB would be charged with investigating the cards before pronouncing the union certified. The initial bargaining must be conducted within 90 days after the employer receives a written request for collective bargaining. If the parties fail to reach an agreement, either party may request mediation through the Federal Mediation and Conciliation Service. If 30 days pass without an agreement, it goes to binding arbitration. Any contract reached will be in place for two years unless the parties agree otherwise. The NLRB would have to seek a federal court order against an employer accused of threatening, discharging or discriminating against an employee during an organization drive or first contract negotiations as well as if an employer commits an unfair labor practice. In addition, there would be a civil penalty of up to \$20,000 per violation and affected employees would receive three times their lost wages for discharge or discrimination violations. If these bills become law, employers will be stripped of their opportunity to speak to employees before the union is certified, especially since union organizing is usually conducted in secret without the employer's knowledge. To track the status of these bills, go to www.govtrack.us/congress.