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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.

Harassment

\$11.5 Million Settlement in Sexual Harassment Case Against NBA Knicks

Isiah Thomas, accused of sexual harassment by the Knicks former vice president for marketing and business operations stated the settlement does not change the fact that he is innocent of the charges. A federal jury had awarded the plaintiff \$11.6 million in punitive damages and she was going back to court to request attorney's fees and compensatory damages. The \$11.5 million settlement included \$4 million in attorney's fees. *Browne Sanders v. Madison Square Garden LP*, No. 06 Civ. 589 (12/10/07)

Wage and Hour

Florida's Minimum Wage

Just a reminder that Florida's minimum wage increased to \$6.79 effective January 1, 2008.

Federal minimum wage continues to be less than the state's minimum wage, so employers must follow state law when paying employees. Employers of tipped employees may continue to count tips actually received as wages under the Federal Fair Labor Standards Act. Tipped employees must be paid \$3.77 per hour effective January 1, 2008. Florida's minimum wage poster is available for downloading at www.floridajobs.org/resources/fl_min_wage.html

Paycheck Errors Did Not Jeopardize Salary Basis Status

An employer underpaid an employee on two of the 50 paychecks it gave him in one year. The First Circuit Court of Appeals ruled that this did not change his status as an exempt employee. The Department of Labor regulations require that a deduction from an employee's pay must constitute an actual practice by the employer to defeat the salary basis test. "Two aberrant paychecks issued

to the employee” do not constitute an “actual practice” the court held. *Cash v. Cycle Craft Co.*, No. 07-1768 (1st Cir. 11/20/07)

RadioShack Settles Class Action with Managers for \$8.8 Million

Managers in small RadioShack stores sued the retailer for unpaid overtime alleging that they were misclassified as executive exempt employees. The managers were the highest-ranking employees on site at the stores and were responsible for general management tasks, including hiring and firing, scheduling, and evaluations. They make substantially more than their subordinates. However, they alleged they were not exempt because they did not supervise two or more full-time or equivalent workers. A Northern District of Illinois judge ruled that RadioShack managers who were not spending 80% of their time supervising employees who together worked at least 80 hours per week failed to meet the Fair Labor Standards Act’s executive exemption and were entitled to overtime compensation. *Perez v. RadioShack Corp.*, No. 02-884 (N.D. Ill. 11/15/07)

Disabilities

Depressed Worker’s Discharge Not ADA Violation

An employee diagnosed with depression who was fired for attendance problems had no discrimination claim under the ADA because she could not meet the essential function of predictably being present at work. The Court held that regular predictable attendance is an essential function of most jobs. Even assuming that the former employee’s depression is a disability protected by the ADA, the fact that she could not attend work on a regular basis means she was unable to perform the essential functions of her job and is not a qualified

individual with a disability. *Rask v. Fresenius Medical Care N. Am.*, No. 06-3923 (8th Cir. 12/6/07)

Voluntary Demotion Considered Adverse Employment Action

A director of nursing had breast cancer. Her supervisor told her that she could not continue in that job and she needed to request a transfer to the nursing pool. Instead, the nurse requested transfer to the Nurse Manager position, a less onerous demotion than the one suggested by her supervisor. The fact that she was demoted to a better position than her supervisor suggested still does not negate the factual issue of whether the transfer was involuntary. Therefore, for the purpose of the appeal, the court assumed that the nurse was subject to the adverse employment action of demotion and ruled that the nurse could maintain her discrimination claim under the Rehabilitation Act. *Garrett v. University of Alabama at Birmingham*, No. 05-11110 (11th Cir. 11/15/07)

Family Medical Leave Act

Employee Prejudiced When Employer Failed to Give Notice of FMLA Being Charged

An employee who took leave for knee surgery was prejudiced by her employer’s failure to comply with the Department of Labor’s regulations requiring notice that the absence was being charged as FMLA. She was able to show she was prejudiced because, she said, had she received individualized notice, she would have been able to postpone her surgery to another FMLA period. Therefore, enforcement of the regulation was not only permissible but consistent with the FMLA’s remedial scheme. *Downey v. Strain*, No. 06-30613 (5th Cir. 12/12/07)