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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.

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### *New Legislation/Regulations*

#### **Florida's Minimum Wage**

Florida's minimum wage is increasing to \$7.21 per hour effective January 1, 2009. This is up from \$6.79 per hour for 2008. Florida's minimum wage applies to all employees in the state who are covered by the federal minimum wage. It is increased every year, pursuant to a Constitutional amendment, based on the consumer price index for the 12-month period prior to September 1 each year. Florida's minimum wage poster, in English and Spanish can be found at <http://www.floridajobs.org/workforce/posters.html#minposter>

#### **Federal Minimum Wage**

On July 24, 2009, the federal minimum wage will increase to \$7.25 per hour. All Florida employers will be required to increase their employees' minimum wage to \$7.25,

regardless of Florida's minimum wage. When Florida's minimum wage increases again on January 1, 2010, employers will be required to follow Florida's minimum wage again.

#### **Family & Medical Leave Act Rules**

As reported in November's Legal and Legislative Update, new FMLA regulations will take effect on January 16, 2009, requiring employers with 50 or more employees to update their policies. The new regulations clarify the relationship between a leasing company (or professional employer organization PEO) and leased employees working for a primary employer. Where in the past companies that leased employees, even if they had only a few employees, were subject to the FMLA, the new regulations make it clear that a PEO must have the right to hire, fire, assign, or direct and control the client employer's employees to make the client employer subject to the FMLA. If there is no such control, there is no joint employer relationship. Further, merely because there is

a PEO / client relationship (joint or otherwise) does not automatically make companies of fewer than 50 employees subject to the Family & Medical Leave Act. See:

29 C.F.R. § 825.106 (b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, **joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.**

(2) A type of company that is often called a **“Professional Employer Organization” (PEO)** contracts with client employers to **perform administrative functions** such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. **A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions.** On the other hand, **if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client’s employees, or benefits from the work** that the employees perform, such rights may lead to a determination that the PEO would be a **joint employer** with the client employer, depending upon all the facts and circumstances.

In those cases in which a PEO is determined to be a joint employer of a client’s employees, the client would still **only** be required, for purposes of determining whether there are 50 or more employees, to **count** employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

Employers should double check with the leasing companies to confirm that their agreement does not give the leasing company the right to hire, fire, assign, or direct and control their employees.

### **ADA Amendments Act**

The House of Representatives and U.S. Senate overwhelmingly passed the ADA Amendments Act. President Bush signed the Act into law on September 25, 2008 and it takes effect on January 1, 2009. However, it will take effect without any regulations developed by the Department of Labor. Watch for proposed rulemaking to be published in the next month or so. The amendments will result in a whole new segment of employees being classified as disabled under the ADA who do not meet the definition of having a disability under the current ADA because mitigating measures are available to them. Please see the September Legal & Legislative Update for more information about the ADA Amendments Act.

### *Insurance Coverage*

### **Untimely Notice of EEOC Charge Excuses Refusal by Insurance Company to Defend**

A liability insurer denied coverage of a Title VII discrimination claim because the employer waited until a lawsuit was filed to notify the company. The company’s policy required the employer to promptly notify it of any claim, defined as including a formal administrative proceeding commenced by the filing of a notice of charges. The company argued that the EEOC charge was not a formal claim but the appeals court rejected the argument. The insurance company properly refused to defend the claim and properly refused to pay the settlement agreed to by the employer. *American Ctr. For International Labor Solidarity v. Federal Insurance Co.*, 104 FEP Cases 1569 (D.C. Cir. 12/5/08)

*First Amendment*

**Public Employees First Amendment Rights**

A discharged employee of the City of Ormond Beach, Florida claimed that he lost his job as the city's director of leisure services for speaking out on a matter of public concern in an e-mail that criticized the city and the management abilities of the city manager. In 2006, the U.S. Supreme Court held, "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." [\*Garcetti v. Ceballos\*, 547 U.S. 410, 421 \(2006\)](#). The form and context in which the former employee responded showed that he sent the email for only one reason: to defend what he perceived as a Commissioner's attack on his job performance as Leisure Services Director. The court held that the former employee responded to the e-mails in his capacity as Leisure Services Director, and the subjects of those e-mails were part of his official duties. Those e-mails triggered the Commissioner's attack on the employee's job performance, which he defended. The appeals court agreed

with the district court that the employee failed to produce sufficient evidence that he spoke as a "citizen" and not a "public employee." *Burton v. City of Ormond Beach, FL*, 2008 WL 4996771 (11<sup>th</sup> Cir. 11/25/08)

*News*

**EEOC Charges at a Record High**

If you are waiting for the Equal Employment Opportunity Commission to make a determination on a discrimination charge, your wait may be a long one. The EEOC received a record high 95,402 private-sector discrimination charges in fiscal 2008 ending September 30, an increase of 15.2% over the previous year. The EEOC has a pending case inventory of 73,951 compared with a backlog of 54,970 charges a year earlier. The union representing EEOC employees is saying the "rock-bottom staffing" and a record volume of charges added up to another failing grade for the agency. The union further criticized the EEOC for not requesting sufficient funding to increase staff. The EEOC's budget was \$329.3 million for 2008 and the Bush administration requested about \$342 million for 2009.