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January 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 you 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 a substitute for legal advice.

New Legislation

Florida's Minimum Wage Act

The voters approved an amendment to the State Constitution in 2004 resulting in a higher minimum wage for employees in the state than the federal minimum wage and providing for an annual increase based on the cost of living. On December 12, 2005, Florida Statutes §448.110 took effect implementing the amendment. The Act answered the question, whether the Fair Labor Standards Act's minimum wage exemptions would apply under Florida's Act. The good news is that they do. "Only those individuals entitled to receive the federal minimum wage under the federal Fair Labor Standards Act and its implementing regulations shall be eligible to receive the state minimum wage..."

The bad news is that the state law is broader than the federal law in that the statute of limitations is four years for a violation and five years if the violation is found to be willful. Federal law is two years and three years respectively.

The new Act requires employees to give their employer 15 days notice before filing a lawsuit. The notice must include the number of hours and work dates, the minimum wage to which s/he is entitled, and the total amount of alleged unpaid wages through the date of the notice. The employer can avoid suit by either paying the total amount of unpaid wages or resolving the claim to the satisfaction of the aggrieved person. Otherwise, the employee can file suit based on the same allegations made to the employer. A prevailing plaintiff can receive unpaid wages, an equal amount in liquidated

damages, attorney's fees and costs. Employer's are entitled to argue and attempt to prove that they had reasonable grounds to believe they did not violate the law. If the employer is successful, all or part of the liquidated damages may be reduced by the judge. The Attorney General can also bring suit for an injunction or may seek to impose a fine of \$1000 per violation payable to the state. The Act leaves unanswered whether the Attorney General and employee may seek civil action at the same time. Employers may not discriminate against or take adverse action against any person in retaliation for exercising their rights under the Act.

The minimum wage effective January 1, 2006 is \$6.40. Tipped employees must receive \$3.38 per hour and the employer may continue to take the \$3.02 per hour wage credit applicable under the FLSA. Expect the minimum wage to increase January 1 of every year.

Discrimination

Rejecting Guide Dog Results in \$200,000 Settlement Agreement

A telemarketing company refused to hire a qualified blind applicant because it said it could not accommodate her guide dog. The Americans with Disabilities Act requires employers to make reasonable accommodations to the known disabilities of qualified job applicants and employees. In this case, the employer knew the woman relied on her guide dog but did not attempt to reach an accommodation. The EEOC reached agreement with the company to pay \$9,000 in back pay and \$191,000 in compensatory damages to the charging

party. *EEOC v. Americall Group, Inc.*, No. 04-C-5554 (N.D. Ill. 12/1/05)

Gender Harassment and Retaliation

In another EEOC conciliation agreement, Boston Market Corp. agreed to pay \$150,000 to an employee who alleged a hostile work environment based on her gender and disability. The complaint alleged that employees made offensive comments to the employee and subjected her to aggressive or sexually harassing physical contacts. *EEOC v. Boston Mkt. Corp.*, No. CV-034227 (E.D.N.Y. 10/5/05)

Jury Found Hospital Discriminated Against Doctor

A federal jury in Las Vegas awarded \$310,000 to a doctor who complained of discrimination and retaliation. Dr. Mohammadkhani filed suit alleging the hospital's medical director and her immediate supervisor discriminated against her based on her gender and national origin. The following year, she filed a lawsuit alleging retaliation. Dr. Mohammadkhani said she complained that her supervisor made disparaging remarks about females and ridiculed her ethnicity. When she complained to hospital officials she was transferred to an outlying clinic.

Sex Discrimination Settlement

The Department of Labor conducting a routing compliance review of an Igloo Products Corp. facility in Texas found evidence of hiring discrimination during 2002 and 2003. The audit found evidence of discrimination against female applicants for operative and laborer

positions. Igloo agreed to distribute \$236,903 in back pay to the 993 rejected applicants.

Maytag Corp. Agrees to Pay \$334,500 to Settle Age Discrimination Suit

Three Maytag sales managers over the age of 50 alleged that a 1999 corporate restructuring resulted in their demotion to zonal managers in violation of the Age Discrimination in Employment Act. Thirteen of the 22 regional sales positions were eliminated in the restructuring. Eight of the 13 were over the age of 50 and only one sales manager over 50 was retained in his original position. In a conciliation decree, Maytag agreed to compensate the sales managers a total of \$334,500 and to work with the EEOC to make sure the company adheres to the requirements of the law in the future. *EEOC v. Maytag Corp.*, No. 04 C 4617 (N.D. Ill. 12/2/05)
Note: The U.S. Supreme Court recently held that the ADEA protects employees from disparate treatment discrimination such as was alleged in this case.

\$2.7 Million Awarded in Age Discrimination Suit

In an unreported case, a jury in Kansas City, Missouri awarded \$2,700,000 to a police officer after finding his police department discriminated against him based on his age. Officer Anthony Hogan, a 25-year veteran of the police force, was transferred out of the community policing unit in 2000 when he was 46 years old. He claimed his superiors wanted someone younger and that they said he was burned out and was dragging his feet. Police officials testified that the term “dinosaurs,” which

was used by police to refer to older officers, was a term of respect!

Can Sexual Harassment Retaliation be a Violation of Florida’s Whistleblower’s Act?

The Fourth District Court of Appeals in West Palm Beach, Florida denied an employer’s motion to dismiss a private whistleblower case based on retaliation for complaining of sexual harassment. The employee alleged that she was retaliated against by her employer for objecting to sexual harassment. Florida’s Whistleblower Act prohibits an employer from taking retaliatory action against an employee because the employee has objected to or refused to participate in an activity, policy, or practice of the employer which is a violation of a law, rule, or regulation. In this case, the employer had fewer than 15 employees so the employee could not file a complaint with the Equal Employment Opportunity Commission or Florida Commission on Human Relations. The Whistleblower Act applies to private employers with 10 or more employees. The employer argued that both Title VII and the FCRA define an employer as a person having 15 or more employees. Therefore, harassment and retaliation are not unlawful under Title VII or the FCRA as applied to a smaller employer. The court said that the employer’s argument may be a good argument if this were a summary judgment motion. However, this is a motion to dismiss and the court could only look at the four corners of the complaint and cannot consider other evidence. **Note:** The court in this case did not create a new cause of action based on harassment or retaliation. It simply said that an employer could not

get such a case dismissed on a motion to dismiss. It would have to file a motion for summary judgment instead. *Rivera v. Torfino Enterprises, Inc.*, 914 So.2d 1087 (Fla. 4th DCA 11/30/05)

Miscellaneous

Update on EEOC Charges and Results

For the fourth year in a row, the Equal Employment Opportunity Commission has received fewer discrimination charges from disgruntled workers. For the fiscal year ended September 30, 2005, the commission received 75,400 charges of discrimination, down from 84,400 in fiscal year 2002. Race charges continued to be the most commonly asserted type of discrimination charge with 36%, sex discrimination followed with 31%, disability bias with 20%, age discrimination 18%, and national origin discrimination about 11%. Many charges alleged multiple types of discrimination and included allegations of retaliation. The amount of money the EEOC got for charging parties followed the same downward trend. The EEOC is authorized to negotiate with employer/respondents for monetary

benefits on behalf of the charging parties. In fiscal year 2005, that amount was \$378,000,000 down from \$415,400,000 in fiscal year 2004.

New Twist on Hiring Illegal Workers--A Case to Watch in the Supreme Court

The Supreme Court agreed to hear a case wherein employees of Mohawk Industries accused it of a RICO violation for recruiting and hiring illegal aliens. The issue is whether a company and its agents, in performing their corporate duties, can be considered a racketeering enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO). The act makes it a crime for any person employed by or associated with any enterprise engaged in interstate or foreign commerce, to conduct or participate in the conduct of such enterprise's affairs through a pattern of racketeering activity. The district court and the Eleventh Circuit Court of Appeals denied Mohawk's motions to dismiss the case prompting the appeal to the Supreme Court. *Mohawk Industries v. Williams*, No. 05-465, on appeal from 411 F.3d 1252 (11th Cir. 2005)