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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

Florida's Preservation of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008, F.S. §790.251

Arguments regarding the enforceability and constitutionality of this new legislation took place on June 23. Judge Robert Hinkle is expected to rule the middle of July, after the legislation takes effect. Until the judge makes his ruling, employers should not search an employee's private motor vehicle. The law does not allow employees to bring weapons into the workplace.

New Jersey Enacts Paid Family Leave Act

New Jersey has become the third state to mandate paid family leave. The Paid Family Leave Act was signed into law on May 2, 2008, but does not take effect until July 1, 2009. It requires up to six (6) weeks off with pay (up to two-thirds/maximum \$524.00 per week) for an employee to care

for a newborn, a newly-adopted child or a seriously ill family member during any 12-month period. The paid leave will be funded by a payroll deduction of \$33.00 per year from employees' paychecks. *N.J. Paid Family Leave Act, P.L. 2008, c. 17.*

Discrimination

Retaliation Claim Allowed Under Section 1981

In a 7-2 ruling, the U.S. Supreme Court held that Section 1981 can be used to bring a claim of employment-related retaliation. Section 1981 is a civil war era statute adopted to guarantee newly freed slaves the same legal rights that other citizens enjoy. That statute provides: "All persons ... shall have the same right in every State and Territory to make and enforce contracts ..." Hedrick Humphries, an African American assistant manager at an Illinois Cracker Barrel, alleged that he was fired based on his race after he complained that another African American worker was also

dismissed because of his race. This is the second retaliation case the Supreme Court has decided in the last year and considerably expands the law of retaliation. Under Section 1981, there are no administrative hurdles, no damage caps as under Title VII, and there is a four (4) year statute of limitations. As a result of this case, employers should start maintaining personnel and other records for at least four years to cover the longer statute of limitations. In dissent, Justice Thomas wrote that retaliation is not discrimination based on race but based on his conduct. Therefore, Justice Thomas joined by Justice Scalia said the Court should not imply a claim of retaliation into a statute that exclusively prohibits discrimination. *CBOCS West, Inc. v. Humphries*, No. 06-1431 (5/27/08)

Nature of Offense Necessary Consideration in Disparate Treatment Case

A corrections officer alleged her white coworkers were treated more favorably than she and that her treatment was based on race. The officer appeared in uniform off-duty at a neighboring county jail where her son had been incarcerated. She behaved in an irrational and disrespectful manner to the sheriff and his deputies. The officer alleged that she is the only person who was ever disciplined for violating the uniform policy and questions whether the policy was ever disclosed to the officers at her barracks. The court explained that the officer's misconduct was more serious than the misconduct that her white coworkers engaged in because their offenses did not involve an abuse of their position. One employee was involved in an off-duty altercation and was convicted of disorderly conduct and resisting arrest. The other coworker made a vulgar remark to a nurse who was treating an inmate. The white coworkers' conduct was distinguishable

because they neither violated the uniform directive nor invoked their official position to gain a personal goal. The court said it was the nature of the offense and not the officer's race that resulted in the difference in the disciplinary action taken. *McCann v. Tillman*, 2008 U.S. App. LEXIS 10048 (11th Cir. 5/9/08)

Sexually Offensive Language Can Create a Hostile Work Environment

In a case of first impression for the Eleventh Circuit Court of Appeals, the Court reinstated a complaint filed by a former employee who alleged she was subjected to crude language of a sexual nature, sexual jokes, pornography, etc. on a daily basis. The trial court granted summary judgment for the employer after it found that the abusive conduct was not directed at the woman. The Eleventh Circuit said that, viewing the work environment as a whole, it was abusive even though no single episode satisfied the Title VII test for hostile work environment. Because the plaintiff was the only woman in the work area, the Court held that the conduct was directed at her. Further, the Court held that a jury could reasonably conclude that the conduct at issue was sufficiently pervasive to support a hostile work environment claim. *Reeves v. C.H. Robinson Worldwide, Inc.*, 2008 U.S. App. LEXIS 9171 (11th Cir. 4/28/08)

Disability

Wal-Mart Settles ADA case for \$300,000

The EEOC announced a settlement with Wal-Mart on behalf of an individual with cerebral palsy. The man applied for "any available position" and was told he was best suited for a greeter position. He was questioned about his ability to work using a wheelchair. When the man was not hired, he filed an EEOC charge. In addition to the financial settlement of \$300,000, the

company agreed to provide Americans with Disabilities Act training to managers at the store as well as to notify job applicants about the settlement. Wal-Mart must also actively seek qualified persons with disabilities. *EEOC v. Wal-Mart Stores, Inc.*, No. 04-cv-0076 (W.D. Mo. 4/18/08)

Proposed Legislation

Penalties for Misclassifying Employees as Independent Contractors Proposed

The Employee Misclassification Prevention Act (H.R. 6111) was introduced in May. The bill would amend the Fair Labor Standards Act and impose penalties on employers who misclassify workers as independent contractors. The maximum fine would be \$10,000 per violation if an employer repeatedly or willfully fails to accurately classify workers. The bill would also require employers to give notice to individuals classified as independent

contractors (a) of their classification, (b) that if misclassified, they are entitled to wages and other labor protections, and c) directing them to the Department of Labor if they suspect they have been misclassified. State unemployment compensation agencies would be required to conduct audits and establish penalties for employers who violate the law. This proposed legislation is in the early stages. It has been referred to the House Committee on Education and Labor as well as the House Ways and Means Committee. The bill has 23 cosponsors and is supported by several unions and employee rights groups.

Misclassifying workers as independent contractors when they are really employees is a serious mistake that many employers make. If challenged, the employer may face Unemployment Compensation fines, Fair Labor Standards Act challenges, workers' compensation problems and Internal Revenue audits, among others.