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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.

Fair Labor Standards Act

Wage & Hour Opinion Letters Withdrawn

The Department of Labor posts opinion letters on its web site as they are signed. They are designated as FLSA2009 and then numbered. Please be aware that the DOL is withdrawing some of the opinion letters they have posted that were signed prior to January 21, 2009 (i.e., during the Bush administration). A final response to the withdrawn opinion letters will be provided in the future. Withdrawn opinion letters cannot be relied upon as statements of agency policy. The withdrawn opinion letters are designated with an asterisk. If you are relying on a 2009 DOL opinion letter, please check the DOL web site to make sure it is still valid. The opinion letters can be found at www.dol.gov/esa/whd/opinion/opinion.htm.

Economy's Impact on Exempt Status

During these trying economic times, it is necessary to closely watch how your decisions

may impact your exempt employees. A change in the size of the workforce, reduction in hours, mandatory vacations or instituting short-term layoffs can affect the exempt status of your employees. An exempt administrative, executive, or professional employee must meet three tests: A duties test, the salary basis test, and the minimum weekly salary test. An employee will meet the salary basis test if she receives a predetermined amount of pay on a regular basis, and that amount is not subject to reduction based upon the quality or quantity of work. An employee is not deemed to be paid on a salary basis if deductions from his predetermined salary are made for absences occasioned by the employer or the operating requirements of the business. If an employee is classified as exempt but she does not meet the salary basis test, the exemption may be lost. Three recent DOL opinion letters addressed this problem (FLSA2009 – 2, FLSA2009 – 14, and FLSA2009 – 18). **Note:** These opinion letters were dated prior to January 21, 2009 and have not been withdrawn. All three opinion letters state that

the employer could implement short-term layoffs as long as each affected employee received compensation for the time off. Where the problem arises is when an employer makes a deduction from an exempt employee's salary for absences of less than a workweek or partial days that are initiated by the employer.

However, an exempt employee does not need to be paid for any workweek in which he performs no work. Therefore, if the employer is going to close down the workplace for an entire workweek, it is permissible to withhold the salary of the exempt employee. Also, employers can go to four-day workweeks with a corresponding change in salary and not lose the exemption as long as the exempt employee receives the \$455 minimum salary each week and continues to fulfill the duties test. If the duties test is based on the executive exemption and the exempt employee is no longer supervising two or more full-time or equivalent employees, the exemption will be lost.

New Legislation

COBRA Changes in Stimulus Package

Subject to income limitations, employees who are terminated "involuntarily" between September 1, 2008, and December 31, 2009, and their covered dependents, would be eligible for a subsidy of 65 percent of the premiums they would be required to pay for up to nine months for any group health plan in which they participated at the time of termination, excluding health flexible spending accounts (FSAs). Please refer to the February Update for more specific information.

The Department of Labor (DOL) has now published four model notices for employers to start using immediately in administering the COBRA subsidy provided under the American Recovery and Reinstatement Act of 2009 (the stimulus package). Below is a summary of the

COBRA Premium Reductions Provisions. The notices and more information can be found at: <http://www.dol.gov/ebsa/cobra.html>

Making Work Pay Tax Credit

The IRS has also issued new withholding tables incorporating the new Making Work Pay tax credit, which was part of the stimulus package. Employers should start using these new tables as soon as possible but not later than April 1. The new withholding tables are included in a revised version of the IRS Publication 15-T. <http://www.irs.gov/pub/irs-pdf/p15t.pdf>

Discrimination

EEOC Charges Reach Record High

A record high 95,402 private sector discrimination charges were filed with the Equal Employment Opportunity Commission during its fiscal year ending 9/30/08, with increases occurring in every major category. This represented a 15% increase over the number filed in fiscal year 2007. Age bias and retaliation accounted for the largest annual increases, while race, sex, and retaliation discrimination charges remain the most frequently alleged violations. The economy is said to be one of the factors that caused the 15% increase.

Florida Workers' Compensation

When Can an Injured Employee Sue Employer?

A recent Florida appeals court case discussed when an injured employee can sue his employer for a workplace injury, *Casas v. Siemens Energy and Automation*, No. 3D04-742 (Fla. Ct. App. 1/14/09). Remember, employers enjoy immunity from liability if they have workers' compensation insurance and an employee is injured on the job. However, in certain circumstances, that immunity can be

overcome. The appeals court said that to overcome the workers' compensation immunity, an injured employee must show that the employer had engaged in conduct that was substantially certain to cause injury or death. One factor to be considered in such cases is concealment of a dangerous condition. In this

case, the plaintiff claimed that his supervisor told him he did not need to turn off the electrical power before clearing a jam. If true, the plaintiff would have been misled about the risk of the concealed danger of getting his hand caught in the press. The court allowed the employee to proceed with his lawsuit.



Summary of the COBRA Premium Reduction Provisions under ARRA



President Obama signed the American Recovery and Reinvestment Act (ARRA) on February 17, 2009. The law gives "Assistance Eligible Individuals" the right to pay reduced COBRA premiums for periods of coverage beginning on or after February 17, 2009 and can last up to 9 months.

To be considered an "Assistance Eligible Individual" and get reduced premiums you:

- MUST be eligible for continuation coverage at any time during the period from September 1, 2008 through December 31, 2009 and elect the coverage;
- MUST have a continuation coverage election opportunity related to an involuntary termination of employment that occurred at some time from September 1, 2008 through December 31, 2009;
- MUST NOT be eligible for Medicare; AND
- MUST NOT be eligible for coverage under any other group health plan, such as a plan sponsored by a successor employer or a spouse's employer.*

Individuals who experienced a qualifying event as the result of an involuntary termination of employment at any time from September 1, 2008 through February 16, 2009 and were offered, but did not elect, continuation coverage OR who elected continuation coverage and subsequently discontinued it may have the right to an additional 60-day election period.

◆ IMPORTANT ◆

◇ If, after you elect COBRA and while you are paying the reduced premium, you become eligible for other group health plan coverage or Medicare you MUST notify the plan in writing. If you do not, you may be subject to a tax penalty.

* Generally, this does not include coverage for only dental, vision, counseling, or referral services; coverage under a health flexible spending arrangement; or treatment that is furnished in an on-site medical facility maintained by the employer.

◇ Electing the premium reduction disqualifies you for the Health Coverage Tax Credit. If you are eligible for the Health Coverage Tax Credit, which could be more valuable than the premium reduction, you will have received a notification from the IRS.

◇ The amount of the premium reduction is recaptured for certain high income individuals. If the amount you earn for the year is more than \$125,000 (or \$250,000 for married couples filing a joint federal income tax return) all or part of the premium reduction may be recaptured by an increase in your income tax liability for the year. If you think that your income may exceed the amounts above, you may wish to consider waiving your right to the premium reduction. For more information, consult your tax preparer or visit the IRS webpage on ARRA at www.irs.gov.

For general information regarding your plan's COBRA coverage you can contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

For specific information related to your plan's administration of the ARRA Premium Reduction or to notify the plan of your ineligibility to continue paying reduced premiums, contact [*enter name of party responsible for ARRA Premium Reduction administration for the Plan, with telephone number and address*].

If you are denied treatment as an "Assistance Eligible Individual" you may have the right to have the denial reviewed. For more information regarding reviews or for general information about the ARRA Premium Reduction go to: www.dol.gov/COBRA or call 1-866-444-EBSA (3272)

Source, Department of Labor web site: <http://www.dol.gov/ebsa/cobra.html>