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September 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 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.

Wage & Hour

Florida's Minimum Wage to Increase January 1, 2007

The Agency for Workforce Innovation has published Florida's new minimum wage for 2007. Effective January 1, 2007, the **minimum wage will increase to \$6.67 per hour**. Florida's minimum wage covers all employees in the state covered by the federal minimum wage. For "tipped employees" meeting eligibility requirements for the tip credit under the Federal Fair Labor Standards Act, employers may count \$3.02 in tips actually received by employees as wages and pay the eligible tipped employees an hourly wage of \$3.65 as of January 1, 2007. Attached to this Update is the new poster (in English and Spanish) which may be printed as needed and must be placed on employee bulletin boards.

Discrimination

Failure to Hire Claim Viable

The Equal Employment Opportunity Commission brought a class action claim against Target Corporation alleging the retailer failed to hire several black job applicants. Target attempted to get the case dismissed but the appeals court denied their request for summary judgment. The court held that a reasonable jury might find that the candidates were denied interviews because of their race, despite the employer's contentions that the manager scheduled to interview them did not know the applicants' race. The court based its holding on the fact that several of the applicants' resumes contained information that suggested they might be black and the manager admitted he typically looked at such information on resumes. Further, after some of the applicants called regarding their

interviews, their calls were not returned. The EEOC presented expert testimony that some people can identify a speaker's race based on his or her voice or name. *EEOC v. Target Corp.*, 98 FEP Cases 1356 7th Cir. 8/23/06)

Employee with Fibromyalgia Awarded \$750,000

A worker who was fired one month after disclosing to his employer that he had fibromyalgia was awarded \$750,000 by a Maine federal jury. The worker worked for the construction firm for 18 years until he was fired. The construction firm insisted that the worker was fired because of his inability to get along with colleagues and insubordination. The jury's verdict required the contractor to pay \$563,000 in back pay, \$137,000 in compensatory damages, and \$50,000 in punitive damages. Yet undetermined are the damages for front pay, prejudgment interest, and attorney's fees. *Harding v. Cianbro Corp.*, No. 04-158-B-W (D. Me. 8/22/06)

Ford Motor Co. Loses in Case Brought by Job Applicant

A human resource official at Ford Motor Company rejected an applicant for temporary part time employment because of the work restrictions placed on her by a doctor. The job applicant was involved in a serious car accident in 1989 resulting in foot and shoulder injuries that the applicant considered were successfully treated. She had been able to work for several years in physically demanding jobs. The applicant had worked for Ford two years before her recent application in a temporary part time position without problems and there had been no change in her physical condition. After the physician placed several physical restrictions on the applicant, the human resource official concluded that the restrictions prevented the applicant from doing any of the jobs in the assembly area and denied her employment. The court

found that the company **regarded** the applicant **as disabled** because the human resource official relied on her own interpretation of the physician's report. The applicant was awarded compensatory and punitive damages. *Peterson v. Ford Motor Co.*, No. 03-5027 (D. Minn. 8/15/06)

An individual who is not disabled but is "regarded as disabled" by an employer is entitled to the same protections under the Americans with Disabilities Act as an individual with an impairment that substantially limits one or more major life activities. Don't assume an individual is unable to perform a job.

Involuntary Lateral Transfer Constitutes Retaliation

A county executive complained of discriminatory promotions and filed a complaint with the Equal Employment Opportunity Commission. Shortly thereafter, he was transferred to another office. His salary, title and other conditions of employment did not change. However, he was assigned clerical tasks and was allegedly told his executive skills were not needed in the new office thereby calling into question the county's explanation for the transfer, the court said. The appeals court ruled that Title VII and the Age Discrimination in Employment Act provide protections not only from biased job actions that affect the terms and conditions of employment but also from materially adverse actions that would dissuade a reasonable person from reporting discrimination. *Kessler v. Westchester County Department of Social Services*, 98 FEP Cases 1185 (2d Cir. 8/23/06)

Computer Programmer Failed to Show Discriminatory Discharge

A computer programmer's doctor told her that she had to stop driving. She requested an accommodation allowing her to telecommute, which her employer agreed

to. She sued her employer for disability discrimination when it ended her telecommuting after three months and required her to work in the office. The programmer alleged that the employer retaliated against her because she sought to continue telecommuting as a reasonable accommodation for her vertigo. About six months after requiring her to return to work, the employer discharged the programmer for poor performance when she called technical support at a software company for help with a problem rather than trying to solve the problem herself. The programmer failed to show that the employer's reason for discharging her was pretextual. Further, the court rejected her claim that she had been productive at home because her home computer had been logged on to the employer's network an average of only six hours a day. *Yindee v. CCH Inc.*, 18 AD Cases 417 (7th Cir. 8/11/06)

Florida Workers' Compensation

Workers' Compensation Immunity Upheld

An employee at Busch Gardens worked with lions. Max, a full-grown male lion suffered from a liver disorder requiring periodic blood tests to be performed. Using positive reinforcement, the lion's keepers trained the lion to enter a narrow cage and lie down so blood could be drawn from his tail. Four keepers performed the procedure, one of whom was to feed meat to the lion. The keepers trained extensively on this procedure, including how to feed Max without his mouth coming in contact with their hands. Ms. Bourassa was a keeper with extensive working experience with all types of animals. She completed all the training necessary to assist with Max's blood tests. On the day of the accident, Ms. Bourassa had arranged for her family to have a behind the scenes tour of the park, including a simulated blood test of Max. Ms. Bourassa was to feed meat to Max. Max grabbed her fingers, pulling her hand

and arm into the cage and severing her arm at the elbow. Ms. Bourassa received treatment covered by Busch Garden's workers' comp carrier but a year later, she sued seeking damages for her injuries. She alleged that her case fell into the intentional tort exception to workers' comp immunity. The trial court and appeals court disagreed because Busch Gardens did not ignore evidence of previous accidents, injuries, or known safety hazards; Bourassa was sufficiently trained in the procedure she was performing at the time of her accident; and Busch Gardens did not conceal the dangers inherent in the blood draw procedures. *Bourassa v. Busch Entertainment Corp.*, No. 2D05-2018 (Fla. 2d DCA 4/7/06)

New Legislation

Department of Homeland Security Changes to Worker Eligibility Documentation

Employers may now store their completed and signed I-9 forms (and presumably the backup) electronically rather than filing away the paper documents. Also, there are new obligations for responding to Social Security Administration "no match" letters. If employers follow the procedures in good faith, they will not be found to have violated their legal obligations. The first step to be completed in 14 days is to verify that there are no typographical or transcription errors, and if there are none, ask the employee to take steps to ensure that Social Security or DHS has the correct information. To be protected by the "safe harbor" you must verify with the SSA or DHS that the discrepancy has been resolved. If the discrepancy has not been resolved in 60 days, you must either discharge the employee or face criminal and civil penalties. It is unlawful to hire or continue to employ someone after obtaining knowledge that he is not authorized to work in the United States. For more information, go to www.dhs.gov.

NOTICE TO EMPLOYEES

FLORIDA MINIMUM WAGE

The Florida minimum wage is \$6.67 per hour, with a minimum wage of at least \$3.65 per hour for tipped employees, in addition to tips, for January 1, 2007, through December 31, 2007.

The rate of the minimum wage is recalculated yearly on September 30, based on the Consumer Price Index. Every year on January 1, the new Florida minimum wage takes effect.

An employer may not retaliate against an employee for exercising his or her right to receive the minimum wage. Rights protected by the State Constitution include the right to:

1. File a complaint about an employer's alleged noncompliance with lawful minimum-wage requirements.
2. Inform any person about an employer's alleged noncompliance with lawful minimum-wage requirements.
3. Inform any person of his or her potential rights under Section 24, Article X of the State Constitution and to assist him or her in asserting such rights.

An employee who has not received the lawful minimum wage after notifying his or her employer and giving the employer 15 days to resolve any claims for unpaid wages may bring a civil action in a court of law against an employer to recover back wages plus damages and attorney's fees.

An employer found liable for intentionally violating minimum-wage requirements is subject to a fine of \$1,000 per violation, payable to the state.

The Attorney General or other official designated by the Legislature may bring a civil action to enforce the minimum wage.

For details, see Section 24, Article X of the State Constitution and Section 448.110, Florida Statutes.

AVISO A LOS EMPLEADOS

SALARIO MÍNIMO EN FLORIDA

El salario mínimo en Florida es \$6.67 la hora, con un salario mínimo de, por lo menos, \$3.65 para los empleados que reciben propinas, además de éstas, desde el 1 de enero de 2007 hasta el 31 de diciembre de 2007.

La tasa del salario mínimo se calcula de nuevo cada año el 30 de septiembre, basándose en el Índice de Precios al Consumo. Todos los años, el día 1 de enero entra en vigor el nuevo salario mínimo en Florida.

Un empleador no puede tomar represalias contra un empleado por el hecho de ejercer su derecho a recibir el salario mínimo. Los derechos que protege la Constitución del Estado incluyen el derecho a:

1. Presentar una queja por el incumplimiento, por parte de un empleador, de los requisitos legales de salario mínimo.
2. Informar a cualquier persona acerca del incumplimiento, por parte de un empleador, de los requisitos legales de salario mínimo.
3. Informar a cualquier persona de sus posibles derechos conforme a la Sección 24, Artículo X de la Constitución del Estado, y ayudarle a hacer valer tales derechos.

Un empleado que no ha recibido el total del salario mínimo legal después de notificar a su empleador y de haberle dado al empleador 15 días para resolver cualquier queja por salarios no pagados, puede entablar una acción civil en un tribunal contra un empleador con el fin de recuperar los salarios atrasados más daños y perjuicios y honorarios de abogado.

Un empleador que sea declarado culpable de violar intencionalmente los requisitos de salario mínimo, está sujeto a pagar una multa de \$1,000 por cada infracción, pagadera al estado.

El Procurador General u otro funcionario designado por la Legislatura puede entablar una acción civil para hacer cumplir el salario mínimo.

Para detalles, ver la Sección 24, Artículo X de la Constitución del Estado, y la Sección 448.110 de los Estatutos de Florida.