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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.

Labor Relations

NLRB Posting Delayed Again

On December 23, 2011, the National Labor Relations Board (NLRB) postponed the implementation of its employee rights notice-posting rule until April 30, 2012. In a press release, the NLRB stated that it agreed to postpone the deadline again "at the request of the federal court in Washington, DC hearing a legal challenge regarding the rule."

Ministerial Exception

U.S. Supreme Court Upheld the Ministerial Exception in ADA Case

The United States Supreme Court unanimously confirmed the existence of a "ministerial exception" — grounded in both the Free Exercise Clause and Establishment Clause of the First Amendment — that operates as an affirmative defense to bar a "minister" from suing a religious institution for employment discrimination. The employee was a fourth grade teacher and commissioned minister at a Lutheran Church and School. Every day, she taught religion and the rest of the fourth grade curriculum, led prayers and devotional exercises, and planned and led chapel services. She became ill in June 2004 and was diagnosed with narcolepsy. She missed the first half of the school year due to her narcolepsy but notified the school that she would be able to return to work in January. The school had already contracted with a teacher for the full year. When the employee threatened to sue, the school terminated her employment. Courts of appeal have long recognized the existence of a ministerial exception, but the question had never reached the Supreme Court until this case. The Supreme Court declined to adopt a test for who qualifies as a "minister," but agreed

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that the employee qualified, and that the exception "is not limited to the head of a religious congregation...." The Court concluded, "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* Case No. 10-553 (U.S. Supreme Court 1/11/12).

Fair Labor Standards Act

Banquet Sales Managers Held Exempt

In a decision that the hospitality industry will find refreshing, the First Circuit Court of Appeals held that former banquet sales managers were exempt administrative employees. Plaintiffs sued their employer for unpaid overtime. The defendants asserted that the plaintiffs were exempt from the overtime requirement because they were administrative employees under the FLSA, 29 U.S.C. § 213(a)(1). The plaintiffs countered that their work did not involve sufficient discretion to satisfy the exemption. The district court determined that the duties of the employees did involve substantial discretion and, under the Circuit's precedent, the exemption was applicable; accordingly, partial summary judgment was entered for the defendants. The plaintiffs appealed.

Plaintiffs were banquet sales managers whose jobs included seeking potential customers for events at the employer, developing the elements of the party or other event and submitting the proposed contract terms for approval by senior officials of the Banquet Halls. Plaintiffs claimed that they did not meet the third prong for exemption because they lacked the authority to make any decisions of financial consequence, supervisory authority or policy-making authority. The court found that while the plaintiffs' discretion in matters having significant financial impact was subject to managerial approval, such restrictions did not detract from the judgment exercised in developing a proposal for the client. Plaintiffs' duties included maintaining primary contact with a client, tailoring an event to their needs, and overseeing the event through to execution. The court ruled that plaintiffs exercised adequate discretion as sales people to be designated as exempt.

In concluding that the plaintiffs were appropriately classified as exempt administrative employees for the purposes of the FLSA the court found that the sales and customer service position that each plaintiff occupied was integral to the functioning of the employers' businesses. "The sales managers were the face of the businesses to prospective clients, and the judgment that they exercised concerned how best to represent the employers and to develop a proposal that would attract the prospective clients to a contract with the venues." *Hines v. State Room Inc.*, 18 WH Cases2d 705 (1st Cir. 2011)

The Department of Labor has taken the position that banquet sales managers are not exempt because they are more in the nature of "production" employees. They were selling the service the employer was established to sell. That is, the employer is a banquet facility and the banquet sales managers were selling banquets. This decision may not be followed in jurisdictions outside of the First Circuit and the Department of Labor is likely to refuse to follow this case. Therefore, the hospitality industry should not rush to reclassify all of their banquet sales managers as exempt administrative employees.

Family Medical Leave

FMLA Leave Abuse

Employers often wonder whether they dare to take disciplinary action against an employee they believe is abusing FMLA. In this case the

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employee worked for an airline as a reservations agent. He worked initially in Salt Lake City then transferred to Houston. His family remained in Salt Lake City. The employee had low seniority and had difficulty getting holidays off. However, in 2004, he suffered a back injury and requested FMLA leave of eight days per month for medical purposes. Eventually, the airline began to question why the employee was using FMLA leave in conjunction with other time off. In 2007, he used FMLA leave 35 times to excuse himself from work on days just before or after his previously scheduled days off. He also used his FMLA leave on important dates and holidays. He had developed a pattern of taking flights to and from Salt Lake City on days he requested FMLA leave. The airline warned the employee that abuse of sick leave will result in termination. On December 24, 2007, the airline learned that the employee had not reported to work and had requested FMLA leave to excuse his absence. They then determined that the employee had purchased a ticket to fly from Houston to Salt Lake City departing on December 22 and returning on December 27, and that the flight had been booked in June 2007. The airline discharged the employee for violating its attendance policy. The employee then sued the airline claiming he was discharged in retaliation for taking FMLA. The court held that the airline's honest belief that the employee abused FMLA leave in violation of its attendance program was a legitimate, non-retaliatory reason for discharging him without review of the wisdom or fairness of the decision. *Rydalch v. Southwest Airlines,* 2011 WL 3349848 (N.D. Utah 2011)

Does the FMLA Protect Workers Before They Become Eligible for Leave?

The U.S. Court of Appeals for the Eleventh Circuit held that the FMLA protected a pregnant worker who was fired after she requested leave, despite the fact that she was not eligible for FMLA leave when she made the request, because she would have been eligible at the time the leave was to have been taken. The employee started working in October 2008. In June 2009 she told her employer that she was pregnant and needed leave the end of November. She developed complications with her pregnancy and took sick and vacation time off to deal with them. In September 2009 she was fired—more than two months before her leave was scheduled to begin. She sued alleging her employer interfered with her FMLA and retaliated against her for attempting to exercise her right to FMLA leave. The employer defended saying she was not entitled to FMLA because she did not work for the employer for 12 months. The employee was terminated exactly eleven months after she was hired. The court ruled that, had she not been terminated, the employee would have been eligible and entitled to begin FMLA leave as of her due date on November 30, 2009. *Pereda v. Brookdale Senior Living Facilities, Inc.,* No. 10-14723 (11th Cir. 1/10/12)

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