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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.

Florida Law

Florida Minimum Wage Update

The Florida minimum wage will increase to \$7.67 per hour, effective January 1, 2012. Florida law requires the Florida Department of Economic Opportunity to calculate a minimum wage rate each year. On November 2, 2004, Florida voters approved a constitutional amendment which created Florida's minimum wage. The minimum wage applies to all employees in the state who are covered by the federal Fair Labor Standards Act (FLSA) minimum wage. Employers must pay their employees the hourly state minimum wage for all hours worked in Florida. The definitions of employer, employee, and wage for state purposes are the same as those established under the FLSA. Employers of tipped employees, who meet eligibility requirements for the tip credit under the FLSA, may count tips actually

received as wages under the Florida minimum wage. However, the employer must pay tipped employees a direct wage. The direct wage is calculated as equal to the minimum wage (\$7.67) minus the 2003 tip credit (\$3.02), or a direct hourly wage of \$4.65 as of January 1, 2012.

Florida Statutes require employers who must pay their employees the Florida minimum wage to post a minimum wage notice in a conspicuous and accessible place in each establishment where these employees work. This poster requirement is in addition to the federal requirement to post a notice of the federal minimum wage. Florida's minimum wage poster is available for downloading in English and Spanish from the Florida Department of Economic Opportunity's website at: <http://www.floridajobs.org>

Wage and Hour Division Hearings

During a hearing on the Fair Labor Standards Act (FLSA) conducted by the House's Subcommittee on Workforce Protections, former administrator of the DOL's Wage and Hour Division (WHD) Tammy McCutchen outlined how the agency's shift in regulatory and enforcement tactics have made complying with the FLSA increasingly difficult for employers. Overall, Ms. McCutchen explained that the WHD has become more punitive during this Administration, that it is upending practices that have been in place "for decades," and has focused its resources on extensive and often unnecessary enforcement actions instead of helping good faith employers comply with the law. During her testimony, Ms. McCutchen stated that the WHD has taken a more combative stance towards employers, regardless of whether these businesses have a history of FLSA violations. Examples of changes at the Wage and Hour Division which Ms. McCutchen testified demonstrate this punitive approach include:

- Conducting unannounced investigations of employers without a prior history of violations, and sending multiple investigators to conduct an investigation of a single facility;
- Demanding that employers produce documents which employers are not required to maintain under the recordkeeping regulations, and threatening to bring subpoena actions in federal court against employers who fail to respond to broad document requests within 72 hours;
- Prohibiting field career staff from using the "self-audit" investigation method, where an employer has already agreed to pay 100% of back wages, and instead

requiring investigators to conduct "full" investigations in almost every case;

- Mandating that the career field staff impose civil money penalties, and liquidated damages in almost every case, rather than allowing these experts to exercise their own discretion regarding the appropriate remedy; and
- Refusing to issue WH-58 waiver forms or issuing only limited waiver forms, even when the employer agrees to pay 100% of back wages as calculated by the Division. WH-58 waiver forms were previously given to employees to sign stating they have received the back pay due to them and agreeing not to sue. By not issuing the waiver forms employers can be sued by an employee even though the employee has already received all compensation owed.

At the same time, the Division has closed its doors to employers seeking guidance regarding what the FLSA requires. It has stopped efforts to inform employers how to comply with the law, preferring only to impose punishments when an employer guesses wrong about what the law requires. This includes, among other things, withdrawing opinion letters and refusing to assist employers who, after discovering FLSA violations, request that the Division supervise the payment of back wages. An employer cannot avoid a lawsuit or WHD audit by asking its employees to waive their right to sue in exchange for unpaid back wages. The WHD and courts mandated that such waivers had to be supervised by the WHD to be valid.

Florida Leads the Country in FLSA Lawsuits

Recent statistics confirm that the boom in Fair Labor Standards Act litigation that started several years ago in Florida is continuing, and is spreading to other parts of the country. In 2010, 6,785 FLSA cases

were filed in federal courts nationally. Based on 2011 figures, it appears that this number will be about 6,900. About 2,200 of those cases will be filed in Florida, representing about 32% of the national total, about the same percentage as in 2010. Roughly the same number of FLSA cases was filed in Florida federal courts in 2008. But in 2008, Florida's share of FLSA cases was nearly 45%. Apparently lawyers in other states have figured out that employers frequently violate the FLSA, and that plaintiffs are entitled to attorney's fees if they prevail regardless of how much the employee receives.

Federal Legislation

Veterans' Jobs Bill

VOW to Hire Heroes Act was passed unanimously by the House and Senate and signed by the President on November 21, 2011. Among other job training and assistance benefits offered to veterans, the Act provides employers with a tax credit of up to \$5,600 for hiring veterans who have been unemployed for at least six months, a \$2,400 credit for hiring veterans who have been unemployed for more than four weeks, but less than six months, and a credit of up to \$9,600 that would increase the existing Wounded Warriors Tax Credit for employers that hire veterans with service-connected disabilities who have been unemployed for at least six months.

Case Law

Family Medical Leave Act Retaliation Claim

The Fifth Circuit Court of Appeals held that a federal district court properly granted an employer summary judgment on a technician's FMLA retaliation claim that alleged he was unlawfully discharged one month after his first request for FMLA leave following surgery for kidney stones and on

the same day he made a second leave request due to back problems. The technician was told he was being fired for a variety of rule violations including: violating vehicular-use policy, failing to relocate within 45 miles of his assigned work location as agreed, and lying about the location of his residence and company vehicle. The technician's failure to comply with this policy was discovered before his first FMLA leave request, he was discharged before his doctor provided medical certification for his second leave request, and he failed to show that the superior who made the discharge decision knew about his leave requests. The Court found that the technician's discharge was not a pretext for FMLA retaliation. *Roberts v. Florida Gas Transmission Co.*, No. 11-30295 (5th Cir. October 28, 2011)

Being Referred to Cutie Does Not Rise to the Level of Sexual Harassment

A female financial advisor failed to establish sexual harassment or constructive discharge claims based on her supervisor's conduct, which included referring to her as "cutie" five to 10 times over two months and stating that her "pretty face" would better represent the employer at a golf outing than his "ugly mug." The court found that the conduct was not severe or pervasive, and she cannot rely on the fact that he grabbed her and yelled "good riddance bitch" after she resigned. Nothing the supervisor is alleged to have done because of the plaintiff's gender, taken individually or as a whole, can be viewed as threatening or humiliating, much less frequent enough, to have unreasonably interfered with her work performance. Finally, the statement the supervisor made after she resigned does not constitute retaliation because it was a stray remark and was neither proximate nor related to the employment decision. *Overly v. KeyBank National Association*, No. 10-2705 (7th Cir. November 10, 2011)