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June 2011

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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.

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### *Florida*

#### **Florida Adopted Revisions to Unemployment Compensation Law**

Governor Rick Scott approved unemployment insurance reform on June 27, 2011. The legislation overhauls the state's unemployment compensation system in several ways. Notably, it strikes prior language that "liberally construed" the unemployment compensation statute "in favor of a claimant." Instead, the legislation states that the statute "shall be liberally construed to accomplish its purpose to promote employment security." It seeks to do so by "increasing opportunities for re-employment" and providing, "through the accumulation of reserves," for the continued payment of unemployment compensation. The legislation also seeks to comply with all federal unemployment laws "as part of a nationwide employment security program."

The legislation reduces available weeks of benefits and ties them to the unemployment rate. Instead of the current state maximum benefit of 26 weeks, the maximum would range from a high of 23 weeks when unemployment reaches 10.5 percent or higher, down to a low of 12 weeks when unemployment is 5 percent or less.

In addition, effective Aug. 1, 2011, the legislation requires claimants to, among other things:

- Participate in an initial skills review using an online education or training program as part of reporting for benefits.
- Contact at least five prospective employers each week or report in person to a one-stop career center to meet with a representative for re-employment services each week and

- File claims by Internet, rather than by phone or mail, with some exceptions for existing claims.

Misconduct is redefined. The legislation expanded the criteria for disqualifying claimants from receiving benefits. It changes the standard for establishing misconduct from behavior showing "willful or wanton" disregard to a "conscious" disregard of an employer's interests found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his/her employees. It also expands the definition of misconduct to encompass off-duty behavior connected with work and specifies chronic absenteeism as a type of misconduct. The legislation revises the employer benefit ratio calculation downward by 10 percent beginning in January 2012. Employers will be allowed to continue to pay their unemployment taxes in installments in 2012, 2013 and 2014.

#### *Labor Relations Issues*

#### **The Obama Administration Proposed Two Pro Union Regulations**

In moves long sought by organized labor and opposed by business groups, the Obama Administration issued two proposed federal regulations in June that could significantly impact union elections. The Department of Labor ("DOL") issued a proposed regulation that would require employers to disclose more information about consultants they hire in response to union organizing campaigns. Under the DOL's proposed new regulations, an employer would be required to report any arrangements with consultants who issue communications on behalf of the employer designed to "directly or indirectly" persuade workers concerning their rights to organize or bargain collectively. The proposed regulation is open for public comment until August 22, and the DOL will then decide whether to make the new rule official.

In the second action, the NLRB issued proposed regulations that are intended to substantially shorten the time period between when a union files a petition for a

union election and the time the election is held. If successful, this proposal would give management less time to respond to a union campaign. Currently, the median time between when a union files a petition and when an election is held is 38 days. The NLRB says it cannot calculate how much shorter the time could be under the new rules. However, dissenting Member Hayes predicts that elections would be held within 10 to 21 days after the petition is filed.

#### *Miscellaneous*

#### **EEOC to Provide Guidance on Leave as a Reasonable Accommodation under the Americans with Disabilities Act**

A dilemma faced by many employers is how long they must wait to terminate an individual who is on a long-term leave of absence without violating the reasonable accommodation provision of the Americans with Disabilities Act. On June 8, 2011, the Equal Employment Opportunity Commission (EEOC) convened a public hearing to hear testimony of representatives from the EEOC, lawyers representing employers and advocates for persons with disabilities on this issue. The EEOC attorneys testifying at the hearing stated that the EEOC has never said that a uniformly applied leave policy, including a no-fault attendance policy, automatically violates the ADA. The EEOC does expect, however, that an employer will modify its no-fault leave policy if an employee needs additional leave as a reasonable accommodation. The EEOC's position is that if an employee who is on leave requests additional leave beyond that which was originally requested, the employer should review the particular circumstances to determine whether continuation of leave presents an undue hardship. The EEOC recognized that truly indefinite leave may result in undue hardship. Indefinite leave is narrowly defined to mean that an employee is not able to say if or when he or she will be able to return to work. The EEOC distinguishes from indefinite leave a situation in which an employee is not able to provide a fixed date of return, and can give only an approximate date of return or a range of

possible return dates. In the latter case, leave may be a reasonable accommodation. The EEOC commissioners commented at the June 8 public hearing that the EEOC will issue new guidance documents under the ADA to address the issue of leave as a reasonable accommodation. No doubt these documents will be welcomed by employers, who have been struggling to balance the need to run their businesses efficiently with what appeared to be the EEOC's disdain for inflexible leave policies.

### **Supreme Court Limits Wal-Mart Sex Bias Class Action Case**

The Supreme Court blocked a massive sex discrimination lawsuit against Wal-Mart on

behalf of women who work there. The court ruled unanimously that the lawsuit against Wal-Mart Stores Inc. cannot proceed as a class action, reversing a decision by the 9th U.S. Circuit Court of Appeals in San Francisco. The lawsuit could have involved up to 1.6 million women, some of whom were managers. The lawsuit alleged that women were not given an opportunity to become managers and that the discrimination was nationwide. The handful of women who brought the lawsuit may pursue their claims on their own, with much less money at stake and less pressure on Wal-Mart to settle. Absent from the case were any common elements tying together literally millions of employment decisions at once made by individual store managers.