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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.

Retaliation

U.S. Supreme Court Further Expands Retaliation to Include Third Party

In a unanimous decision, the U.S. Supreme Court held that an employee who alleges that he was discharged in retaliation for his fiancée's filing of a sex discrimination charge against their mutual employer fell within the zone of interests protected by Title VII for the purpose of finding him to be an "aggrieved" person with standing to sue under Title VII. Based on its decision in *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, (2006) the Court concluded that the employee's discharge easily met the standard set forth for finding a violation of Title VII's anti-retaliation provision since a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired. The employer in this case argued, as have many employers before, that Title VII of the Civil

Rights Act requires an individual to engage in protected activity before he can claim that an adverse action was retaliatory conduct. The Courts of Appeals have agreed with that argument because the retaliation provision of Title VII protects someone who opposes unlawful discrimination or participates in an investigation under Title VII. The Supreme Court rejected the employer's argument that applying the Burlington standard to adverse actions against third parties would lead to line-drawing problems concerning the types of relationships entitled to protection. While acknowledging the "force" of the argument that such an application of this standard would place an employer at risk any time it discharges an employee who has a connection to a different employee who has filed an EEOC charge, the Court found that it did not justify a categorical rule that third-party reprisals do not violate Title VII, given the "broad wording" of Title VII's anti-retaliation provision. Resolving the more difficult question of whether the

discharged employee himself had standing to bring an action under the provision, the Court held that the term “aggrieved” in Title VII incorporates a “zone of interests” test that is derived from the common usage of the term under the Administrative Procedure Act. Applying this test to Mr. Thompson, the Court concluded that he is well within the zone of interests sought to be protected by Title VII. Observing that the purpose of Title VII is to protect employees from their employer's unlawful actions, it noted that his injury was not an accident, but rather it was his employer's intended means of harming his fiancée and was the unlawful act by which it punished her. *Thompson v. North American Stainless LP*, 131 S.Ct. 863 (1/24/11).

Fair Labor Standards Act

Regular Rate for Calculating Overtime Must Include Pay for Unused Sick Leave

The City of Albuquerque, New Mexico allowed employees to sell back their accrued but unused vacation and sick leave. The Court of Appeals used this case as an opportunity to instruct employers on calculating the regular rate of pay for overtime purposes when they pay employees for unused leave time. The Court said that payments for sick leave “buy-backs” are for services rendered because they relieve the burden on employers of unscheduled absences and are analogous to attendance bonuses, which the Department of Labor regulations treat as part of the regular rate. However, vacation-leave buy-backs are analogous to holiday work premiums because the use of vacation leave does not burden employers as do unscheduled sick-leave absences and do not need to be used in calculating overtime. The city was not required to count those hours for which employees received paid time-off but performed no work toward the FLSA's statutory overtime-hours threshold. The Department of Labor regulations state that FLSA overtime applies only to hours actually worked and not for holidays, vacations and other time that was paid but the employee did not work. The total amount

of the compensation for unused sick leave should have been divided by the number of hours worked during the workweek in which it was paid. If overtime had been worked during the workweek the compensation was paid, one-half of the regular rate should have been multiplied by the number of hours actually worked over 40 hours in a week and added to the total due an employee. Example:

Assume \$300.00 compensation for sick leave divided by 43 hours actually worked during the workweek; that equals a regular rate of \$6.98. One half of \$6.98 is \$3.49. Therefore, an additional \$10.47 [$\$3.49 \times 3 \text{ hours} = \10.47] is what would be owed to the employee in addition to the \$300.00.

Rejecting the employees' claim that the city should have used a one and one-half times multiplier, the court pointed out that this would improperly result in the employees receiving two and one-half times their regular pay rate for each overtime hour worked because the regular rate includes straight time. *Chavez v. City of Albuquerque*, No. 09-2274 (10th Cir. 1/12/11)

FLSA Crackdown

As part of its expansion effort, the Department of Labor is targeting industries for investigations. Last year, they targeted restaurants in six states. In December 2010, the DOL recovered almost \$436,000 of unpaid wages on behalf of 27 employees of a New York restaurant. According to the Wage and Hour Division, restaurants historically have low compliance rates. The hottest issues in FLSA litigation against restaurant employers are those that arise out of the employer's use of the tip credit. Under the FLSA, the restaurant may pay employees who receive tips \$2.13 per hour in direct wages and use their tips to make up the difference between the direct wage and the minimum wage, which under the federal law is currently \$7.25 per hour. Problems arise when the employee's tips plus the direct wage paid by the employer is less than the minimum wage and when the employee

does work that does not generate tips, among other things. Employers of tipped employees should do an annual audit to make sure they are in compliance with the Fair Labor Standards Act.

Sexual Harassment

Employer Found Not Liable For Sexual Battery by Coworker

When an employee, who worked in the deli department of a store, reported that she had been assaulted in a cooler by coworker the day before, the store's managers began interviewing employees about the incident on the same day. The coworker left on vacation two days later without being interviewed, while managers continued to investigate the incident. Managers questioned him when he returned to work, and he admitted only to hugging her, putting his face against hers, and giving her a gift, but denied touching her inappropriately or giving her an inappropriate card. Management could not substantiate her most serious allegations so they decided to discipline the coworker but not to terminate him. They also adjusted the two employees' work schedules so that they only overlapped for about 90 minutes each week and assigned them to work some 80 feet apart, after which the two had no further contact. The employee reported the incident to the police. The police questioned the coworker who admitted the allegations after failing a lie detector test. The employer investigated further and discharged the coworker for the harassment as well as lying to them during the investigation. The employee sued the employer even though it discharged the coworker. The court found that the employer's response when the employee lodged her complaint was sufficiently prompt and adequate to preclude a finding of liability. The fact that the coworker was not interviewed until after his vacation did not change that finding. The delay in questioning the coworker until after his vacation was due to the employer's policy of confronting an alleged harasser only after all information from other sources was acquired. *Sutherland v. Wal-Mart Stores*, 111 FEP Cases 495 (7th Cir. 1/21/11)

Family & Medical Leave Act

Faith Healing is not Medical Care

An employee was fired for taking seven weeks off work to accompany her husband on a series of "healing pilgrimages" in the Philippines. The husband received no conventional medical treatment on the trip and saw no doctors or health care providers. The employee was fired for taking the time off and she sued alleging a violation of the Family & Medical Leave Act. "Health care provider" is defined as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery. The employee argued that because an exception exists allowing members of the Christian Scientist faith to be treated by those not otherwise deemed as "health care providers" under the FMLA, it would be unconstitutional to disallow an exception for healing by a Catholic priest. The First Circuit disagreed, holding the Christian Scientist exception exists to benefit patients whose religions forbid ordinary medical care, a category inapplicable to the employee's husband. As such, the seven-week absence was not protected leave under the FMLA. *Tayag v Lahey Clinic Hospital, Inc*, 17 WH Cases2d 232 (1st Cir. 1/31/11)

E-Verify

Florida State Agencies and State Contractors Must Use E-Verify

Florida Gov. Rick Scott issued an executive order (EO) on Jan. 4, 2011, that requires state agencies and state contractors to verify the legal immigration status of employees. Specifically, EO 11-02 requires that all state agencies under the direction of the governor immediately use E-Verify to check employment eligibility of current and prospective employees. In addition, the agencies are required to include in all state contracts a requirement that contractors use E-Verify to check the employment eligibility of all persons employed during the contract term as well as persons (including subcontractors)

assigned by the contractor, the statement said. In his campaign last year, Governor Scott pledged to implement a law similar to Arizona's 2007 statute in which the state can revoke the

license of a business if it does not use E-Verify, and hires undocumented workers. The Arizona law was appealed to the U.S. Supreme Court and has yet to be decided.