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**LEGAL ALERT**

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**ALERT ON LEGAL DEVELOPMENTS FOR EMPLOYERS IN PUERTO RICO**

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**GINA**

Title II of the Genetic Information Non Discrimination Act of 2008 (GINA) prohibits employers from discriminating, harassing or retaliating against applicants and employees on the basis of genetic information. It also restricts acquisition and disclosure of genetic information by employers. GINA's employment provisions cover employers with 15 employees or more. They entered into force as of November 21, 2009.

The Equal Employment Opportunity Commission (EEOC) has revised its "Equal Employment Opportunity is the Law" poster to add information about GINA. I have attached an English version of the poster, which also contains updates from the Department of Labor. Proposed regulations issued last March. The DOL is still working on final regulations.

You can find more information on GINA at <http://www.eeoc.gov/laws/types/genetic.cfm>.

**FMLA –**

**FMLA Amendments to military caregiver and qualified exigency leave provisions - National Defense Authorization Act for Fiscal Year 2010 (the "NDAA 2010")**

The Family and Medical Leave Act of 1993 (FMLA) allows eligible employees to take up to 12 weeks of leave during a 12-month period because of the employee's or a family member's serious health condition. It also applies to leave for the birth, adoption, or placement of a child for adoption or foster care. Pursuant to 2008 amendments, when leave is to take care of a relative with a "serious injury or illness" incurred in the line of duty on active military duty, it may last up to 26 weeks. Also pursuant to those amendments, employees can take 12 weeks of leave to handle certain "qualifying exigencies" that arise when a relative who is a member of the National Guard or Reserve is called to active duty.

Employees eligible for FMLA leave are those who have worked for at least 1,250 hours during the 12 months preceding the leave, have been employed by the employer for at least twelve months, and work in a worksite with fifty or more employees.

The National Defense Authorization Act for Fiscal Year 2010 (the "NDA 2010"), signed into law on October 28, 2009, expanded the provisions regarding leave for "qualifying exigencies" and for "military caregivers". Before NDA 2010, "qualifying exigency leave" only applied to family members of National Guard and Reservists called to active duty in support of a "contingency operation". NDA 2010 extended this right to family members of active duty service members as well, who are deployed to a foreign country, and not just in support of a contingency operation.

NDA 2010 also extends the scope of military caregiver leave to families of certain veterans, who previously were not covered by the provision. Hence, FMLA now covers relatives of a veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the five-year period preceding the date on which the veteran undergoes the medical treatment, recuperation, or therapy that motivates the leave. It now also permits military caregiver leave for serious injuries or illnesses that are the result of pre-existing conditions that were aggravated by service while on active duty.

### **FMLA Amendment to clarify coverage for flight crew members - Airline Flight Crew Technical Corrections Act**

Waiting for the President's signature is the Airline Flight Crew Technical Corrections Act (AFCTCA), which would amend the FMLA to close a loophole that prevented flight attendants and pilots from meeting the 1,250 hours of work requirement to be eligible for FMLA leave. For these employees, hours on the job between flights or on mandatory standby were not being counted toward their FMLA credit. Under the AFCTCA, however, eligibility for pilots and flight attendant will depend on the hours they actually work or for which they are paid – not just those spent in flight. Accordingly, a crew member will now qualify for leave if he or she has worked or has been paid for at least 60 percent of his or her applicable monthly guarantee, or the equivalent amount annualized over the preceding 12-month period, and has worked or been paid for at least 504 hours during the previous 12-month period.

### **ARRA Expiration and upcoming extension**

The American Recovery and Reinvestment Act of 2009 (ARRA) temporarily reduced COBRA premiums for individuals who are eligible for COBRA coverage because of their own or a family member's involuntary termination from employment that occurred from September 1, 2008 through December 31, 2009. If these employees elect COBRA, they may be eligible to pay only 35% of the COBRA premiums for up to 9 months. Employers pay the difference, which they may recover through certain tax credits.

The Department of Labor released a new Q&A for COBRA to cover questions related to the upcoming expiration of the ARRA premium reduction benefit this December 31<sup>st</sup>. The Q&A makes it clear than an employee who is involuntarily terminated no later than

December 31, 2009, and becomes COBRA eligible by that date, is entitled to the ARRA premium reduction benefit for the full 9 months, even if they expire after December 31, 2009. An employee terminated during that period who does not become eligible for COBRA until after December 31<sup>st</sup>, however, is not entitled to the premium reduction benefit. The Q&A warns, however, that there is pending legislation that could extend the ARRA premium assistance. You can find the Q&A at <http://www.dol.gov/ebsa/faqs/faq-cobra-arra.html>.

## **CLOSING LAW**

After much debate, the Puerto Rico Closing Law was amended by Law No. 143 of November 16, 2009, to expand permissible operation hours for the retail sector and establish a minimum rate for Sunday work that displaced the former double overtime rate. Below is a summary of the main changes.

**Expansion of Sunday hours of operation:** Before Law No. 143, retail stores could open to the public only between 11 a.m. and 5 p.m. Now, they need only close between 5 a.m. and 11 a.m. The new law retained the limitations on the kind of products that pharmacies may sell during otherwise restricted hours (medication with and without prescription, health, personal hygiene, and baby products, school effects, books, magazines, and candy).

**Expansion of hours of operation during the rest of the year:** Before Law No. 143 shops could only open the rest of the year from 5 a.m. until midnight, except for December 24 and 31 and January 5, when they had to close at 9:00 p.m. Law No. 143 eliminated these restrictions. It retained the absolute closure requirement for January 1 and 6, Good Friday, Easter Sunday, Mothers' Day, Fathers' Day, General Elections, Thanksgiving and December 25.

**Elimination of double pay for Sunday work:** Before, Sunday work in a retail establishment was considered overtime subject to compensation at double the regular rate of pay. Law No. 143 eliminated Sunday work from the list of what is considered overtime work under Law No. 379 of May 15, 1948 and replaced the double rate standard with a minimum rate of \$11.50.

**Modification of the definition of a retail establishment:** The definition of a covered retail establishment was amended to cover establishments owned by the same person or legal entity. Presumably this language seeks to ensure that when several establishments are operated by the same legal entity they receive similar treatment.

The modified law retained the exceptions for stores located in hotels, airports, seaports, historical zones, cultural and sports establishments, funeral homes and cemeteries, and the "plazas del mercado", as well as for pharmacies, gas stations, restaurants, book and music shops and owner-operated establishments. The small shops exception was also

retained, though the employee maximum was raised from 7 to 25 employees. These establishments are exempt from the limitations on operation hours and minimum Sunday pay.

**Increase on penalties:** Criminal penalties were replaced with administrative fines. The range of fines increased from a \$1,000-\$25,000 range to a \$5,000-\$50,000. Enforcement is now through the Department of Consumer Affairs (DACO) instead of the courts.

Significantly, Law No. 143 eliminated the limitations on who could work on Sundays (previously, only certain part time, technical or exempt employees could be required to work on Sundays). It also eliminated the requirement of a written voluntary agreement for Sunday work as well as the Secretary of Labor approval for such agreements, the prohibition on working two Sundays in a row, the prohibition on conditioning employment on availability for Sunday work, among other previously existing employee protections. Gone as well is the prohibition against requiring tenants to open on Sundays.

#### **CLOSING REMARKS**

I hope that the information provided in this bulleting will be of interest to you. This bulletin is not intended as legal advice but as an alert for situations when seeking such advice might be to your business advantage. Please feel free to contact us should you wish to discuss these or any other employment matters further. You can also find our Employment Law Updates in our website [www.arizmendisafilippo.com](http://www.arizmendisafilippo.com).