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CONTENTS AT A GLANCE

DEVELOPMENTS IN PUERTO RICO LAW

Page 2

Wage and Hour

Employers can finally require employees to submit to electronic methods of payment and send them their pay-stub via electronic means rather than paper, though they now must disclose to them the risks of electronic fraud**.**

Breastfeeding

Breastfeeding can no longer considered indecent exposure, obscene conduct or otherwise punishable conduct.

COURTS ON POINT

Page 3 to 6

Sexual Harassment and Affairs at Work

Consensual workplace affairs can be very costly for employers subject to the US Court of Appeals for the First Circuit, which includes Puerto Rico: that Court has decided that the fact that harassment is motivated by the hostility of a failed consensual relationship is no defense against a sexual harassment claim under Title VII.

Wage and Hour

Two incidents of pay-docking are not enough to prove that the employer had an actual practice of effecting salary deductions that would defeat an employee's exempt status, according to the US First Circuit Court of Appeals, so that an employee whose duties entailed overall customer satisfaction did not lose his otherwise exempt status.

FMLA picks

If an employee becomes belligerent, suffers an anxiety attack, takes leave, files an OSHA complaint and then a police report, all because a stray dog wandered into her office, is the behavior so bizarre so that the employer should know that she is in need of FMLA leave?

WARN

Creative employer was able to cut short WARN penalties by extending the employment relationship until laid off employees found job with successor.

ADMINISTRATIVE DEVELOPMENTS

Page 6 to 8

New I-9 Form

A revised Employment Eligibility Verification Form (I-9) is available. The new form eliminates several documents from the list of those an employer can use to confirm identity and identify eligibility.

Use of Employer Email for Union Business

In a significant victory for employers that furthers their rights to limit employee use of employer-provided computer systems, the NLRB has held that employees are not entitled to use the employer's electronic mail system to promote union activities. There is one major caveat: employers who selectively discipline employees who use their system for union activity may still face liability.

Employee Testing and Screening

Employers who use tests or other objective selection criteria to screen job applicants or grant promotions should take a look at the new EEOC Fact Sheet on employment tests and selection procedures.

Occupational Safety

OSHA's final rule on employee's personal protective equipment (PPE) confirms that employers must pay for most of it.

DEVELOPMENTS IN PUERTO RICO LAW

Wage and Hour

Employers can finally require employees to submit to electronic methods of payment and send them their pay-stub via electronic means rather than paper, though they now must disclose to them the risks of electronic fraud.

On December 26, 2007 the Governor approved amendments to Law No. 17 of April 17, 1931, which regulates the payment of wages. The amendment allows employers to require employees to submit to one of three methods of wage payment: direct deposit, electronic transfer or credits on a payroll card. The employee may elect from the payment methods made available by the employer. Though the new law reads very similar to the old one, the new text contains a significant development. Before, an employer could not make direct deposit or electronic transfer its only methods of payment, because the law allowed the employees to opt-out of such methods. Now, the employer can require the employee to submit to whatever methods of payment it decides to make available.

The amendment also modifies the duties of an employer who chooses to implement direct deposit or electronic transfer of funds. Employers can now provide the required payroll stub in electronic format, including via fax, by phone or via a Web portal, as long as it is at no additional cost to the employee. It must also make available to the employee information on electronic fraud, and the degree of responsibility of each party involved in an electronic wage transaction (the bank, the employer and the employee). Finally, the amendment allows a new method of payroll payment: credits on a payroll card. This option is probably most attractive to employers who operate in an industry where employees are less likely to have bank accounts. *For more details see Law No. 213 of December 26, 2007.*

Breastfeeding

Breastfeeding can no longer considered indecent exposure, obscene conduct or otherwise punishable conduct.

As of September 19, 2007, the law in Puerto Rico is that a woman is entitled to breastfeed her baby in any place, public or private, where she is allowed to be. The law imposes penalties on violators that range between $1,000 and $5,000. So, next time you see an employee breastfeeding her baby in the company lobby or lounge during off-hours when she visits to show her baby to co-workers, what will you do? Certainly not discipline her for indecent exposure in the workplace. If her conduct, however, violates other workplace rules, such as rules against disturbing co-workers during their work-time or against remaining on premises after-hours, discipline might be in order as long as it is not discriminatorily applied. Each case should be evaluated against its specific circumstances. *For further details see Law No. 121 of September 19, 2007.*

COURTS ON POINT

Sexual Harassment and Affairs at Work

Consensual workplace affairs can be very costly for employers subject to the US Court of Appeals for the First Circuit, which includes Puerto Rico: that Court has decided that the fact that harassment is motivated by the hostility of a failed consensual relationship is no defense against a sexual harassment claim under Title VII.

The US Court of Appeals for the First Circuit has recently ruled that whenever gender-specific epithets are used, there is harassment based upon sex and therefore a Title VII claim, regardless of whether the epithets were motivated by the hostility of a failed consensual relationship, and even if the harasser made no effort to rekindle sexual relations with the former lover (i.e. made no sexual advances). The Court reasoned that, presumably, the relationship would never have occurred if the victim had not been of the sex preferred by the harasser. Therefore, it concluded, the victim's sex was inextricably linked to the decision to harass. The First Circuit thus distanced itself from other courts who have suggested that it might be more difficult for failed lovers to prove sexual harassment, because in those cases the harassment is not "because of sex" but because of hostility between the former lovers.

The First Circuit reached this decision in a case involving sexual harassment between peers. Allison Forest worked as a bartender at Chili's Restaurant. For about one year she dated co-worker Mike Vashaw, until the relationship went sour. This sourness reflected at work. Mike refused to give Allison kitchen implements that she needed and messed with her orders. He called her "whore", "bitch", "slut" and "cunt". Once he squirted her with hot water, cornered her in a cooler and, in addition to the colorful epithets previously listed, told her that she was fat and needed to go to the gym. Luckily, Chili's had a policy against sexual harassment in place which contained a complaint mechanism and promised disciplinary action against wrongdoers. Aware of this policy, Allison complained to her employer of Mike's conduct three times during the span of about two months for which the conduct lasted. Each time, the employer responded by subjecting Mike to progressive discipline, starting with an oral warning, then a written warning, and in his third strike, striking Mike out of his job. Unhappy, however, at her employer's refusal to keep Mike off premises during times when she was not at work, Allison quit and then sued for sexual harassment.

The trial court dismissed her complaint on the grounds that the harassment was motivated by the failed relationship, not by sex, and therefore Allison could establish no Title VII claim. The trial court suggested the case might have fared differently had there been proof of sexual advances. As described before, the First Circuit vehemently rejected this theory.

The First Circuit nevertheless concluded that the employer in this case took prompt and effective remedial action upon the complaint in light of the circumstances, which precluded Title VII liability. The circumstances which the court deemed pertinent in this part of the analysis were: Chili's anti-harassment policy and managerial training, the brief duration of the conduct, Allison's initial request that Mike not be dismissed, the pre-existing failed relationship between them, and Chili's investigation and discipline after each complaint. *See Forrest v. Brinker International Payroll Company, LP, No. 07-1794, United States Court of Appeals for the First Circuit, decided December19, 2007.*

Wage and Hour

Two incidents of pay-docking are not enough to prove that the employer had an actual practice of effecting salary deductions that would defeat an employee's exempt status, according to the US First Circuit Court of Appeals, so that an employee whose duties entailed overall customer satisfaction did not lose his otherwise exempt status.

Department of Labor Regulations provide that an "actual practice" of making improper deductions from the salary of a supposedly exempt employees demonstrates an intent not to pay them on a salary basis and defeats their exemption. Under those same regulations, however, an actual practice is proven by "the number of improper deductions". In a recent decision, the First Circuit concluded that two "aberrant" paychecks did not constitute sufficient prove under those regulations.

The case in question was filed by Thomas Cash, who was hired by Boston Harley to work as its "New Purchase/Customer Relations Manager" on a $60,000 annual salary. Cash himself designed the job description with high aspirations, but ended up performing only some of the duties he envisioned. He essentially coordinated with several Boston Harley departments to ensure that all motorcycles were properly outfitted and delivered. If ordered parts were not installed, Cash instructed the Service Manager what to do. He also stayed in contact with the customer to ensure satisfactory service. He occasionally attended managerial meetings, mainly to report on the status of ordered motorcycles and their scheduled time for pickup or delivery, and then was asked to leave. He did not supervise any employees.

Upon termination several months into the job, Cash sought cash. He sued Boston Harley alleging he was a non-exempt employee who was never paid overtime. He claimed the employer had no intention of paying him on a guaranteed salary basis because he received two payroll checks with deductions for working only part of the week. He also claimed his duties were not exempt. The employer defended on the grounds that he was an exempt administrator. The trial court agreed with the employer, dismissing Cash's demand on summary judgment. The First Circuit Court of Appeals affirmed.

Regarding the exempt nature of his duties, the court held that Cash met the "management" and "discretion" criteria because:

- he attended manager meetings,
- his duties focused on improving customer service generally, reacting to the their unique needs, rather than routine selling efforts focused on particular sales transactions,
- in the performance of his duties, Cash was likely inspired by his broader pre-job preconception, and
- his salary was greater or equal to that of all other employer managers.

Note that the last two considerations bear little relation to his actual duties. Yet, despite his name the court left Cash empty-handed. *See Cash v. Cycle Craft Company, Inc., No. 07-1768, United States Court of Appeals for the First Circuit, decided November 20, 2007.*

FMLA picks

If an employee becomes belligerent, suffers an anxiety attack, takes leave, files an OSHA complaint and then a police report, all because a stray dog wandered into her office, is the behavior so bizarre so that the employer should know that she is in need of FMLA leave?

FMLA requires employers to provide employees notice of their FMLA rights as soon as they receive notice that the employee suffers from a serious health condition. What is sufficient employee notice, however, has been the subject of much litigation. In this case, the employee contended that her conduct was so outrageous that it gave her employer constructive notice of her need for FMLA protection. The US Seventh Circuit Court of Appeals agrees this might be a viable argument, especially if the dog was a puppy...

The employee in the case in question reacted bizarrely to a brief encounter with a stray dog who wandered into the warehouse where she worked. She became belligerent and agitated, used foul language, left work, filed an OSHA complaint, insulted and berated a high ranking company officer, visited the emergency room, and even called the police when her desk was moved to a location farther away from the door to avoid another stray animal encounter. After nine days of reporting to work only twice for brief periods of time where she performed no work, her employer wrote to tell her that she had exhausted all leave, and that if she failed to qualify her absence under the FMLA (filing FMLA paperwork) her employment would be terminated the following week. In response, the employee sent two notes from her doctor, which failed to provide all FMLA information. Thus, the employer terminated her employment a month after the incident.

The Court determined that simply telling her employer that she was sick did not constitute sufficient notice of her need for FMLA leave. The Court warned, however, that she may have given her employer "constructive notice" of such need:

> Lengthy encounters of yelling and swearing at one's superiors so severe that a company locks out an employee with a previously unblemished record for safety concerns, coupled with that employee's calling the police because her belongings have been moved to another desk, are undeniably unusual and could be viewed by a trier of fact as unusual enough to give [the employer] notice of a serious mental health condition.

Though this decision is not binding on Puerto Rico Courts, it constitutes persuasive authority. It might be worth bearing in mind when dealing with cases where a medical condition is evident to the layperson's eye, even if the concerned employee has made no formal FMLA request. *See* <u>Stevenson v. Hyre Electric</u>, *United States Court of Appeals for the Seventh Circuit, No. 2007-10-16, issued October 16, 2007.*

Another recent FMLA decision continues the trend toward not requiring employees to use "magic words" when providing notice to an employer of the need for FMLA leave. The US Third Circuit Court of Appeals has held that informing a supervisor of the need for <u>possible</u> additional heart monitoring and surgery constitutes sufficient employee notice to the employer. *See* <u>Sarnowski v. Air Brooke Limousine, Inc.</u>, *Unites States Court of Appeals for the Third Circuit, decided December 12, 2007.*

WARN

Creative employer was able to cut short WARN penalties by extending the employment relationship until laid off employees found job with successor.

As you know, WARN (the Worker Adjustment and Retraining Notification Act) requires covered employers to provide advance notice of a plant closing or a mass layoff. The notice must issue at least 60 days before the employee's "employment loss". Standard practice in this regard is to provide the notice at least 60 days before the employee's last day of actual work. In one case decided by the US Fourth Circuit Court of Appeals, however, the employer tried a different approach: it issued the WARN notice the day of the closing but, instead of laying off the employees, informed them that they would remain employed for sixty more days, with no actual work but with full pay and benefits, unless they found employment with its successor plant.

The employees who accepted work before the 60-days were over filed a claim under WARN, claiming that the company did not comply with its 60-day advance notice requirement and demanding pay and benefits for the full 60-days. The company countered that these employees did not suffer an "employment loss", because they received pay and benefits until they voluntarily resigned to work for its successor. The trial court agreed with the employer, dismissing the case on summary judgment. The Fourth Circuit agreed:

> When an employer commits to continue payment of wages and benefits to its employees, the employment relationship has not ended. Thus, our precedent has consistently held, as we do now, that "termination" does not necessarily occur when the employer ceases production. […] Congress sought to protect employees' expectation of wages and benefits, *not* their expectation of performing work.

Though this decision is not binding on Puerto Rico Courts, it constitutes persuasive authority and may be worth considering when examining options for a WARN-covered layoff. *See Long v. Dunlop Sports Group Ams. Inc., United States Court of Appeals for the Fourth Circuit, No. 06-2143, issued Oct. 29, 2007.*

ADMINISTRATIVE DEVELOPMENTS

New I-9 Form

A revised Employment Eligibility Verification Form (I-9) is available. The new form eliminates several documents from the list of those an employer can use to confirm identity and identify eligibility.

The documents no longer acceptable are: Certificate of U.S. Citizenship (Form N-560 or N-561), Certificate of Naturalization (Form N-550 or N-570), Alien Registration Receipt Card (I-151), Unexpired Reentry Permit (Form I-327), Unexpired Refugee Travel Document (Form I-571). It adds one document to the list: Unexpired Employment Authorization Document (I-766).

The form can be completed electronically. It can be found at the website for the US Citizenship and Immigration Services. The old form will not be accepted after December 26, 2007.

Use of Employer Email for Union Business

In a significant victory for employers that furthers their rights to limit employee use of employer-provided computer systems, the NLRB has held that employees are not entitled to use the employer's electronic mail system to promote union activities. There is one major caveat: employers who selectively discipline employees who use their system for union activity may still face liability.

The NLRB has held that employees have no right to use employer equipment for union communications, as long as the restriction does not discriminate against union communications that are of a similar character as other communications the employer may allow through its equipment. The NLRB thus rejected arguments that, because email has revolutionized the way we communicate and employees increasingly use it for business and non-business needs, union communications using employer email should be afforded the same protection as face-to-face union solicitation or its manual distribution of written materials on company premises during non-working time.

The case in question involved a newspaper-publishing company which implemented a written Communications Systems Policy ("CSP"). The CSP cautioned employees that the employer provided the systems and equipment to conduct its business and not to be used to "solicit or proselytize for commercial ventures, religious or political cause, outside organizations or other non-job related solicitations". As things turned out, however, for several years the employer tolerated use of email for personal reasons, including the occasional birthday party invitation, request for services such as dog-walking, or sales of sports tickets. The employer also tolerated email use for an employer sponsored United Way campaign.

On two occasions the employer reprimanded a union member for using email to conduct union business in violation of the CSP. The first time occurred when the employee emailed all employees clarifying alleged inaccuracies in an email sent the day before regarding the presence of anarchists at a union rally. The second time occurred when she emailed to invite employees to wear green to show union support during the negotiation process and to invite employees to participate in the union's entry in an upcoming town parade.

The NLRB upheld the validity of the CSP on its face. It then went on to examine whether the CSP was non-discriminatorily enforced. It found that the employer incurred in union discrimination when it enforced the policy to discipline the employee for sending emails clarifying the facts surrounding the union rally, because it was along the nature of the personal emails that the employer had tolerated in the past. Though the NLRB was silent on this point, a factor that may have weighed in its decision is that the emails on the union rally were started by the employer. Thus, the employer inadvertently turned the union rally into a job-related matter, opening the door to further related email communications.

In contrast, the NLRB found that the employer could validly discipline the employee for emailing employees to invite them to wear green or participate in the parade, because there was no evidence that the employer allowed employees to use email to solicit support for other organizations, except for the United Way. The NLRB noted that allowing use of email to solicit for this charitable organization was distinguishable from allowing its use for union solicitation. Though the NLRB did not expressly state so, presumably both activities are not of a similar nature and therefore are non-comparable for purposes of establishing discrimination. *See The Guard Publishing Company, 351 NLRB No. 70, decided December 16, 2007.*

Employee Testing and Screening

Employers who use tests or other objective selection criteria to screen job applicants or grant promotions should take a look at the new EEOC Fact Sheet on employment tests and selection procedures.

One reason employers use screening tests and other objective selection criteria is because they are facially independent from the factors that an employer may not legally consider, such as race, age or gender. The use of these so called objective measures, however, can still violate anti-discrimination laws if they disproportionately exclude people by race, sex, or other characteristics protected by law. In the face of such disparate impact, the employer can defend its procedure if it is job-related and consistent with business necessity. Even then, however, the employer will face liability for discrimination if it turns out that there was a less discriminatory alternative.

On December 2007 the EEOC issued a fact sheet that explains the standards that exist to evaluate these tests under Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act. It also outlines several recent litigation efforts in this area by the EEOC and suggests best practices that employers should follow, such as:

- Administer selection procedures without regard to race, color, national origin, sex, religion, age, or disability.
- Ensure that selection procedures are properly validated for the positions and purposes for which they are used. While a vendor’s documentation supporting the validity of a test may be helpful, the employer still bears ultimate responsibility.
- If a selection procedure screens out a protected group, determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure.
- Keep abreast of changes in job requirements and update the test specifications or selection procedures accordingly.
- Understand a test’s effectiveness, limitations, appropriateness for a specific job, and whether it can be appropriately administered and scored.

Occupational Safety

OSHA’s final rule on employee’s personal protective equipment (PPE) confirms that employers must pay for most of it.

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced a final rule on employer-paid PPE. With a few exceptions, the new rule provides that all PPE will be provided at no cost to the employee. OSHA anticipates that this rule will result in more than 21,000 fewer occupational injuries per year.

Some of the exceptions contained in the final rule are for ordinary safety-toed footwear, ordinary prescription safety eyewear, logging boots, and ordinary clothing and weather-related gear. The final rule also clarifies OSHA's requirements regarding payment for employee-owned PPE and replacement PPE. It grants employers six months from the date the final rule was published, to adjust their existing PPE payment policies to the final rule. The final rule was published in the Federal Register on November 15, 2007.