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LABOR AND EMPLOYMENT

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1. Spring Ahead – New Jersey's Department of Labor Proposes Changes to Overtime Regulations

On March 21, 2011, the New Jersey Department of Labor and Workforce Development ("NJDOL") announced its proposal to repeal its "existing rules regarding overtime exemptions for bona fide executive, administrative, professional and outside sales employees and replace them with the analogous Federal overtime exemption regulations." New Jersey's current overtime regulations are inconsistent with their federal counterpart. Although both provide overtime exemptions for certain individuals employed in executive, administrative, and professional positions, significant differences exist as to who is eligible for the exemption. Notably, the so-called "white collar" exemptions do not apply in New Jersey if otherwise exempt employees spend more than 20 percent of their workweek on non-exempt work (40 percent for executive and administrative employees in retail or service establishments). In contrast, the federal regulations do not impose any express limit on the amount of time an employee may perform non-exempt work in order to qualify for the exemption. A public hearing on the NJDOL's proposed amendment was held on April 15, 2011, and written comments may be submitted through May 20, 2011. The NJDOL's proposal, if adopted, represents a substantial change in New Jersey's overtime exemption rules, which will have a positive economic impact on companies that do business in New Jersey.

2. Equal Employment Opportunity Commission Issues Final Regulations for the ADA Amendments Act

On March 25, 2011, the Equal Employment Opportunity Commission ("EEOC") published final regulations ("Regulations") implementing the

ADA Amendments Act of 2008 ("ADAAA"), which will take effect on May 24, 2011. The ADAAA made important changes to the definition of the term "disability," making it easier for an individual seeking protection under the Americans with Disabilities Act ("ADA") to establish that he or she has a disability within the meaning of the ADA.

The EEOC explains that the ADAAA continues to use the basic definition of "disability" under the ADA. A disability is still defined as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. The ADAAA, however, interprets these statutory terms more broadly.

The EEOC provides the following nine rules of construction in determining whether an impairment substantially limits a major life activity and, thus, constitutes a disability:

i. The term "substantially limits" is to be construed broadly;
ii. A significant or severe restriction is not required, and constitutes a disability if it substantially limits the abilities of the individual as compared to the general population;
iii. Extensive analysis is not required;
iv. An individualized assessment is required;
v. Scientific, medical, or statistical analysis is not required;
vi. No consideration should be given for mitigating measures (*e.g.,* prosthetic devices, medication, etc.), except for ordinary eye glasses or contact lenses;
vii. Impairments that are episodic or in remission are disabilities if they substantially limit a major life activity when active;
viii. One substantial limitation is sufficient; and
ix. The effects of an impairment lasting fewer than six months can be substantially limiting.

The Regulations also expand the definition of "major life activities." In addition, with respect to "regarded as" cases, the Regulations place the focus on how the individual is treated due to an actual or perceived impairment rather than on the employer's belief regarding the impairment.

For a more detailed summary of the Regulations and a list of actions employers should take to protect themselves, see EpsteinBeckerGreen's *Act Now* Advisory entitled "ADA Amendments Act: Final EEOC Regulations – What Employers Need to Know."

3. The New York Wage Theft Prevention Act Takes Effect

On April 9, 2011, the New York Wage Theft Prevention Act (the "Act") took effect, which amends the notice of wage rate requirements and expands the penalties available when employers violate the Act. Section 195 of the Labor Law, as amended by the Act, requires all employers, other than governmental agencies, to give employees at the

time of hire, and on or before February 1 of each year of employment, notice of the following:

i. The employee's rate or rates of pay;
ii. The overtime rate of pay, if the employee is subject to overtime regulations;
iii. The basis of wage payment (per hour, per shift, per week, piece rate, commission, etc.);
iv. Any allowances the employer intends to claim as part of the minimum wage, including tip, meal, and lodging allowances;
v. The regular pay day;
vi. The employer's name and any names under which the employer does business;
vii. The physical address of the employer's main office or principal place of business and, if different, the employer's mailing address;
viii. The employer's telephone number.

The notice must be provided in the employee's primary language, as identified by the employee, through translated notices provided by the New York Department of Labor ("NYDOL"). The NYDOL has issued templates for employers to use in order to comply with the Act. Also, available on the NYDOL's website is a "Frequently Asked Questions" sheet addressing common employer questions regarding the notice requirement of the Act.

For a more detailed summary of the Wage Theft Prevention Act compliance requirements, and a list of actions employers should take to protect themselves, see EpsteinBeckerGreen's *Act Now* Advisory entitled "They're Here – New York State Department of Labor Issues Updated 195.1 Templates and WTPA Frequently Asked Questions."

4. NLRB Proposed Rule to Require Posting of NLRA Rights

On December 21, 2010, the National Labor Relations Board ("NLRB") proposed a rule requiring employers to post a notice ("Notice") to employees of their rights under the National Labor Relations Act ("NLRA"). Most employees in the private sector are covered by the NLRA. The NLRA, however, does not cover individuals who are employed by federal, state, or local government; agricultural laborers; independent contractors; persons working in the domestic service of a person or family in a home; persons employed by a parent or spouse; supervisors; persons employed by an employer subject to the Railway Labor Act; or any person who is employed by a person who is not an "employer," as defined in the NLRA.

The Notice would provide*, inter alia*, that employees have the right to: (i) act together to improve wages and working conditions; (ii) form, join, and assist a union; (iii) bargain collectively with their employer; and (iv) choose not to do any of these activities. The Notice would also instruct employees on how to contact the NLRB with questions or complaints.

The Notice is to be located where other workplace notices are typically

posted. If an employer communicates with employees primarily by email or other electronic means, the Notice would also have to be posted electronically.

The comment period for the proposed rule closed on February 20, 2011, and a final rule will likely be issued in the near future.

5. Scratching the Surface – The U.S. Supreme Court Clarifies the Cat's Paw Doctrine

On March 1, 2011, in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the Supreme Court of the United States ruled that an employer may be held liable for employment discrimination under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), based on the nondiscriminatory actions of a decision maker who is influenced by the discriminatory animus of lower-level supervisors. The USERRA, which is analogous to Title VII of the Civil Rights Act, finds employment discrimination when discriminatory animus plays any "motivating factor" in the adverse employment action.

The Supreme Court reversed the U.S. Court of Appeals for the Seventh Circuit's finding that "a 'cat's paw' case could not succeed unless the nondecisionmaker exercised such 'singular influence' over the decision maker that the decision to terminate was the product of 'blind reliance.'" Justice Scalia opinioned that, so long as the biased supervisor "designed and intended to produce the adverse action," and did, in fact, cause the adverse employment decision, notwithstanding an independent investigation, the employer may be liable. Justice Scalia, however, further noted that traditional principles of proximate causation may, in some instances, shield an employer from liability "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that)."

For a list of steps that employers should take to avoid litigation as a result of this decision, see EpsteinBeckerGreen's *Act Now* Advisory entitled "Supreme Court Let's Cat's Paw 'Claw' Employers."

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Health Employment And Labor Summit -
June 7, 2011, National Press Club, Washington, DC

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