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## WORKPLACE UPDATE<sup>®</sup>

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February 2005

### CONTINGENT FEES ARE TAXABLE

The U.S. Supreme Court recently decided two cases involving the same issue: whether that portion of damages recovered by a plaintiff that is paid to his attorney under a contingent fee agreement is taxable to the plaintiff as gross income. In one of the cases before the Court, *Commissioner v. Banks*, the Ninth Circuit ruled that the plaintiff in an employment discrimination case involving state and federal law who settled for \$464,000 and paid his attorney \$150,000 as part of a contingency arrangement did not have to include the \$150,000 as part of his adjusted gross income. In the second case, the Ninth Circuit held that a bank executive who sued his employer for wrongful discharge in violation of public policy and intentional interference with employment and economic expectations, who was paid almost \$5 million in damages individually and whose attorney received an additional \$3.8 million, did not have to include the \$3.8 million paid to the attorney as adjusted gross income. The Supreme Court ruled against the plaintiff in both cases, holding that income is taxed to the one who earned it regardless of any attempts at anticipatory assignment thereof to someone else. The Court took cognizance of the recently passed American Jobs Creation Act of 2004 which extended the deductibility of legal expenses

paid in cases involving unlawful discrimination to the alternative minimum tax calculation. In each of the cases before the Court, the taxpayer could have listed the legal expenses as “miscellaneous itemized deduction” for regular income tax purposes but this deduction would have been of no help in calculating the alternative minimum tax liability for the plaintiffs. Thus, while the new legislation cures the problem for future litigants, the Act is of no help to Mr. Banks, Mr. Banaitis and others with pre-existing claims as the new legislation is not retroactive. *Commissioner v. Banks*, U.S. No. 03-892 (01/24/05); *Commissioner v. Banaitis*, U.S. No. 03-907 (01/24/05).

### NO DUTY TO DIVULGE EMPLOYEE'S HISTORY AS SEX OFFENDER

A Publix supermarket employee arranged for a co-worker to babysit her seven-year-old daughter during part of her split shift at Publix. The co-worker was on parole for conviction of attempted sexual battery on a minor under twelve, a fact that had been made known to the Publix store manager by the State Department of Corrections, but not to the Publix employee. The manager did not notify the employee of the co-worker's background either. Over a period of three months, the co-worker sexually molested the employee's daughter on at least two occasions. The co-worker's husband sued Publix claiming the company was liable for

the child's injuries as both employees worked for Publix and Publix was under a duty to disclose the co-worker's background to the employee. A Florida appeals court has ruled that Publix did not have a duty to disclose the information to the co-worker even though there was an employment relationship between the co-worker and the employee as the injury occurred "while the employees were off duty, not then acting for the employer's benefit, not on the employer's premises, and not using the employer's equipment." To impose a duty on Publix under these circumstances, the court noted, "would have 'broad ramifications' requiring employers to monitor their employee relationships apart from work, in areas such as commuting and socializing." *K.M. v. Publix Super Markets, Inc.*, Fla. Dist. Ct. Appl. No. 4D04-502 (01/26/05).

#### BAIT AND SWITCH

Neeraj Chopra was solicited to leave his home in India to take a computer analyst position in the U.S. at a salary of \$42,000 per year by the owners of U.S. Professionals, a company which supplies contract workers to other companies in the United States. When Chopra arrived in Memphis to start work, he was given a job as a cashier in a gas station at below minimum wage rather than the computer analyst job he was promised. After he was terminated, U.S. Professionals refused to pay the cost of his return to India and he stayed on in Memphis working for a hotel. Chopra sued U.S. Professionals and its owners in state court in Tennessee claiming breach of contract and intentional misrepresentation. A jury awarded him over

\$126,000 in compensatory damages and \$30,000 in punitive damages against the defendants. On appeal, the Tennessee Court of Appeal upheld the judgment and dismissed the defendants' argument that Chopra was an illegal alien and he had no standing to sue in any court in the U.S. The Court found this argument "somewhat disingenuous" inasmuch as it was the defendants whose actions resulted in Chopra's illegal alien status, that is, had they fulfilled their obligations and placed him in the job promised and paid for his return to India, he would have had an H-1B visa available for high skilled workers in specialty occupations. *Chopra v. U.S. Prof'ls LLC*, Tenn. Ct. Appl. No. W-04-01189-R3-CV (02/02/05).

#### RODENT'S RIGHTS

The International Association of Machinists Union sought to use a 12-foot inflatable rat located on a public right-of-way adjacent to a car dealership where it had a labor dispute as a symbol of the labor dispute with the dealership. The city of Fairfield, Ohio stopped the union from using the balloon on the third occasion it sought to do so, citing a Fairfield ordinance against placing structures on a public right-of-way. The union then filed suit in federal district court and obtained a temporary restraining order against the city's actions claiming it violated the union's First Amendment right to freedom of speech. The district court granted the restraining order and the city appealed to the Sixth Circuit. That Court upheld the ruling in a 2-1 decision finding that the ordinance's restrictions on a public forum such as the display of the rat were not

narrowly tailored to serve a significant government interest and allow ample alternative means of communication. *Tucker v. Fairfield, Ohio*, 6th Cir. No. 03-4508 (02/11/05).

UNION MEMBERSHIP  
DOWN AGAIN

Union membership as a share of U.S. salary workers has fallen to 12.5% according to the Department of Labor Bureau of Labor Statistics. This level continues a twenty year decline — membership was at 20.1% in 1983. Among private employers, union membership stood at 7.9% in 2004. Compared to this, unionization among government workers stood at 36.4% in 2004, which was down from 37.2% in 2003.

PARTIES CAN AGREE TO  
FINAL RESOLUTION  
BY REGIONAL DIRECTOR

The National Labor Relations Board has announced that it is amending its regulations to allow employers and unions which stipulate to an election to consent to the resolution of all disputes concerning the election by the Regional Director with no appeal to the NLRB. Under existing regulations, the parties can stipulate to the Board's jurisdiction, the appropriate unit, and the time and place for the election. The new rule will allow them to also stipulate to the Regional Director's finality in rulings on the election. The rule will become effective March 1, 2005.

WAL-MART V. THE UNIONS

In the latest series of skirmishes between Wal-Mart and unions seeking to organize its employees, Wal-Mart has won one and called it quits at one. The United Food and Commercial Workers (UFCW) was recognized by the Quebec Labor Relations Board as the bargaining representative at a Wal-Mart in Jonquiere, Quebec in August 2004. Wal-Mart and the union held nine days of meetings over the next seven months but were unable to agree on a contract. The company announced on February 9, 2005 that it was closing the Jonquiere store because it had been “unsuccessful in reaching an agreement with the union that would allow the store to operate efficiently and profitably.” The union claims that the company was closing the store because of its policy against allowing its employees to unionize which the union called “cowardly.” The union has pledged to start a grassroots mobilization campaign against Wal-Mart in Canada. The provincial labor board approved on January 17 a certification for the UFCW for another Quebec Wal-Mart store in Saint-Hyacinthe and the UFCW has applications for certification pending at eleven other Wal-Mart stores in Canada. Meanwhile, in an election in New Castle, Pennsylvania held two days after the announcement of the closing of the Jonquiere store, seventeen tire and lube employees voted unanimously to reject the UFCW as their bargaining representative. The union blamed the Jonquiere store closure as the main reason the employees voted against the union in New Castle.

CLASS OF THOUSANDS ARE  
CERTIFIED AGAINST BOEING

A class of some-15,000 present and former black employees of the Boeing Company has been certified by a federal judge in Seattle with respect to race discrimination claims in promotion, retaliation, hostile work environment and compensation. The class members reside in eight different states. As is common in large class action cases such as this, the case has followed a somewhat tortuous history. Suit was initially filed in 1998 against Boeing in which allegations of race discrimination promotion retaliation and hostile work environment were made. Boeing settled with the original plaintiffs in the case but disgruntled members of the class filed objections and appealed the case to the Ninth Circuit Court of Appeals. That court upheld the certification but rejected the settlement and the case was remanded to the district court. The plaintiffs then moved to amend their claims to add discrimination in compensation and asked the court to certify the 15,000 member class. Boeing argued that the class and the practices at issue were too diverse and covered various different business units, job categories, locations and collective bargaining agreements so that the class would not be manageable. The district court rejected this argument, relying on statistical evidence, internal company studies on EEO and anecdotal evidence to support its action. The court ruled that a jury would determine the intentional discrimination or disparate treatment claims while the judge will decide the disparate impact claims. *Williams v. Boeing Co.*, W.D. Wash. No. C98-761 (01/21/05).

USERRA HEALTH PLAN COVERAGE  
PERIOD EXTENDED

On December 10, 2004, President Bush signed a bill which extended the period for which a service member can elect to continue health coverage after leaving employment for military service from eighteen months to twenty-four months. This new change highlights the difference between COBRA coverage which is mandated by the Internal Revenue Code and ERISA, and USERRA's COBRA-like coverage which is required separately under the Veterans Benefits laws (U.S. Code Title 38). Regulations implementing this change have not been enacted by the Department of Labor as of date. The new act also requires employers to give notice of these USERRA rights, benefits and obligations to each person entitled to such rights or benefits by notice to be posted where employers customarily post notices for employees.

FLSA ISSUES GUIDANCE LETTERS

The Department of Labor (DOL) has issued a number of opinion letters concerning various issues under the Fair Labor Standards Act and the Family and Medical Leave Act (FMLA). These include the following:

- The DOL reiterated its position that paralegals do not qualify for exempt status as professionals unless they possess an advanced specialized degree in another professional field and apply advanced knowledge in that field to the performance of their duties.
- While claims adjusters may qualify for exempt status as administrative employees, a determination must be made on a case-by-case basis. In the example cited in the opinion letter, the individuals did not qualify because they followed specific guidelines in carrying out their duties and did not make determinations regarding liability or negligence.
- The DOL rejected various bonus and incentive plans as violating the overtime regulations, including a plan that offered a \$3.00 per hour bonus if the employees work group met production goals, a plan which excluded a piece rate bonus from the calculation of overtime, and a plan which provided for a lump sum overtime premium based on the volume of deliveries to induce employees to work overtime.

- In an opinion covering the FMLA, the DOL wrote that an employer could require its employees who were absent because of illness to provide “proof of illness” in order to receive paid sick leave and that an employer could require a drug test for employees returning from a FMLA leave.

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