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LABOR & EMPLOYMENT LEGAL ALERT
July 2006

STATE INSURANCE FUND ANNOUNCES NEW PREMIUM RATES

The Corporation of the State Insurance Fund (SIF) has announced the worker's accident compensation insurance premium rates applicable from July 1, 2006 thru June 30, 2007. Most premium rates remained unchanged. The premium rates for seven (7) of the risk classifications were increased.

The occupations subject to rate *increases* and the percentage increase are: clerical office and drafting employees (5%); electrical apparatus mfg. (0.5%); concrete construction (0.7%); police, guards private detectives (2.1%); hardware and auto parts stores (1.7%); maintenance of residential buildings and houses (1.5%); maintenance of commercial buildings (1.6%).

Of these, the 5% premium rate increase for clerical employees (#8810), represents the most significant hike. This classification is often used in service and commercial operations, as well as for strictly administrative personnel in manufacturing operations.

On the other hand, the rates for fifty (50) risk classifications were lowered. Most of the occupations subject to rate *reductions* are in the construction and construction-related risks; maritime, air and land transportation; quarry; and entertainment machinery businesses. Other activities subject to a rate reduction include: grain milling; confection & candy mfg; certain canneries; yarn or thread mfg. (not textile); metal products mfg; oil still erection or repair; automobile or trailer body mfg.; oxygen and other gases mfg; fertilizer mfg & drivers; handling and removal of toxic materials; TV and radio stations; auto service stations; and maintenance of industrial plants. Unless your operations are similar to these groups, chances are you will only be impacted by the rate increase for the payroll subject to the "clerical and drafting employees" risk classification.

The insurance policy year for regular policies starts on July 1st and ends on June 30 of the following calendar year. At this time of the year employers need to remember the SIF must receive the employer's Payroll Statement on the actual salaries paid during the preceding policy year on or before **July 20th**.

Employers who fail to timely file the Payroll Statement will be uninsured for work related accidents occurring after July 1 until the insurance premium for the New Year is actually paid. If the Payroll Statement is timely filed, the employer will be insured for the workplace accidents occurring after July 1, *provided* the employer pays the premiums by the deadline that will appear on a subsequent invoice.

Although employers are not required to send the payment of the estimated premium together with the Payroll Statement, we strongly encourage that it be done. In doing so, the employer can significantly reduce the possibility of a lapse of coverage resulting from a tardy payment.

Supreme Court Opens Door For Retaliation Claims

Employees who file discrimination complaints often allege they suffered retaliation after complaining. For example, an employee who has previously presented a harassment complaint to the employer will frequently allege in court that after the complaint was presented, he/she suffered retaliation by the supervisor or co-workers because of the protected action.

The possibility of having a jury trial on the retaliation claim is independent from the underlying harassment claim. The harassment claim may be dismissed because it lacked merit or because the employee unreasonably failed to take the available actions to avoid or stop the

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harassment. The retaliation claim, however, can survive.

Under the more recent court developments, many federal judges have been adept to dismissing "hostile environment" harassment claims when the alleged victim did not timely utilize the employer's available internal complaint procedure.

The First Circuit (the federal appellate court with jurisdiction over Puerto Rico) has normally required the claimant demonstrate that because of the protected action the employee had suffered "an adverse employment action" that "materially changed the terms and conditions" of the plaintiff's employment. *Noviello v. City of Boston,* 398 F.3d 76, 88 (1st Cir. 2005)(Typically an "adverse employment action" requires a change in the terms and conditions of employment. However, if the employer engages in or tolerates a retaliatory hostile work environment that is sufficiently "severe or pervasive", it may be cognizable as a retaliatory adverse employment action). *The law has been modified.*

On June 22nd the United States Supreme Court issued a decision that provides a broader interpretation of Title VII's anti-retaliation provision. *Burlington Northern, v. White,* 2006 U.S. LEXIS 4895. In this case the Court adopted a new nation-wide "materially adverse" standard that replaces divergent circuit court rulings and impacted the First Circuit's law. Specifically, the Court held the "anti-retaliation provision does not confine the prohibited actions and harms to those that are related to employment or occur at the workplace." Also prohibited are those employer actions that "*would have been materially adverse to a reasonable employee or job applicant*." This means that the alleged employer's actions need only be harmful "to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Thus, this decision probably has made it easier for employees to avoid summary dismissal of their retaliation claims.

The new standard contains two key phrases. First, the challenged action must be "*materially adverse"*, meaning that it does not refer to "trivial or insignificant harms." Citing *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 80 (1998) (a sexual harassment case), the Court emphasized that judges must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." Thus, an employee's decision to report discriminatory behavior will not immunize the employee from petty slights or minor annoyances that often take place at work and all employees experience, such as personality conflicts that generate "antipathy" or "snubbing" by supervisors and co-workers.

Another key phrase is "*reasonable worker.*" This is intended to make the legal standard less subjective. But this is easier said than done. To prevail on a retaliation claim, a plaintiff now only needs to show "that a *reasonable* employee would have found the challenged action materially adverse." In this context, what the complainant needs to show is that the complained of action or conduct might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."

The Court also stated the new standard could only be phrased in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. A change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, non-actionable or petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement, might deter a reasonable employee from complaining. An act that would be immaterial in some situations can be deemed material in others.

In this particular case, plaintiff (White) sued her employer (Burlington Northern & Santa Fe Railroad), for sexual harassment under Title VII. She had been hired to be a forklift operator. After some time operating the forklift, White complained to company officials about being sexually harassed

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and discriminated against by her foreman. Shortly after she complained, White was told that other Burlington employees were resentful of her because she was a junior employee and operating the forklift, since that was considered an easier and cleaner job reserved for more senior male employees. White was then transferred to a standard track laborer position. While working as a track laborer, White had a conflict with some other employees regarding transportation to a site. White was ultimately suspended without pay. This suspension came seven days after White filed her second sex discrimination claim. The employer investigated the suspension, found that White was not "insubordinate," and ultimately reinstated her with full back pay. White persisted with her sexual harassment, discrimination and retaliation claims, and after trial, a jury entered a verdict in her favor.

The issue presented to the Supreme Court was whether White's temporary suspension and demotion from forklift operator was an "*adverse employment action*" under Title VII. The employer argued that the Court should adopt the "ultimate employment decision" doctrine, which provides that certain short-lived changes to one's job are not discrimination under Title VII if the changes could have been caused by a variety of factors.

The Supreme Court agreed with the lower courts, acknowledging that Burlington's actions were in retaliation for her harassment complaint. The Majority Opinion further asserted that, even though White was eventually reinstated and given back pay for the wages she lost during the suspension, the actions themselves would sufficiently dissuade reasonable workers from presenting a discrimination charge. Therefore, under the new standard, White's unlawful retaliation claim succeeded and her $43,000 award was upheld.

In light of the *Burlington Northern* decision it is reasonable to foresee that retaliation claims will increase. Ironically, to some extent employees claiming "retaliation" will receive greater protection than those who simply claim having been subject to ¨discrimination¨, since discrimination claims normally require the claimant to prove having been adversely impacted in a "term or condition of employment"

The judicial desire to protect against retaliation will also likely be extended to other retaliation sections under the ADA, ADEA, FMLA, Sarbanes-Oxley, and other laws.

Because of the vague nature of the Supreme Court's decision, employers may find it difficult to determine whether an action or environment negative or adverse to an employee who has previously complained is "materially adverse" and will support an actionable retaliation claim.

To address this development employers should implement training programs aimed at understanding and preventing retaliatory actions.
Employers also need to review carefully any personnel or other action taken concerning a complaining individual, at least during the weeks and months following her/his complaint. Employers must take particular care to ensure that any actions taken against an employee (whether on or off the job) after a complaint of discrimination are supported by legitimate business concerns. Although the law continues to recognize that the complaining employee is not entitled to preferential treatment or relaxation of normal workplace rules, a "heightened state of awareness" should prevail following an employee's complaint.

White Collar Exemptions

The Puerto Rico Supreme Court recently declined to recognize the "administrative" exempt status of a bank employee, whose primary duties consisted in collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products were appropriate for customer's needs and financial situation; advising the customer regarding the different financial products; and promoting, marketing and servicing the loan (including compiling the documentation required to process the loan), all within the employer's policies and guidelines. *Malavé Serrano v. Oriental Bank & Trust,* 2006 TSPR 63 (April 20, 2006). As a result, the employee in this case was deemed entitled to

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overtime and unpaid vacation leave under the applicable local laws.

Puerto Rico's Minimum Wage, Vacation and Sick Leave Law requires that federal precedent be applied when evaluating whether a particular occupation is exempt. However, in reaching its decision the Supreme Court relied exclusively on its own interpretation of the local regulation (Regulation 13-Fourth Revision) which, until recently, had provided general definitions for the terms "executive", "administrative" and "professional" employees.

The Supreme Court's analysis casts doubt as to whether in the future federal precedent will be followed in determining who qualifies as an exempt employee under local law. The potential exposure resulting from a misclassification can significantly impact a business. The federal regulations and case law provide extensive guidelines for the application of these terms. Applying local law in a manner consistent with federal law obviously would promote greater certainty in the workforce.

In light of this development, employers should examine the positions presently classified as *exempt* to ensure the employee fully qualifies under both federal and local rules.

On the other hand, the Supreme Court's decision may be short lived. The Puerto Rico Secretary of Labor and Human Resources recently promulgated a new Regulation 13 (Fifth Revision), which substantially conforms the local regulation to the federal rules. Moreover, Article III-D of the new Regulation 13 states the local regulation should be interpreted in a manner consistent with the federal regulation and includes, by reference, the federal exemptions, examples and definitions.

Reference to Section 541.203(b) of the federal regulation (which provides administrative exemption examples) probably would have resulted in the dismissal of plaintiff's overtime and vacation leave claim in this case. However, only future cases will shed light on whether the Puerto Rico Supreme Court will interpret the new Regulation 13 in accordance with the federal rules.

Pending Labor Bills

The Third Ordinary Session of the 15th Legislative Assembly ended on June 30, 2006, leaving pending several labor related bills. We first mention House Bill 2546, a bill that would have jeopardized an employer's ability to implement total or partial closings. Fortunately, the Governor vetoed the bill. The bill was approved by both houses in a tripartisan vote and within days of being filed. The manner in which this bill was approved, should forewarn employers that absent increased vigilance on their part, the existing legislative environment provides fertile grounds for the passage of many pro-labor laws. A selective overview follows:

Plant Closings. On June 9, 2006 Governor Acevedo Vilá vetoed House Bill 2546 (Ferrer Ríos-PPD), which would have amended Puerto Rico´s Wrongful Discharge Act (Law No. 80 of May 30, 1976, as amended), to require the payment of the discharge indemnity in cases of total or partial plant closings by employers with fifty (50) or more employees, unless the employer could prove the closing was required because the operation was operating with losses. The governor vetoed the bill, considering it contrary to a policy favoring investments in Puerto Rico.

Minimum Wage Increases. The House PNP members have filed House Bill 1714, which would amend the local Minimum Wage Law, to establish a local minimum wage of $5.40, with annual increases of $0.20, until the year 2020. Thereafter, the yearly increase will be $0.25.

In 1995 and 1998, the Administration had formulated a new minimum wage policy, pursuant to which the local government would no longer establish minimum wages but rather would apply the federal minimum wage. In doing so, it rejected prior efforts that had supported *lower* minimum wages in Puerto Rico. This had been promoted to avoid increased unemployment. For the same reason, the new policy overturned legislation that permitted local minimum wages *higher* than the federal minimum.

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The undermining of the existing minimum wage policy commenced with Law No. 320 of September 2000, which required the local Secretary of Labor to establish a minimum wages for all public sector employees (except municipal employees) of at least $5.80. More recently, Law No 27 of July 20, 2005 required the local Secretary of Labor to establish a procedure to implement statutory mandated minimum compensation for nurses.

From this perspective, the bill represents a complete reversal of the existing minimum wage policy. Absent an extensive economic analysis of the bill, its approval can significantly impact local employment levels.

Mobbing. Once again a bill has been introduced that would prohibit and penalize any type of psychological harassment or emotional abuse in the workplace or the educational system. House Bill 1946 (González González-PPD; Rivera Ramirez-PNP). The bill was under active consideration during the months of April and June 2006.

While the bill uses the term "mobbing" to identify the prohibited conduct, the definitional section covers a variety of significantly less severe conduct. "Mobbing" is traditionally identified with an intentional and malicious group behavior to punish or force a person out (of the workplace, school, etc), which is accomplished through unjustified accusations, humiliation, general harassment, emotional abuse, and/or terror'. "Bullying", is similar, but implies individual acts of aggression.

House Bill 1946 is not limited to such type of extreme conduct. Rather, it incorporates the more ambiguous terms developed in the sexual harassment field. In doing so, it proscribes all types of harassment, irrespective of whether the harassment is motivated or due to the victim's protected characteristics (*e.*g., gender, race, color, national origin, religion, age, disability).

In fact, the bill would prohibit many types of *perceived* abusive, rude, inconsiderate, blunt, insensitive, frank, demanding, forceful or assertive communications in the workplace and educational institutions. Both the "aggressive" person and the employer will be held liable. Finally, the person accused of the misconduct will have the burden of proving that there was no psychological harassment and that the conduct was nondiscriminatory.

Family Leave. House Bill 1799 (Ferrer Ríos, Colberg Toro, Torres Cruz, Vizcarrondo Irizarry, González González- PPD; Méndez Núñez, González González-PNP) has passed the House and is presently under consideration by the Senate. The bill will extend to private sector employees a right similar to what was granted to public sector employees, authorizing them to use their accrued sick leave to cover absences necessary to attend the sickness of a son or daughter, the sickness or personal matters of an elder (60 years of age or more) or handicapped relative or person for whom the employee is the tutor or legal custodian. In certain cases, once the sick leave account has been exhausted, the employee will be able to use the accrued vacation leave.

Domestic Violence Protocol. House Bill 2131 (Rivera Ramirez-PNP) has passed the House and is presently under consideration by the Senate. The bill will require all employers to establish a formal protocol to handle domestic violence situations, pursuant to guidelines to be developed and monitored by the Office of the Solicitor for Women.

Payroll Incentives To Hire Ex-Convicts. House Bill 2093 and Senate Bill 996 (All-PNP) have passed in their respective bodies. Both amend the Unemployment Fund law to authorize the use of financial resources of the "Fund to Promote Employment Opportunities", to provide incentives (which can include payroll subsidies) for employers to hire and train ex-convicts. This Fund (which is funded by a portion of the employer's unemployment contributions) was also recently tapped by the passage of Law No. 81 of August 26, 2005, to target to hiring persons between 16 and 24 years of age and persons who are seeking employment for the first time.

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Christmas Bonus. Senate Bill 1066 (Arango Vinent-PNP) has passed the Senate and awaits consideration by the House. The bill will overturn a recent interpretation of the Puerto Rico Secretary of Labor and Human Resources that significantly limits the type of evidence that can be submitted by the employer to be excused from paying the mandatory Christmas bonus. Under the bill, the Department of Labor would have to continue accepting financial statements certified, compiled, or revised by a CPA, and not only CPA certified audited statements.

The bill will also permit employers to use their fiscal year, rather than the October 1 thru September 30 year required under the Christmas bonus law. Requests to be excused from paying all or part of the mandatory Christmas bonus must be filed before November 30.

If passed, this bill will ease the financial and administrative burden on those employers who are under significant financial constraints and limited in their ability to pay the bonus. As indicated in our October 2005 newsletter, Commonwealth Law No. 124 of September 29, 2005, increases the 2% mandatory Christmas bonus (based on a maximum $10,000 yearly salary), as follows:

Year	15 or less employees		16 or more employees	
2006	2.5%	($250)	3%	($300)
2007	2.75%	($275)	4.5%	($450)
2008	3%	($300)	6%	($600)

Tips and Service Charges. Bipartisan House Bills 1306, 1307, 1308 and 1309 (Méndez Núñez, Jiménez Cruz-PNP; S. Rodríguez, Ferrer Ríos-PPD), were recent passed by the House and await consideration by the Senate. These bills will *exclude* from the definition of "wages" or "salary" amounts received by employees due to customer "tips" or employer imposed "services charges", for purposes of worker's accident compensation premiums, vacation and sick leave, maternity leave payments and overtime rates. If passed, these bills will significantly benefit the tourism, hotel and restaurant industries. Similar bills had been filed in the Senate, but were shelved due to negative reports. Whether these bills can be sufficiently amended to overcome prior objections, is uncertain.

Note: *Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, contact:*

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