LABOR PERSPECTIVES

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AMENDMENTS TO THE CLOSING LAW CHANGE HOW RETAIL ESTABLISHMENTS MAY OPERATE ON SUNDAYS

Act No. 143 of November 16, 2009 ("Act No. 143") amended the Puerto Rico Closing Law, Act No. 1 of December 1, 1989 ("Act No. 1"), and related provisions of Puerto Rico Act No. 379 of May 15, 1948, also known as the Puerto Rico Wage and Hour Act ("Act No. 379"). The amendments became effective immediately. In essence, Act No. 143 eliminated most of the Closing Law's restrictions on hours of operation that were imposed on all covered commercial establishments and established a new hourly rate of $11.50 for Sunday work.

For purposes of the Closing Law, "covered establishments" are: any site, store or similar place where any type of business operation or commercial activity for the sale or transfer of retail or wholesale articles is carried out, or that is owned by the same corporation or natural or juridical person.

Before the amendments enacted by Act No. 143, covered establishments, with certain exceptions, could only open to the public on Sundays between 11:00 a.m. and 5:00 p.m. Also, from Monday to Saturday, covered establishments could only open to the public between 5:00 a.m. and 12:00 midnight.

As a result of Act No. 143, all covered establishments shall remain closed to the public on Sundays between 5:00 a.m. and 11:00 a.m., but may remain open after 5:00 p.m. However, drugstores and other commercial establishments that operate pharmacies may open on Sundays before 11:00 a.m. but can only sell certain items. Act No. 143 eliminates all other Closing Law restrictions on an establishment's hours of operation. Therefore, covered establishments may now remain open 24 hours a day, with the exception of Sundays, between 5:00 a.m. to 11:00 a.m. and during several holidays, when they shall close all day.

Act No. 143 does provide for exceptions for certain establishments. The following are not considered "covered establishments" for purposes of the Act: hotels, inns, condo-hotels, airports, seaports; those located within the demarcation of an old or historic zone dedicated primarily to the sale of goods or to provide services of tourist interest; those located in places exclusively engaged in the development of cultural, artisanry, recreational or sports activities; those dedicated mainly to the preparation and the direct sale to the public of cooked meals; pharmacies; gasoline

(continues on page 2)

In this Issue...

Amendments to the Closing Law Change How Retail Establishments May Operate on Sundays.....1-2
by: Jan Carlos Bonilla Silva

The Payment of Workers' Compensation Policy Premiums Is Now More Flexible 3
by: Juan Felipe Santos

Practical Considerations Regarding Social Media Policies for Employers.....4-5
by: Karem M. Rodríguez-García

Practice Group News.....5
by: María Antongiorgi

Puerto Rico Senate Pushes for Expansion of Protected Classes under Act 100.....6
by: Luis R. Amadeo

Breach Notification Requirements Are Now in Effect! Are you in compliance with ARRA? 7
by: Patricia M. Marvez Valiente

Last Weeks of Extension Period for COBRA Premium Subsidy Under ARRA 7
by: Patricia M. Marvez Valiente

(continued from page 1)

stations and business establishments located therein; bookstores, newsstands, booths or kiosks for the sale of books, magazines, newspapers and literary or musical publications or recordings; those that operate as part of the facilities of a funeral home or cemetery; the establishments located in the marketplaces; those operated exclusively by their owners or their relatives within a second degree of consanguinity or affinity; and those that are owned by natural or juridical persons and that do not have more than 25 employees in their weekly payroll, including employees by contract.

Act No. 143 also establishes a new minimum hourly rate of $11.50 for all employees of a covered establishment who work on a Sunday. To that effect, Act No. 143 amended Act No. 379 to eliminate the provision that required covered establishments to pay twice the regular hourly rate to employees assigned to work Sundays; although all other overtime requirements continue in effect.

Furthermore, Act No. 143 eliminates many other restrictions regarding who may be assigned to work on a Sunday, as it now allows the employer to assign any employee, regardless of probationary, part-time or full-time status, to work on Sundays and to work consecutive Sundays as well, without a need to obtain a permit from the Department of Labor. Act No. 143 also eliminates the prohibition on making Sunday work a condition of employment in covered establishments.

The entities excluded from the new minimum hourly compensation of $11.50 for Sunday work are those excluded from the definition of "covered establishments," except those located within the demarcation of an old or historic zone dedicated primarily to the sale of goods or to provide services of tourist interest; pharmacies; gasoline stations and business establishments located therein; and the establishments located in the marketplaces. Furthermore, galleries, workshops, centers, booths that sell Puerto Rican works of art and artisanry and the establishments located in the marketplaces are also excluded from the new minimum hourly compensation of $11.50 for Sunday work.

Also, Act No. 143 eliminates the criminal penalties for its violation, although it maintains Act No. 1's provisions for the application of administrative fines in amounts between $5,000 and $50,000 per violation. The Department of Consumer Affairs is entrusted with the enforcement of this Act.

These new amendments to the Closing Law make it easier for employers to establish work schedules for Sundays without taking into consideration employment status, overtime pay, and previous Sunday work, among other things. Also, by establishing a minimum hourly compensation of $11.50, as opposed to twice the employee's hourly rate (at least $14.50, considering the current minimum wage), Sunday work will cost less than what it previously did. In sum, Sunday work will be easier to schedule and less costly, making it easier on employers to operate their establishments.

However, some controversies have arisen with the passing of the new amendments to the Closing Law. How does the new hourly rate for Sunday work affect the weekly and daily overtime calculation? What does "minimum compensation of eleven (11) dollars and fifty (50) cents for every hour worked on Sunday" mean and what effect will it have in the operations of the employer? Does Act No. 289 of April 9, 1946, commonly known as the "Weekly Day of Rest Act", apply to "covered establishments"? Do those employers who have operations in Puerto Rico and in another State or country have to count the employees outside of Puerto Rico in order to qualify for the 25-employee exemption? What impact, if any, do the new amendments have on the applicability of Act No. 289 of April 9, 1946, commonly known as the Weekly Day of Rest Act? What impact, if any, do the new amendments have on employees whose hourly rate is higher than $11.50? These, and many other questions, will eventually have to be clarified either by the Puerto Rico Courts or by the Puerto Rico Legislature. M&V

"As a result of Act No. 143, all covered establishments shall remain closed to the public on Sundays between 5:00 a.m. and 11:00 a.m., but may remain open after 5:00 p.m."

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THE PAYMENT OF WORKERS' COMPENSATION POLICY PREMIUMS IS NOW MORE FLEXIBLE

Puerto Rico Act No. 45 of April 18, 1935, as amended ("Act No. 45"), also referred to as the Workers' Accident Compensation Statute, establishes a workers' compensation system to protect employees in Puerto Rico. Act No. 45 grants immunity to insured employers from any damages resulting from an employee's work-related accident. This government program is mandatory and may not be substituted with private coverage.

Article 23 of Act No. 45 provides that the State Insurance Fund Corporation ("SIF") shall collect premiums from employers. The premiums will be based on the total amount of salaries paid which are collected semi-annually in advance of the coverage period.

On December 29, 2009, Governor Luis A. Fortuño signed Puerto Rico Act No. 212 ("Act No. 212"), which amends Article 23 of Act No. 45. Act No. 212 went into effect immediately after its approval. By operation of Act No. 212, employers are allowed to make partial or monthly payments of the mandatory annual premium instead of payments of at least 50% or more of the annual premium on a semester basis. That is, before the enactment of Act No. 212, employers had to pay 50% or more of the annual premium on or before the established semester-in-advance deadline (usually July 20th), as long as the balance was fully paid by the following deadline (usually January 20th). Although this amendment applies to all employers, it specifically seeks to benefit small and medium-size businesses that are experiencing economic difficulties as a result of the current economic crisis.

Act No. 212 does not grant an extension of time for employers to pay the premiums. They must still be paid in advance before the semester deadline established by the SIF Administrator. At the moment of determining whether an employer is insured or not under Act No. 45, the SIF Administrator will consider only those premiums that have been completely paid on or before the advance semester deadline; this determination is made independently of the number of partial payments made during the semester period. The deadline to declare whether an employer is insured will continue to be on a semester basis.

"Act No. 45 grants immunity to insured employers from any damages resulting from an employee's work-related accident. This government program is mandatory and may not be substituted with private coverage."

Furthermore, employers must continue to file a payroll statement with the SIF on or before July 20 of every year. In the payroll statement, the employer must report the payroll for the fiscal year that ended on June 30. The SIF Administrator may request the payment of an additional premium based on the payroll statement. That amount must be paid by the deadline established by the SIF Administrator.

It is critical that the SIF premiums be paid on time. Otherwise, an employer will be considered an uninsured employer. Such determination will result in the loss of employer immunity against lawsuits for work-related injuries or illnesses of its employees. The use of hand delivery or certified mail, return receipt requested, procedures are highly recommended when paying SIF premiums. The effective date of the coverage of the insurance policy, for employers submitting the payroll return and/or insurance premium by certified mail, shall be the date stamped by the post office. However, if the date is illegible, or the evidence of the stamp date is somehow lost or unavailable, the effective date of coverage may very well be deemed to be the date that the SIF received the payroll return and/or insurance premium. MCV

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PRACTICAL CONSIDERATIONS REGARDING SOCIAL MEDIA POLICIES FOR EMPLOYERS

Social media is here to stay. Its exponentially growing user base is now unstoppable.

In the context of work, the increasing use of social media tools is not only worrisome in terms of the time many employees spend on social networks during work hours, but also in terms of how some employees are portraying the organizations they work for while using such tools. Admittedly, a significant number of employees regularly use social networks for business purposes. Yet, a reduced number of companies have policies in place governing their employees' use of social media tools. Consequently, employees' use of Twitter, Facebook, LinkedIn, YouTube, MySpace, and other social media for work-related purposes or otherwise, may create significant liability for employers.

It is legally permissible to regulate and even ban employees from engaging in social media networking while on company time and property. The needs and goals of the organization should dictate the best course of action to follow with regards to the use of social media. However, banning all social networking at work is often times unnecessary and extreme, frequently proves hard to monitor and enforce, and may result in the loss of benefits related to business-networking. If some type of social media networking is allowed, organizations should address and manage the risks

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associated with employees' use of these tools. In any event, organizations should develop and formalize official policies clearly stating their position on the use of social media and related networking activities. These policies should provide structure, boundaries, and guidance regarding their use.

Some organizations may already have policies in place which could be revisited and modified to include aspects related to social media. Other organizations will simply have to add a distinct policy regarding the use of social media. When drafting these policies, the following important considerations should be contemplated:

- The policy should be made applicable to all employees of the organization.
- It should specifically indicate whether any type of social networking at work is allowed. If allowed, it must specify which types of social networking are permitted.
- It should specify whether employees are required to seek prior approval to conduct business over social media. The policy should state that employee may not use the organization's name, logo, or other intellectual property cannot be used without prior approval. Likewise, employees should be reminded that they cannot disclose any kind of confidential or proprietary information, nor can they discuss and/or disclose the existence and/or the content of any financial and/or legal matters.
- The policy should state whether employees are required to clearly identify themselves and disclose their affiliation to the organization when discussing organizational issues.
- When employee blogs are involved, the policy should state who owns and is responsible for the content.
- The policy should clearly state that employees have no right to privacy with respect to social networking,

and that the organization reserves the right to monitor employee use of social media regardless of the time and location where the activity occurred. It should clearly specify that such monitoring may take place at work, during work hours or not; while using a personal or company computer; and even during personal time, irrespective of whether an employee is using a company or personal computer.

- The policy should specify that other company policies, such as anti-harassment, anti-discrimination, workplace conduct, ethics, loyalty, communications, and information technology policies, among others, extend to social media and networking, regardless of whether the activity takes place inside or outside the workplace.
- Employees should be made aware that they will be held accountable for any negative, defamatory, or disparaging portrayals of the organization, its management and/or co-workers. The policy should also state that any violation may be used as grounds for discipline regardless of where the activity takes place.
- Employees should also be made aware that any personal comments regarding any aspect of the organization's business over any social media tool, must be accompanied by a disclaimer clearly conveying that the views and/or the opinions expressed are not those of the organization, but their own.
- The policy may include "best practice" examples regarding acceptable and unacceptable behavior in online social media tools.
- Finally, employees should be reminded that what they publish is usually traceable, widely accessible, and will remain so for a long time. Therefore, they should consider the content carefully and use common sense and courtesy when posting any kind of business-related information in any social media tools.

The true language and content of the policy should be specifically tailored to the needs of each organization, taking into account its unique business interests, concerns, goals and expectations. To that effect, the language and content of the policy should be reviewed and consulted with information technology personnel, human resources, marketing and public relations professionals, other internal company decision makers, and legal counsel. For more information or assistance regarding this matter, you may contact any of the attorneys in McConnell Valdés LLC Labor and Employment Law Practice Group.

PRACTICE GROUP NEWS

by: María Antongiorgi

Dalina Sumner joined the Labor and Employment Law Practice Group as an associate in October 2009. **Dalina** graduated from the University of Puerto Rico School of Law in May 2009. She obtained a Bachelor (1996) and a Masters Degree (2001), both in Art History, from Columbia University. Prior to joining the Labor and Employment Law Practice Group, **Dalina** worked at McConnell Valdés LLC as a summer associate in 2007 and 2008.

Reinaldo Figueroa also joined the Labor and Employment Law Practice Group as an associate in October 2009. **Reinaldo** graduated from the University of Puerto Rico School Of Law in May 2009. He obtained a Bachelor Degree in Economics, Administrative Sciences and Accounting from the Interamerican University of Puerto Rico. Prior to joining the Labor and Employment Law Practice Group, **Reinaldo** worked at McConnell Valdés LLC as a summer associate in 2007 and 2008.

Rebecca Paez Rodríguez joined the Labor and Employment Practice Group as Counsel in November 2009. **Rebecca's** prior experience includes counseling and litigation in local and federal courts in areas such as employment discrimination, wage and hour claims, Americans with Disabilities Act, Title VII, ADEA, worker´s compensation, leaves of absences, labor arbitration and employment termination. Prior to joining McConnell Valdés LLC, **Rebecca** served as Labor Advisor for the Governor of the Commonwealth of Puerto Rico. MCV

Luis R. Amadeo is a Member in the Labor and Employment Law Practice Group of McConnell Valdés LLC.

PUERTO RICO SENATE PUSHES FOR EXPANSION OF PROTECTED CLASSES UNDER ACT 100

On November 9, 2009, the Puerto Rico Senate approved Senate Bill No. 102 ("Bill 102"), regarding prior criminal convictions. This Bill seeks to amend Act No. 100 of June 30, 1959, Puerto Rico's general anti-discrimination in employment statute, to make an employee's status as an ex-convict a protected class under Act No. 100.

The Bill's stated legislative purpose is to incorporate ex-convicts into society by making it illegal for employers to categorically reject them as employment candidates. If enacted into Law, the Bill would require employers to weigh the following factors when deciding whether past convictions disqualify a job applicant for a position:

- the duties and requirements of the position in relation to the crime committed;
- the degree of rehabilitation of the job applicant and any information a third party or the applicant may "legitimately" shed on the subject, including:
- attenuating or extenuating circumstances at the time of the commission of the crime;
- the applicant's age at the time the crime was committed;
- the remoteness of the conviction; and, lastly,
- the legitimate interest of the employer in protecting its property and safety and that of third parties or the general public.

According to the Bill, an employer may only defend the denial of employment to an ex-convict, on account of the latter's status as such, when the employer's decision "is justified, upon taking these criteria into account, whose final analysis concludes that there is a risk to which its interests and those of the community would be reasonably exposed by the hiring of such person."

Stated in other terms, Bill 102 alternatively provides that "these criteria may only be exercised against the aforementioned applicants by reason of their prior criminal convictions when, upon weighing the aforementioned elements in the antecedent paragraph under a frame of reasonability, employers understand that such convictions disqualify them to occupy the positions which are the subject of their employment applications."

Under the Bill, employers who err in this analysis would be liable to job applicants for double the damages which the alleged discrimination has caused, fines of up to $5,000, be forced to hire previously convicted job applicants or ex-employees, be subject to cease and desist orders, and face penalties of up to 3 months in jail.

This is further complicated by the fact that employers bear the non-delegable duty of maintaining a safe workplace under the law. In this regard, Senate Bill 102 does not provide any conditional privilege, limitation on damages, or even deference to an employer's good faith exercise of discretion in deciding whether a job applicant's prior criminal background is incompatible with the duties of an employment position.

To the contrary, most Puerto Rico employment-law statutes, including Puerto Rico Act No. 100, are interpreted "liberally" in the employee's favor. Such a measure, if approved by the House and signed into law, would force employers into a "catch-22" when making hiring decisions concerning applicants with criminal backgrounds.

"The Bill's stated legislative purpose is to incorporate ex-convicts into society by making it illegal for employers to categorically reject them as employment candidates"

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BREACH NOTIFICATION REQUIREMENTS ARE NOW IN EFFECT! ARE YOU IN COMPLIANCE WITH ARRA?

Patricia M. Marvez Valiente is an Associate in the Labor and Employment Law Practice Group of McConnell Valdés LLC.

The Health Information Technology for Economic and Clinical Health Act ("HITECH" or "the Act"), enacted as part of the American Recovery and Reinvestment Act of 2009 ("ARRA"), was signed into law on February 17, 2009. HITECH addresses the privacy and security issues that arise when covered entities breach the security and privacy provisions of HIPAA in relation to unsecured protected health information ("PHI"). Covered entities include group health plans, health care providers and business associates. Employers who are administrators of group health plans, or who provide health care services to their employees at on-site clinics, should pay special attention to this recent development which strengthens HIPAA's civil and criminal enforcement mechanisms.

HITECH requires covered entities to give notice to certain individuals and entities when there has been a breach in the security and privacy of unsecured PHI; that is, PHI that is not safeguarded by encryption or similar technology. A breach occurs when there has been an acquisition, access to, use of, or disclosure of unsecured PHI in an impermissible manner which, in turn, compromises the security and privacy of the PHI.

If a breach has indeed occurred, then a covered entity must give notice of such breach to the following individuals and/or entities: a) affected individuals; b) the U.S. Health and Human Services Department ("HHS"); and c) at times, to the media.

The HHS will strictly enforce the terms to issue the applicable notices. Failure to comply with these time frames will translate into steep penalties for covered entities and business associates. The required notifications must be sent to affected individuals without unreasonable delay and no later than 60 days after the breach was discovered. In turn, the notice to the HHS must be provided concurrently with the individual notice when the breach involves 500 or more individuals. Finally, notice to a prominent media outlet must be provided for a breach involving more than 500 residents; this media notice must be carried out without unreasonable delay and no later than 60 days after the breach.

The Act also impacts the business associates' role in relation to a covered entity since HITECH imposes a new responsibility upon business associates. For example, in the case of COBRA administrators, it requires them to give notice to the covered entity in the event that they discover a breach, or if the business associate is responsible for a breach.

New responsibilities require new action plans. Therefore, in light of HITECH's new obligations, covered entities and business associates must develop mechanisms to avoid breaches and, thus, sanctions for violations. Some of the ways covered entities and business associates can ensure that they are in compliance with HITECH and ARRA is to establish breach notification procedures. They may also review and, if feasible, renegotiate business associate contracts, train their workforce to handle and report breaches, and to comply with administrative requirements to achieve technical safeguards in relation to protected health information.

Should you need assistance with these or any other welfare benefit matters, do not hesitate to contact any of the attorneys in the Welfare Benefits and ERISA Litigation Practice Team within McConnell Valdés LLC's Labor and Employment Law Practice Group. M&V

LAST WEEKS OF EXTENSION PERIOD FOR COBRA PREMIUM SUBSIDY UNDER ARRA

On December 19, 2009, President Barack Obama signed into law the Department of Defense Appropriations Act of 2010 ("DOD" or "the Act") to amend the American Recovery and Reinvestment Act of 2009 ("ARRA").

Among ARRA's provisions, as originally enacted, are premium reductions for health benefits under the Consolidated Budget Reconciliation Act of 1985 ("COBRA") for assistance to eligible individuals; that is, employees who are eligible for continuation of coverage under COBRA who have been involuntarily terminated between September 1, 2008 and December 31, 2009. The employee's family members who are eligible for COBRA at any time between September 1, 2008 and December 31, 2009, and have elected COBRA, are also assistance eligible individuals under ARRA. Furthermore, before the recent amendment, ARRA also provided for a 65% reduction in COBRA premiums for a period of up to nine months.

As a result of the amendments provided by the DOD, COBRA premium assistance was extended to include individuals involuntarily terminated between January 1, 2010 and February 28, 2010, and the total allowable time an assistance eligible individual could receive the COBRA premium assistance was extended from nine to fifteen months. In tune with ARRA's notice requirements, the DOD mandates that employers acting as plan administrators give notice to eligible individuals, as well as qualified beneficiaries who have had a COBRA qualifying event, about the changes in premium reduction and the total allowable time to receive the subsidy.

First, employers must furnish an updated General Notice to participating employees and qualified beneficiaries who: (1) have experienced a qualifying event from September 1, 2008 to February 28, 2010; (2) have lost coverage; and (3) have not been given an General Notice.

Further, the DOD mandates that by February 17, 2010, employers must also issue a Premium Assistance Extension Notice to: (1) individuals who were assistance eligible individuals as of October 31, 2009 (unless they are in a "transition period," as such is described below); and (2) individuals who experienced a termination of employment on or after October 31, 2009, lost coverage, and were not provided an updated General Notice. Individuals who are in a "transition period" must be provided this notice within 60 days of the first day of their transition period.[1]

Therefore, plan administrators should be vigilant in relation to the dates any assistance eligible individuals were terminated, or will be terminated, in order to determine whether a new notice must be given to such employees and/or their eligible beneficiaries. M&V

[1] An individual's "transition period" is the period that begins immediately after the end of the maximum number of months (generally nine) of premium reduction available under ARRA prior to its amendment.

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